

2. Copy of AS/RP-1, Application For Sales and Use Tax Registration for Taxpayer, designated Exhibit E-2.
3. Face sheet of audit report and auditor's comments dated September 20, 2001, designated Exhibit E-3.
4. Notice of Sales and Use Tax Assessment dated October 3, 2001, designated Exhibit E-4.
5. Letter dated October 19, 2001 from the Taxpayer to the Department of Revenue, designated Exhibit E-5.
6. Letter dated November 14, 2001 from the Sales and Use Tax Division to the Taxpayer, designated Exhibit E-6.
7. Letter dated December 11, 2001 from the Sales and Use Tax Division to the Taxpayer, designated Exhibit E-7.
8. Order to Make Available Records or Furnish Information dated December 5, 2000, designated Exhibit E-8.
- 8a. Order to Make Available Records or Furnish Information dated December 5, 2000, designated Exhibit E-8a.
9. Two purchase invoices dated December 1, 2000, designated Exhibit E-9.
10. Sales records for the period January 1999 to November 1999 furnished by the Taxpayer to [a mall located in North Carolina], designated Exhibit E-10.
11. Internal e-mail dated December 13, 2001 from the examining auditor to the Sales and Use Tax Division, designated Exhibit E-11.
12. Letter dated January 18, 2002 from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-12.
13. Letter dated March 18, 2002 from the Taxpayer to the Assistant Secretary of Revenue, designated Exhibit E-13.
14. Letter dated March 20, 2002 from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-14.
15. Copy of Brief for Tax Hearing prepared by the Sales and Use Tax Division, designated as Exhibit E-15.

FINDINGS OF FACT

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

1. The Taxpayer was registered as a partnership with the Department and made retail sales of taxable tangible personal property during the audit period.
2. The Taxpayer operated from a kiosk in [a mall located in North Carolina] from October 1998 until moving to a larger location located in a strip mall in November 1999.
3. The Taxpayer ceased filing sales and use tax returns after December of 1998 yet continued making sales of taxable tangible personal property.
4. The Taxpayer did not furnish any books or records of the business's sales to any representative of the Department for the audit period.
5. The auditor utilized the Taxpayer's sales records obtained from the [mall located in North Carolina] to determine taxable sales for the audit period, which was the best information available to complete the audit.
6. Sales tax was assessed at the combined general 6% rate of tax by the auditor on the Taxpayer's retail sales of [taxable tangible personal property].
7. The Notice of Proposed assessment was mailed to the Taxpayer on October 3, 2001.
8. The Taxpayer notified the Department that it objected to the assessment on October 19, 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. The Taxpayer was, at all material times, a retailer engaged in the business of making taxable sales of tangible personal property.
2. The Taxpayer is required to keep adequate books and records and to provide this information to representatives of the Secretary of Revenue pursuant to G.S. 105-164.22, 105-164.30, and 105-164.31.
3. The Taxpayer did not provide any of the books and records of the business and provided no evidence, written or otherwise, to contradict the assessment or overcome the presumption of correctness.
4. The Secretary must base a proposed assessment on the best information available and the assessment is presumed to be correct pursuant to G.S. 105- 241.1(a). The burden is upon a Taxpayer who takes exception to an assessment to overcome that presumption.

5. The Taxpayer is liable for the applicable State and county additional sales tax assessed on its sales of taxable tangible personal property.
6. Notices of proposed assessment for the periods were properly issued to the Taxpayer pursuant to G.S. 105-241.1.

DECISION

The Taxpayer operated as a partnership and was engaged in the business of selling [general merchandise] at retail. The Taxpayer's business originally operated from a kiosk in [a mall located in North Carolina] until moving to a strip mall in November 1999. Sales tax was remitted to the Department up through December, 1998 but then inexplicably the Taxpayer ceased filing and remitting its sales and use tax returns altogether. The business ceased operations in August 2001.

When contacted by the field auditor, the Taxpayer advised that it would furnish the books and records of the business; however, no books or records were ever furnished by the Taxpayer to any representative of the Department. Since G.S. 105-241.1(a) provides that the Secretary must base a proposed assessment on the best information available and that a proposed assessment of the Secretary is presumed correct, the auditor completed the audit by utilizing the Taxpayer's 1999 weekly sales summaries obtained from the [mall located in North Carolina]. Increases in the Taxpayer's sales were factored into account for the move from the kiosk to the larger strip mall facility and to account for the normal growth of the business. On December 1, 2000, a representative of the Department made purchases of taxable items from the Taxpayer's business. Invoices for those sales indicate that the Taxpayer was not charging tax on its retail taxable sales.

When questioned as to why [Taxpayer] refused to furnish the books and records required by G.S. 105-164.22, 105-164.30, and 105-164.31, the Taxpayer advised the examining auditor that the books and records were in the custody of [the Taxpayer's accountant] and were destroyed in the September 11, 2001 World Trade Center tragedy. The auditor revisited the

Taxpayer's business on November 15, 2001 and requested any available books and records of the business and questioned the Taxpayer as to why it continued to fail to file and remit monthly sales and use tax returns. The Taxpayer stated that it had closed the store and would provide the records when the records were ready. To date, no records have been received by any representative of the Department. At the hearing the Taxpayer stated that the books and records were given to an unnamed man who was a potential buyer of the business and were never returned. The Taxpayer further stated that since [Taxpayer] was also operating a recording studio at the same location and had very few retail sales, it was [the Taxpayer's] belief that sales tax was not required.

The Taxpayer has not furnished any evidence whatsoever that supports an adjustment to the amount of tax assessed. Therefore, it is my determination that the assessment has been proposed based on the best information available and that the tax, penalties, and accrued interest of said assessment should be deemed correct and sustained.

This 25th day of July 2002.

Signature _____

Eugene J. Cella
Assistant Secretary of Administrative Tax Hearings