

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 August 1, 1995 through)
June 30, 2001, by the Secretary of)
Revenue of North Carolina)
vs.)
[Taxpayer])

FINAL DECISION
Docket No. 2002-63

This matter was heard before the Assistant Secretary of Administrative Hearings, Eugene J. Cella, in the City of Raleigh, on May 7, 2002, upon application for hearing by the taxpayer wherein it protested the proposed assessment of tax, penalty and interest for the period August 1, 1995 through June 30, 2001. 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 W. C. Shelton, Administration Officer. The Taxpayer was represented by [an attorney] and [4 employees] of the Taxpayer.

Pursuant to G.S. 105-241.1, the Department mailed a Notice of Sales and Use Tax Assessment to the Taxpayer on August 15, 2001 assessing tax, penalty and interest in the amount of \$676,669.64. The Taxpayer objected to the proposed assessment in a letter dated September 7, 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 no-recourse repossessed manufactured homes subject to the 2% State sales or use tax with a maximum tax of \$300.00 per article?
2. Does the fact that some repossessed manufactured homes are taxable and some are not taxable, based on the fact that some were originally sold under no-recourse agreements and others under recourse agreements, mean that all repossessed manufactured homes should be non-taxable so as to present uniform fairness to the consumer?
3. Does the prior Installment Paper Dealer tax audit of the Taxpayer conducted by the Field Operations Division constitute "erroneous written advice" pursuant to G.S. 105-264 by the Department and preclude the assessment of the additional sales and use tax?

4. Is the Taxpayer making tax exempt “occasional or isolated” sales when no-recourse repossessed manufactured homes are sold?

EVIDENCE

The following items were introduced into evidence by the Sales and Use Tax Division of the Department of Revenue 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. Audit report dated July 31, 2001, designated Exhibit E-2.
3. Notice of Sales and Use Tax Assessment dated August 15, 2001, designated Exhibit E-3.
4. Letter dated September 7, 2001, from the Taxpayer to the Department, designated Exhibit E-4.
5. Letter dated September 25, 2001, from the Sales and Use Tax Division to the Taxpayer, designated Exhibit E-5.
6. Letter dated October 8, 2001, from the Taxpayer to the Sales and Use Tax Division, designated Exhibit E-6.
7. Letter dated October 12, 2001, from the Sales and Use Tax Division to the Taxpayer, designated Exhibit E-7.
8. Letter dated December 12, 2001, from the Sales and Use Tax Division to the Taxpayer, designated Exhibit E-8.
9. Letter dated December 13, 2001, from the Taxpayer to the Sales and Use Tax Division, designated Exhibit E-9.
10. Section 40-4 of the North Carolina Sales and Use Tax Technical Bulletins, designated Exhibit E-10.
11. Redacted letter dated February 22, 1967, from the Attorney General assigned to the Sales and Use Tax Division, designated Exhibit E-11.
12. Sample Consignment Agreement between the Taxpayer and retail dealers, designated Exhibit E-12.
13. Sample Manufactured Home Dealer Agreement between the Taxpayer and retail dealers, designated Exhibit E-13.
14. Letter dated December 18, 2001, from the Sales and Use Tax Division to the Taxpayer, designated Exhibit E-14.

15. Letter dated January 8, 2002, from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-15.
16. Letter dated January 18, 2002, from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-16.
17. Letter dated April 2, 2002, from the Taxpayer to the Assistant Secretary of Revenue, designated Exhibit E-17.
18. Letter dated April 5, 2002, from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-18.
19. Copy of Brief for Tax Hearing prepared by the Sales and Use Tax Division, designated as Exhibit E-19.

Evidence presented at the hearing by the Taxpayer consisted of the following:

20. Appeal Letter and Supporting Documentation submitted by the Taxpayer, designated Exhibit TP-1.
21. Copy of Certificate of Repossession, North Carolina Department of Transportation, Division of Motor Vehicles, submitted by the Taxpayer, designated Exhibit TP-2.
22. Letter dated May 22, 2002, from the Taxpayer to the Assistant Secretary of Revenue, designated Exhibit TP-3.

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

23. Memorandum, dated June 4, 2002, and attached redacted Final Decision of August 7, 1978, from the Sales and Use Tax Division to the Assistant Secretary of Revenue, designated Exhibit E-20.

FINDINGS OF FACT

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

1. The Taxpayer is primarily engaged in business as a financial organization; however, the Taxpayer makes retail sales of no-recourse manufactured homes which have been repossessed.
2. The Taxpayer financed manufactured homes which were sold either on independent dealer sales lots or on [related company] sales lots.
3. The homes sold on independent dealer sales lots were sold under a no recourse agreement and those sold by a related company dealer sales lot were sold pursuant to a full recourse agreement.

