

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 October 1, 1999 through)
August 31, 2002, by the Secretary of)
Revenue of North Carolina)
)
)
 vs.)
)
 [Taxpayer])

FINAL DECISION
Docket No. 2003-219

This matter was heard before the Assistant Secretary of Administrative Hearings, Eugene J. Cella, in the City of Raleigh, on May 15, 2003, upon application for hearing by the taxpayer wherein it protested the proposed assessment of tax, penalty and interest for the period October 1, 1999 through August 31, 2002. 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 [President of the Corporation].

Pursuant to G.S. 105-241.1, the Department mailed a Notice of Sales and Use Tax Assessment to the Taxpayer on November 12, 2002 assessing tax, penalty and interest in the amount of \$17,330.78. The Taxpayer objected to the proposed assessment in a letter dated December 9, 2002 and timely requested a hearing.

ISSUES

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

1. Is the proposed sales and use tax assessment properly proposed to be assessed, on sales of fertilizer, lime and seeds, when the Taxpayer contends they were never notified of the legislative change to G.S. 105-164.13(1) which, effective, February 1, 2002, was amended to exempt fertilizer, lime, land plaster, and seeds sold to farmers for agricultural purposes? Previously, the exemption covered fertilizer on which the inspection tax was paid and lime and the exemption for seeds applied to whomever the products were sold.
2. Is the proposed sales and use tax assessment properly proposed to be assessed on sales of herbicides and insecticides purchased for use on animals or plants, as appropriate, held or produced for commercial purposes?

3. Are the penalties and interest on the Taxpayer's assessment correctly proposed and assessed?

EVIDENCE

The following items were introduced into evidence:

1. Copy of Memorandum dated May 16, 2001 from the Secretary of Revenue to the Assistant Secretary of Tax Administration, designated Exhibit E-1.
2. Copy of Sales and use tax auditor's report for the period October 1, 1999 through August 31, 2002 dated November 15, 2002, designated Exhibit E-2.
3. Notice of Sales and Use Tax Assessment dated November 12, 2002, designated Exhibit E-3.
4. Letter dated December 9, 2002 from the Taxpayer's representative to the Department of Revenue, designated Exhibit E-4.
5. Letter dated January 24, 2003 from the Sales and Use Tax Division to the Taxpayer's representative, designated Exhibit E-5.
6. Letter dated February 7, 2003 from the Taxpayer's representative to the Sales and Use Tax Division, designated Exhibit E-6.
7. Letter dated March 10, 2003 from the Taxpayer's representative to the Sales and Use Tax Division, designated Exhibit E-7.
8. Letter dated March 12, 2003 from the Sales and Use Tax Division to the Taxpayer's representative, designated Exhibit E-8.
9. Form E-505 Supplement dated January 2002, designated Exhibit E-9.
10. Form letter dated January 18, 2002 and attachment of trade groups and professional associations, designated Exhibit E-10.
11. Copy of power point slides on fertilizer presented to the North Carolina Association of Certified Public Accountants, Piedmont Chapter on January 8, 2002, designated Exhibit E-11.
12. House Bill 688 titled An Act to Tax the Sales of Fertilizers and Seed to NonFarmers and to Appropriate Revenues for Turfgrass Research and Education and the Savings Reserve Account, effective February 1, 2002, designated Exhibit E-12.
13. Sales and Use Tax Technical Bulletin 10-1 entitled Seeds and Fertilizer dated June 1, 2002, designated Exhibit E-13.
14. Sales and Use Tax Technical Bulletin 10-3 entitled Insecticides, Herbicides, Etc. dated June 1, 1996, designated Exhibit E-14.

15. Letter dated April 28, 2003 from the Assistant Secretary of Revenue to the Taxpayer's representative, designated Exhibit E-15.
16. Copy of Brief for Tax Hearing, Docket Number 2003-219, designated Exhibit E-16.

The following evidence was presented on behalf of the Taxpayer at the hearing:

