

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE
SECRETARY OF REVENUE

IN THE MATTER OF:

The Proposed Assessment of [North Carolina)
County] Sales and Use Tax for the period)
May 1, 1999 through April 30, 2002, by the)
Secretary of Revenue of North Carolina)
vs.)
[Taxpayer])

FINAL DECISION
Docket No. 2002-690

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 May 1, 1999 through April 30, 2002. 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. The Taxpayer was represented by [two corporate officers and a business counselor].

Pursuant to G.S. 105-241.1, the Department mailed a Notice of Tax Assessment [for North Carolina County] Sales and Use dated July 8, 2002 to the Taxpayer, assessing tax and interest in the amount of \$1,968.27. The Taxpayer, in a letter dated July 18, 2002, objected to the assessment and timely requested a hearing before the Secretary of Revenue.

ISSUE

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

Are the charges the Taxpayer made to customers for the delivery of tangible personal property subject to [North Carolina County] sales tax?

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. Audit report dated June 21, 2002 covering the period May 1, 1999 through April 30, 2002, designated Exhibit E-2.

3. Notice of Tax Assessment [for North Carolina county] Sales and Use dated July 8, 2002, designated Exhibit E-3.
 4. Letter dated July 18, 2002 from the Taxpayer to the Sales and Use Tax Division, designated Exhibit E-4.
 5. Letter dated August 12, 2002 from the Sales and Use Tax Division to the Taxpayer, designated Exhibit E-5.
 6. Letter dated August 19, 2002 from the Taxpayer to the Sales and Use Tax Division, designated Exhibit E-6.
 7. Letter dated August 28, 2002 from the Sales and Use Tax Division to the Taxpayer, designated Exhibit E-7.
 8. Letter dated September 4, 2002 from the Taxpayer to the Sales and Use Tax Division, designated Exhibit E-8.
 9. Taxpayer's August 2001 sales and use tax return, dated September 17, 2001, designated Exhibit E-9.
 10. Sales and Use Tax Technical Bulletins 38-1 and 38-2, designated Exhibit E-10.
 11. Letter dated October 11, 2002 from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-11.
 12. Letter dated October 22, 2002 from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-12.
 13. Brief For Tax Hearing, prepared by the Sales and Use Tax Division, designated E-13.
- The Taxpayer presented the following evidence at the hearing:
14. Letter dated November 6, 2002 from the Taxpayer's accountant to the Secretary of Revenue, designated Exhibit TP-1.
 15. Taxpayer's September 2000, April 2001, and June 2001 sales and use tax returns, designated Exhibit TP-2.
 16. Important Notice about Taxes on Delivery Charges: To Florists, dated April 5, 2002, designated Exhibit TP-3.
 17. Notice of Tax Assessment [for North Carolina County] Sales and Use dated July 8, 2002, and Notice of Sales and Use Tax Assessment dated July 8, 2002, designated Exhibit TP-4.
 18. Letter dated July 18, 2002 from the Taxpayer to the Sales and Use Tax Division, designated Exhibit TP-5.
 19. Letter dated August 12, 2002 from the Sales and Use Tax Division to the Taxpayer, designated Exhibit TP-6.

20. Letter dated August 19, 2002 from the Taxpayer to the Sales and Use Tax Division, designated Exhibit TP-7.
21. Letter dated August 28, 2002 from the Sales and Use Tax Division to the Taxpayer, designated Exhibit TP-8.
22. Taxpayer's invoice number 34412 and sales ticket to [a business] dated July 27, 2001, and Taxpayer's invoice number 3895 and sales ticket to [a business] dated August 3, 2001, designated Exhibit TP-9.
23. Synopsis of Taxpayer's protest, designated Exhibit TP-10.
24. Screen print dated November 6, 2002 of Frequently Asked Questions About Sales and Use Tax from the Department's web page, designated Exhibit TP-11.
25. Sales and Use Tax Technical Bulletins 9 and 41, designated Exhibit TP-12.
26. Sales and Use Tax Technical Bulletin 38, designated Exhibit TP-13.

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

27. Letter dated November 14, 2002 from the Taxpayer to the Assistant Secretary of Revenue, designated TP-14.
28. Memorandum dated November 20, 2002 from the Sales and Use Tax Division to the Assistant Secretary of Revenue, designated E-14.
29. Letter dated January 16, 2003 from the Assistant Secretary of Revenue to the Taxpayer, designated E-15.

FINDINGS OF FACT

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

1. The Taxpayer made retail sales of landscaping materials such as rock, gravel, pavers, topsoil, and mulch during the audit period.
2. In some transactions, the Taxpayer, using its own truck, made deliveries of the landscape materials sold to customers and made a separate charge for the delivery thereof on the sales invoice.
3. In all instances involving the delivery of tangible personal property, the customer paid for the property prior to delivery.
4. The Taxpayer collected and remitted [for North Carolina County] sales tax on its retail sales of landscape materials, but did not collect or remit [North Carolina County] sales tax on its delivery charges.