4. The Taxpayer has no recourse against the independent selling dealer in the event of default by the original buyer of the manufactured homes during the audit period.
5. The Taxpayer acquired ownership of the repossessed no-recourse manufactured homes at the time they were repossessed, due to the default of the purchaser on their financing agreement with the Taxpayer.
6. The Department has assessed tax on the sale of the repossessed manufactured homes which were originally sold under a no recourse agreement by independent dealer sales lots.
7. The Notice of Proposed assessment was mailed to the Taxpayer on August 15, 2001.
8. The Taxpayer notified the Department that it objected to the assessment on September 7, 2001 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. G.S. 105-164.13(16) provides an exemption from sales tax provided the article is repossessed by the selling vendor and sales tax was paid on the original sale of the article.
2. New, used and repossessed manufactured homes are offered for sale at various dealers lots; however, the taxable and non-taxable sales tax status of the homes cannot be used to seek an exemption from sales tax by any retailer. Perfect equality in the collection of the tax by retailers from consumers is, as a practical matter, impossible as between almost any two or more retailers by reason of the differences in types of merchandise sold and selling methods, Fisher v. Jones, 15 N.C. App. 737, 190 S.E.2d 663 (1972).
3. 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 the sales tax liability on repossessed manufactured homes acquired and offered for sale. G.S.105-83 "Installment paper dealers" is administered by the Corporate, Excise and Insurance Tax Division and the sales and use tax assessment at issue is administered by the Sales and Use Tax Division. Therefore, the Department has not provided erroneous sales tax advice and is not precluded from assessing sales tax against the Taxpayer due to a prior Installment Paper Dealer audit for a prior period.
4. G.S. 105-164.3(1) cites no specific number of sales which would constitute non-taxable "isolated or occasional sales".
5. The Taxpayer's retail sales of \$18,257,966.11 during the audit period do not constitute occasional or isolated sales.
6. The Taxpayer is a retailer making retail taxable sales under G.S. 105-164.3(13) and (14).

7. The Taxpayer is liable for the 2% State sales tax with a maximum of \$300.00 per article on its sales of no-recourse repossessed manufactured homes sold on independent dealer lots.
8. Notice of proposed assessment for the period August 1, 1995 through June 30, 2001 was properly issued pursuant to G.S. 105-241.1

DECISION

The Taxpayer corporation is engaged primarily in the business of financing of manufactured homes; however, the Taxpayer sells manufactured homes which have been repossessed upon default of the buyer. The homes financed are either sold by independent manufactured home dealers or by a related company's manufactured home dealer. The homes sold on independent dealer sales lots were sold under no-recourse agreements and those sold by a related company dealer sales lot were sold pursuant to full-recourse agreements.

G.S. 105-164.13(16) provides an exemption from tax for sales of articles repossessed by the vendor if the tax was paid on the sales price of the article. The Taxpayer acquired ownership of the repossessed no-recourse manufactured homes at the time they were repossessed, due to the default of the purchaser on their financing agreement with the Taxpayer. Under the terms of the Taxpayer's no recourse agreement with the independent selling dealer, the Taxpayer has no recourse against the dealer in the event of default by the buyer of the home. Thus, the Taxpayer was not originally "the vendor" of the manufactured homes.

The Department has assessed sales tax on the Taxpayer's sales of no-recourse repossessed manufactured homes sold at the independent dealer lots. The Taxpayer has objected to the proposed assessment and has stated that, despite the Taxpayer's ownership of the manufactured home, the sale was made by the independent dealer to the new customer. The Department holds that a financial organization, and other Taxpayers as well, are required to collect and remit the sales tax on property offered for sale when the initial buyer defaults on his financial agreement with the financial organization and the financial organization takes

possession of the property and resells it. The longstanding position of the Department is buttressed by a February 22, 1967 opinion from the North Carolina Attorney General and by the supporting Sales and Use Tax Technical Bulletin 40-4.

The Taxpayer has also objected to the fact that since some of the homes on an independent dealer's lot would be taxed due to the Taxpayer's repossession and others exempt due to dealer repossession or a full recourse agreement that this is disadvantageous to the consumer. The Taxpayer states that consumers would have no way of knowing if a repossessed manufactured home was taxable or not. The Department responds that this disparity has no bearing on the correctness of the assessment against the Taxpayer. The information on whether or not a particular home is subject to sales tax is freely available to the consumer before they have committed themselves to purchase. Moreover, in the case of Fisher v. Jones, 15 N. C. App. 737, 190 S.E2d 663 (1972), it was noted that "Perfect equality in the collection of the tax by retailers from consumers is, as a practical matter, impossible as between almost any two or more retailers by reason of the differences in types of merchandise sold and selling methods."