17. Undated letter from [President of the Taxpayer], designated Exhibit TP-1.

FINDINGS OF FACT

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

1. The Taxpayer operates a retail hardware store selling primarily to non-farmers in [a North Carolina County area].
2. The Taxpayer's sales tax liability resulted from his failure to charge the general rate of State and local tax on his sales of fertilizer, feed, seeds, herbicides and insecticides to customers for non-agricultural use.
3. The Taxpayer has objected to the assessment on the basis of his contention that he was not notified of the change in G.S. 105-164.13(1), effective February 1, 2002 nor the change in G.S. 105-163.13(2a) effective August 1, 1995.
4. The Sales and Use Tax Division advises registered taxpayers of the availability of various Sales and Use Tax Administrative Rules and Technical Bulletins which may affect their business.
5. The Department of Revenue's web site was modified to reflect the change in G.S. 105-164.13(1).
6. The Department of Revenue has personnel in offices located throughout the State that are available to assist taxpayers with any questions concerning their sales tax responsibilities.
7. The Sales and Use Tax Division included the change in G.S. 105-164.13(1) in its public speaking schedule.
8. The Sales and Use Tax Division maintains a mailing list of attorneys, Certified Public Accountants, public accountants and individual taxpayers for the purpose of mailing out any changes or other important notices concerning sales and use taxes. The aforementioned subjects were notified of the clarification of G.S. 105-164.13(2a), effective August 1, 1995, and the change to G.S. 105-164.13(1), effective February 1, 2003.
9. All trade groups whose members might sell fertilizer and seeds were notified in writing advising them of the law change concerning the taxation of fertilizer immediately after the bill became law on January 4, 2002.

10. The Notice of Proposed assessment was mailed to the Taxpayer on November 12, 2002.
11. The Taxpayer notified the Department that it objected to the assessment on December 9, 2002 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. Effective February 1, 2002, G.S. 105-164.13(1) was amended to provide an exemption from sales tax for "Commercial fertilizer, lime, land plaster, and seeds sold to a farmer for agricultural purposes."
2. G.S. 105-164.13(2a) provides an exemption from tax for "Any of the following when purchased for use on animals or plants, as appropriate, held or produced for commercial purposes: (b) Rodenticides, insecticides, herbicides, fungicides, and pesticides."
3. The sales tax must be added to the purchase price and constitutes a debt from the purchaser to the retailer until paid, but failure to charge or collect the tax from the purchaser shall not affect the retailer's liability. Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962)
4. The sales tax is primarily a privilege or license tax on retailers, and not a tax on consumers. Even though the sales tax is primarily a license or privilege tax on retailers, the intent of the law is that the sales tax be passed on to the consumer. Rent-A-Car Co. v. Lynch, 39 N.C. App. 709, 251 S. E. 2d 917.
5. It is the primary responsibility of taxpayers to avail themselves of information so as to educate themselves in the areas regarding their tax liability. The fact that a taxpayer fails to adequately or timely inform himself of his obligations does not relieve him of the liability for the payment of such tax.
6. 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. If the accidents of trade lead to inequality or hardships, the consequences must be accepted as inherent in government by law instead of government by edict. Fisher v. Jones, 15 N.C. App. 737, 190 S.E.2d 663 (1972).
7. G.S. 105-164.7 provides, in part, that "Every retailer engaged in the business of selling or delivering or taking orders for the sale or delivery of tangible personal property for storage, use or consumption in this State shall . . . add to the sales price of such tangible personal property the amount of the tax on the sale thereof . . . and the retailer's failure to charge to or collect said tax from the purchaser shall not affect such liability. . . ." The statute contains no provisions for exceptions to the Taxpayer's obligation to collect the general rate of tax on his sales of fertilizer, seeds, herbicides and insecticides to non-farmers.

8. The penalty is assessed by the auditors based purely on the percentage of deficiency pursuant to G.S. 105-236(5)a.
9. The interest is assessed pursuant to G.S. 105-241.1(i) and there is no statute which authorizes the waiver or abatement of interest charges.
10. The Notice of Proposed assessment was mailed to the Taxpayer on November 12, 2002.
11. The Taxpayer notified the Department that it objected to the assessment on December 9, 2002 and timely requested a hearing.

DECISION

The Taxpayer operates a retail hardware store and sells primarily to non-farmers. The Taxpayer's sales tax liability resulted from his failure to charge the State and local rate of tax on his sales of fertilizer, feed, seeds, herbicides and insecticides to customers for non-agricultural use.

G.S. 105-164.13(2a) provides an exemption from tax for "Any of the following when purchased for use on animals or plants, as appropriate, held or produced for commercial purposes:

(b) Rodenticides, insecticides, herbicides, fungicides, and pesticides."

This statute was changed effective August 1, 1995 to make it clear that all of the exemptions, including herbicides and insecticides, in the subdivision were limited to the commercial production of animals or plants. This had the effect of making these items taxable unless sold to farmers or others engaged in the commercial production of animals or plants.

Prior to February 1, 2002, G.S. 105-164.13(1) provided an exemption from sales tax for "commercial fertilizer on which the inspection tax is paid and lime and land plaster used for agricultural purposes whether the tax is paid or not." Effective February 1, 2002, the statute was changed to provide an exemption from sales tax only for "Commercial fertilizer, lime, land plaster, and seeds sold to a farmer for agricultural purposes."