5. The Taxpayer provided no evidence of an agreement with its customers that title passed to the tangible personal property sold to its customers prior to delivery.
6. The Taxpayer listed "deliveries" under the column for nontaxable receipts on its monthly sales and use tax returns.
7. The notice of [North Carolina County] sales tax assessment was mailed to the Taxpayer on July 8, 2002.
8. The Taxpayer protested the assessment and, by letter dated July 18, 2002, 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 Taxpayer's retail sales of tangible personal property are subject to [North Carolina County] sales tax.
2. The fees identified as delivery charges on the Taxpayer's invoices which were given to its customers are included in the sales price upon which the [North Carolina County] sales tax is due.
3. G.S. 105-164.3 (16) defines "sales price" to include delivery charges.
4. G.S. 105-164.4 states that sales tax shall be computed on the "sales price" of tangible personal property sold at retail.
5. G.S. 105-164.12 provides that delivery charges connected with the sale of tangible personal property are taxable when the title to the property being shipped passes to the purchaser at the destination point.
6. G.S. 105-509 imposes the [North Carolina County] sales and use tax at the 1/2% rate on the net taxable sales of tangible personal property subject to the general rate of State sales and use tax.
7. G.S. 25-2-401(2) of the Uniform Commercial Code provides that unless otherwise explicitly agreed, where the contract requires delivery at destination, title passes to the purchaser at destination.
8. The Notice of Tax Assessment [for North Carolina County] Proposed for the period of May 1, 1999 through April 30, 2002 was issued pursuant to G.S. 105-241.1.

DECISION

The Taxpayer is engaged in the business of making retail sales of landscaping materials. In some transactions the Taxpayer also delivered those materials to customers using

its own truck and made a separate charge for delivery on the sales invoices. The Taxpayer collected and remitted [North Carolina County] sales tax on the sale of the landscape materials, but did not charge or remit [North Carolina County] sales tax on the delivery charge. The Department has proposed to assess additional [North Carolina County] sales tax on the delivery charges.

The Uniform Commercial Code clearly stipulates that in transactions where the vendor is required under the terms of the contract to deliver goods to the customer's destination, unless there is an explicit agreement to the contrary, title passes at the destination point. G.S. 105-164.3(16) and G.S. 105-164.12 provide that all expenses, including delivery, incurred prior to the passage of title to the customer are part of the sales price on which the sales tax is computed.

The Taxpayer has put forth the argument that theirs is a unique business where the title to the product sold to customers passes at the Taxpayer's business location. The Taxpayer describes how often, when a customer selects and pays for a certain pallet of rock, the pallet is tagged by the Taxpayer and that pallet is set aside for sale to that customer. That designated pallet may, at the customer's request and for a fee, be delivered by the Taxpayer to the customer's designated location or may be picked up and transported by the customer's own device.

Notwithstanding the Taxpayer's contention that title passes once the customer has paid for a pallet of rock and the pallet has been designated as a particular customer's, the provisions of G.S. 25-2-01 of the Uniform Commercial Code stipulate that title passes at the place of delivery "unless otherwise explicitly agreed." It seems that the underlying principle of this statute is that the risk of loss should not pass to purchaser until the purchaser has physical possession and control of the goods. To have title to the goods before taking physical control or possession would leave the purchaser in the disadvantageous position of owning property but not being in position or have the right to safeguard that property. If the pallet of rock,

designated for delivery to a particular customer, was stolen from the Taxpayer's yard prior to delivery or fell off the Taxpayer's truck en route to the customer's location, it is incongruous that the customer should absorb the loss while the Taxpayer still had dominion and control of the goods. Regardless, I cannot agree that merely tagging a pallet for delivery to a particular customer constitutes an explicit agreement with its customers that title passes at the point of origin.

The Taxpayer also pointed out that, with each monthly sales and use tax return filed with the Department since the business began operating, the Taxpayer has listed deliveries under the column for nontaxable receipts. The Taxpayer contends that the returns were processed by the Department each month and, since the Taxpayer was never notified of the application of tax to delivery charges, the Department was in effect tacitly approving the Taxpayer's exemption from tax for delivery charges.

I must disagree. Much of the same contention was also rejected in Henderson v. Gill, 229 N.C. 313,49 S.E.2d 754 (1948). Aside from the fact that the Department processes thousands of such returns each month which would, as a practical matter, make it impossible to review each return for absolute accuracy, there is no way for the Department to determine from a review of the returns alone whether the Taxpayer was correctly or incorrectly exempting deliveries since some delivery charges were exempt prior to January 1, 2002. The burden is upon the Taxpayer to determine the proper tax treatment of its sales transactions and to collect and remit the correct amount of sales tax to be reported on its sales and use tax returns. The Taxpayer's returns are always subject to possible later review and adjustment by the Department as part of the audit process.

The Taxpayer has also argued that the assessment of tax on delivery charges should be set aside based on mitigating circumstances. The Taxpayer contends that the Department has done an inadequate job of informing the public of the application of tax to delivery charges, citing the four accountants employed by the Taxpayer as examples of practitioners who did not

know of the taxability of delivery charges. The Taxpayer further contends that it made reasonable efforts to inform itself of the sales and use tax responsibilities and that officers of the corporation were told verbally in 1998 or 1999 by Department of Revenue personnel that delivery charges were not taxable.

Long before the Taxpayer began operations, the Department, in the form of Regulations, of tax Administrative Rules, and Technical Bulletins, has been publishing information on the application of sales or use tax to delivery charges. The Department also issues letter rulings to taxpayers who submit in writing specific questions regarding the application of tax to business transactions. It is the responsibility of each taxpayer to research his or her business and determine the sales and use tax requirements. Failure of the Taxpayer to properly inform itself of the tax consequences of sales transactions is not a basis for voiding an assessment. The Taxpayer also states that it was given erroneous verbal advice from Departmental personnel some time in 1998 or 1999, but was not able to provide an exact date or the name of the individual who gave the advice. Regardless, it is well settled in Henderson v. Gill, that whether or not the Taxpayer was given erroneous verbal advice from Departmental personnel, the Department is not estopped to collect tax that is legally due.

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 7th day of February, 2003

Signature _____

Eugene J. Cella
Assistant Secretary of Administrative Tax Hearings