Another objection raised by the Taxpayer is the fact that the issue of the sales tax liability due on the Taxpayer's sales of repossessed manufactured homes was not addressed during a previous installment paper dealer tax audit of the Taxpayer. G.S. 105-83 "Installment paper dealers" is administered by the Corporate, Excise and Insurance Tax Division and the sales and use tax assessment at issue is administered by the Sales and Use Tax Division. The Department argues that this does not preclude the Department from assessing additional tax in subsequent sales and use tax 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 written approval regarding the Taxpayer's treatment of the sales tax liability on repossessed manufactured homes acquired and offered for sale.

Finally, at the hearing the Taxpayer raised the issue of "occasional or isolated" sales as set forth in G.S. 105-164.3(1). The Taxpayer contends that since they are a financing organization principally engaged in the business of financing purchases of manufactured homes and not a retailer, that any sales of repossessed manufactured homes are exempt from tax under the statute. In support of their contention, the Taxpayer provided documentation showing a summary of the value of retail installment contracts which they funded versus sales of repossessed manufactured homes. The summary indicated that only 5.63% of the contracts and 3.20% of the dollar volume represented sales of repossessed manufactured homes. The Taxpayer also furnished a copy of Sales and Use Tax Administrative Rule 7B .1501. Finance Companies, which they contend supports their position. The Department responds to this objection with a copy of a Final Decision from August 1978 concerning a non-profit organization which sought to have its *de minimus* sales declared exempt from sales tax. G.S. 105-164.3(1) cites no specific number of sales which would constitute non-taxable "occasional or isolated sales" therefore the Secretary of Revenue used the ordinary Webster's definition of "occasional" and "isolated" in his affirmation of the Sales and Use Tax Division's position.

There are many examples of businesses whose principal business is derived from non-retail type operations but who also make retail taxable sales. For example, companies whose principal business is the refining of oil may also operate convenience stores and, of course, their retail sales of taxable items are subject to the sales tax. This is notwithstanding that the taxable sales from the convenience stores represent a relatively small part of the firm's overall business revenue.

With respect to Administrative Rule 17 NCAC 7B .1501 cited by the Taxpayer, the Sales and Use Tax Division cites the applicable definition of "retail" and "retailer" in G.S. 105-

164.3(13) and (14) respectively, which encompass the Taxpayer because the statutes hold the retailer liable for the sales tax at the time the property changes ownership. "Retail" shall mean "the sale of any tangible personal property in any quantity or quantities for any use or purpose on the part of the purchaser other than for resale." The Sales and Use Tax Division poses the determinative question: Who else but the Taxpayer is liable for the tax? The dealer selling the manufactured home does not own the property and the Taxpayer's customers do not self-assess and remit sales tax to the Department when a North Carolina retailer fails to collect tax.

The whole basis of the Sales and Use Tax statutes is uniform fairness, to the extent possible, for all retailers selling similar property. There are many motives for businesses to make sales even though this may not be their principal business endeavor or the property they are selling is sold for a lower price than market conditions warrant. To achieve fairness among similar retailers, businesses cannot invoke any claim of loss or incidental sale to avoid being held liable for the tax on the same or similar property also offered for sale by competitors.

It is my determination that the Taxpayer's sales of the no-recourse repossessed manufactured homes are taxable. The Taxpayer cannot cite its perceived disparity in the sales tax status of homes offered for sale by various manufactured home retailers as a means of escaping its liability for sales of manufactured homes. Further, a prior Installment Paper Dealer tax audit made under G.S. 105-83 does not constitute a prior written opinion of the Department on sales of manufactured homes taxed under G.S. 105-164.4(1b). Finally, the Taxpayer's sales of \$18,257,966.11 of repossessed no-recourse manufactured homes during the audit period can, in no way, be considered an "occasional or isolated sale" under G.S. 105-164.3(1).

Therefore, the proposed assessment of sales tax is deemed to be correct under the law and the facts, is sustained and is hereby declared to be finally determined and immediately due and collectible together with penalty and interest as allowed by law.

This 11th day of July, 2002.

Signature _____

Eugene J. Cella
Assistant Secretary of Administrative Tax Hearings