Since the Taxpayer's sales of fertilizer and seeds were categorically exempt from tax until the statutory change effective February 1, 2002, the Taxpayer has objected to the assessment on the basis of his contention that he was not notified of the change in G.S. 105-164.13(1). The Taxpayer has also objected to the assessment of tax on his sales of herbicides and insecticides to non-farmers as well as to the statutory penalties and interest assessed in the audit report.

The Sales and Use Tax Division ("Division") responds that it makes every effort to provide adequate information to taxpayers, and it has an extensive program for apprising persons who are liable for payment of sales and use taxes of their liability and of any statutory changes. For example: (1) The Division advises registered taxpayers of the availability of various Sales and Use Tax Administrative Rules and Sales and Use Tax Technical Bulletins which may affect their businesses, (2) The Department's web site was modified to reflect the change in the G.S. 105-164.13(1), (3) The Department has personnel in offices located throughout the State that are available to assist taxpayers with any questions concerning their sales tax responsibilities, (4) The Sales and Use Tax Division included the change in G.S. 105-164.13(1) in their public speaking schedule to trade and professional associations, including the North Carolina Association of CPAs, Piedmont Chapter, (5) The Division maintains a mailing list of attorneys, Certified Public Accountants, public accountants and other individual taxpayers for the purpose of mailing out Sales and Use Tax Administrative Rules, Sales and Use Tax Technical Bulletins and other important notices concerning sales and use taxes. The aforementioned subjects were notified of the clarification of G.S. 105-164.13(2a), effective August 1, 1995, and the change to G.S. 105-164.13(1), effective February 1, 2003. (6) All trade groups whose members might sell fertilizer and seeds were notified in writing of the change to G.S. 105-164.13(1). The aforementioned groups and professional associations were all mailed an E-505 Supplement advising them of the fertilizer law change immediately after the bill became law on January 4, 2002.

I must agree with the Sales and Use Tax Division that it is the primary responsibility of taxpayers to avail themselves of such information, such as that cited above, so as to educate themselves in the areas regarding their tax liability. Given the aforementioned efforts by the Division, the fact that a taxpayer fails to adequately or timely inform himself of his obligations does not relieve him of the liability for the payment of such tax.

Prior to August 1, 1995 herbicides and insecticides were exempt from tax to whomever sold. However, the Taxpayer also failed to collect the applicable tax on its sales of herbicides and insecticides to non-commercial customers which have been taxable since August 1, 1995.

It is also appropriate to point out that the case law supports the Sales and Use Tax Division's position on the issue of the Taxpayer's statutory responsibilities. The sales tax must be added to the purchase price and constitutes a debt from the purchaser to the retailer until paid, but failure to charge or collect the tax from the purchaser shall not affect the retailer's liability, Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962). The sales tax is primarily a privilege or license tax on retailers, and not a tax on consumers. Even though the sales tax is primarily a license or privilege tax on retailers, the intent of the law is that the sales tax be passed on to the consumer. Rent-A-Car Co. v. Lynch, 39 N.C. App. 709, 251 S.E.2d 917, rev'd on other grounds, 298 N.C. 559, 259 S.E.2d 564 (1979). 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. If the accidents of trade lead to inequality or hardships, the consequences must be accepted as inherent in government by law instead of government by edict. Fisher v. Jones, 15 N.C. App. 737, 190 S.E.2d 663 (1972).

G.S. 105-164.7 provides, in part, that "Every retailer engaged in the business of selling or delivering or taking orders for the sale or delivery of tangible personal property for storage, use or consumption in this State shall . . . add to the sales price of such tangible personal property the amount of the tax on the sale thereof . . . and the retailer's failure to charge to or

collect said tax from the purchaser shall not affect such liability. . . .” I do not believe the Taxpayer willfully ignored the change in the G.S. 105-164.13(1) and it is regrettable that the Taxpayer failed to inform himself of the change in the aforementioned statute. Without the sound and practical reasoning of G.S. 105-164.7, and the case law which supports it, any retailer so inclined could simply claim to have not received notification of adverse statutory changes and avoid the obligation to collect and remit the appropriate tax.

The penalty is assessed by the auditors based purely on the percentage of deficiency pursuant to G.S. 105-236(5)a. Interest is assessed pursuant to G.S. 105-241.1(i) and there is no statute which authorizes the waiver or abatement of interest charges.

Therefore, the proposed assessment of tax and interest is deemed correct under the law and the facts and is hereby sustained. Because the failure to pay the tax was not the result of a negligent or intentional act by the Taxpayer, I find reasonable cause to waive the penalties. The proposed assessment of tax and accrued interest is hereby declared to be finally determined and immediately due and collectible with interest as allowed by law.

This 31st day of July, 2003.

Signature_____

Eugene J. Cella
Assistant Secretary of Administrative Tax Hearings