

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 May 1, 2000 through)
March 31, 2003, by the Secretary of)
Revenue of North Carolina)
)
)
 vs.)
)
)
 [Taxpayer])

FINAL DECISION
Docket No. 2003-441

This matter was heard before the Assistant Secretary of Administrative Hearings, Eugene J. Cella, in the City of Raleigh, on December 18, 2003, upon application for hearing by the taxpayer wherein it protested the proposed assessment of tax, penalty and interest for the period May 1, 2000 through March 31, 2003. 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 hearing was handled by mail.

Pursuant to G.S. 105-241.1, the Department mailed a Notice of Sales and Use Tax Assessment to the Taxpayer on July 14, 2003 assessing tax, penalty and interest in the amount of \$17,853.56. The Taxpayer objected to the proposed assessment and timely requested a hearing.

ISSUES

The issues to be decided are:

1. Are the Taxpayer's charges to customers for the rental of tangible personal property, i.e., portable toilets, subject to sales tax notwithstanding that the Taxpayer cleans and maintains the toilets during the period of use by the customer and makes no separate charge for such service?
2. Is the Taxpayer liable for the sales tax on the gross receipts from toilets which he did not collect from his customers?
3. Can the Taxpayer avoid the assessment of sales tax based on the fact that he failed to collect the sales tax for the use of portable toilets from his customers during the audit period?

EVIDENCE

The following items were introduced into evidence by the Sales and Use Tax Division:

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 May 1, 2000 through March 31, 2003 dated June 15, 2003, designated Exhibit E-2.
3. Copy of Notice of Sales and Use Tax Assessment dated July 10, 2003, designated Exhibit E-3.
4. Copy of letter dated July 14, 2003 from the Taxpayer to the Department of Revenue, designated Exhibit E-4.
5. Copy of letter dated July 24, 2003 from the Sales and Use Tax Division to the Taxpayer, designated Exhibit E-5.
6. Copy of letter dated July 28, 2003 from the Taxpayer to the Sales and Use Tax Division, designated Exhibit E-6.
7. Copy of letter dated August 7, 2003 from the Sales and Use Tax Division to the Taxpayer, designated Exhibit E-7.
8. Copy of sample Statement dated September 30, 2002, designated Exhibit E-8.
9. Copy of sample Statement dated June 16, 2003, designated Exhibit E-9.
10. Copy of sample Credit Memo dated July 20, 2000, designated Exhibit E-10.
11. Copy of three sample invoices for toilet tissue, chemicals and urinal blocks, designated Exhibit E-11.
12. Copy of redacted Final Decision Docket Number 90-22 from the Deputy Secretary of Revenue dated October 1990, designated Exhibit E-12.
13. Copy of redacted Final Decision Docket Number 91-139 from the Deputy Secretary of Revenue dated April 7, 1992, designated Exhibit E-13.
14. Copy of redacted Final Decision Docket Number 94-71 from the Assistant Secretary of Revenue for Legal and Administrative Services dated May 13, 1994, designated Exhibit E-14.
15. Copy of redacted Administrative Decision Number 278 from the Tax Review Board dated February 7, 1994, designated Exhibit E-15.
16. Copy of Sales and Use Tax Technical Bulletin 34-17, revised June 1, 2002, designated Exhibit E-16.

17. Copy of IMPORTANT NOTICE: To All Portable Toilet Businesses, dated May 13, 2002, designated Exhibit E-17.
18. Copy of power point slides for seminars given by the Sales and Use Tax Division in [North Carolina], designated Exhibit E-18.
19. Copy of letter dated September 4, 2003 from the examining auditor to the Sales and Use Tax Division, designated Exhibit E-19.
20. Copy of letter dated October 20, 2003 from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-20.
21. Copy of letter dated October 28, 2003 from the Taxpayer to the Assistant Secretary of Revenue, designated Exhibit E-21.
22. Copy of letter dated November 4, 2003 from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-22.

The following additional information was presented by the parties after the hearing date.

23. Copy of letter dated November 17, 2003 from the Taxpayer to the Assistant Secretary of Revenue, designated Exhibit E-23.
24. Copy of various Taxpayer invoices for portable toilet rentals from August 2001 through November 2002, designated Exhibit E-24.
25. Copy of various invoices from the Taxpayer's vendors from September 2000 to November 2002, designated Exhibit E-25.
26. Copy of Depreciation Detail Listing, Form 1120, from the Taxpayer's Federal Income Tax return, designated Exhibit E-26.
27. Copy of Brief for Tax Hearing, held on December 18, 2003, designated Exhibit E-27.

FINDINGS OF FACT

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

1. The Taxpayer did not charge, collect and remit sales tax on its charges for the rental of its portable toilets.
2. There was no separation in the Taxpayer's books and records between rental charges and cleaning charges for the use of its portable toilets. Although the Taxpayer did not separate rental charges from cleaning charges in its records, the auditor allowed the taxpayer nontaxable maintenance fees.
3. The invoices sent to the Taxpayer's customers denote "no service" or a weekly charge of \$15.00 or \$60.00 monthly.

4. The Taxpayer's business does include the service or "cleaning" by emptying waste from of toilets' holding tanks; however, waste removal is not the essence of the transactions in question.
5. The portable toilets are enclosures designed for the comfort and privacy of the user. The customer contracts for the use of the facility itself and not mere waste removal.
6. The removal of the waste, like the provision of chemicals and toilet paper, is simply routine maintenance necessary to render the toilets usable.
7. There were no optional maintenance agreements and nothing in the record to suggest that the Taxpayer's customers were given the option of renting the portable toilets from the Taxpayer and performing their own cleaning or hiring a different company to clean the units.
8. The issue of the rental versus optional maintenance charges for portable toilets was addressed in "Important Notice: To All Portable Toilet Businesses" on May 13, 2002 and in Sales and Use Tax Technical Bulletin 34-17, issued June 1, 2002.
9. There is no evidence that the Taxpayer received or complied with the lenient guidelines set forth in the "Important Notice" and Sales and Use Tax Technical Bulletin 34-17.
10. The fact that the Taxpayer paid income tax on the profits from its business has no bearing on the sales and use tax assessment.
11. The Taxpayer did not pay sales and use tax on the purchase of its portable toilet units.
12. The Taxpayer's purchase invoices indicate that the Taxpayer did pay sales and use tax on the purchase of supplies such as toilet tissue, chemicals and paper towels.
13. Sales tax was due on the rental of the portable toilets and the examining auditor used a sound and practical method to determine the taxable gross receipts.
14. The Notice of Proposed assessment was mailed to the Taxpayer on July 10, 2003.
15. The Taxpayer notified the Department that it objected to the assessment 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. 105-164.4(a)(2) provides that the "gross receipts" from a lease or rental of tangible personal property are subject to the tax.
2. G.S. 105-164.7 provides that a Taxpayer cannot claim that they failed to collect the sales tax from the customer in order to avoid assessment of sales tax on taxable transactions.

3. The case of Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155, 123 S.E.2d 582 (1962) provides that failure to charge or collect the tax from the purchaser shall not affect the retailer's sales tax liability.
4. The case of 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) provides that 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.
5. The Notice of Proposed assessment was issued to the Taxpayer pursuant to G.S. 105-241.1.

DECISION

The Taxpayer operates a portable toilet business known by the [trade name] and a [roll-off waste container service]. The Taxpayer did not charge, collect and remit sales tax on the charges for the use of the portable toilet rentals and there was no optional maintenance agreement between the Taxpayer and its customers. There was no separation between rental charges and cleaning charges for use of the portable toilets in the Taxpayer's books and records. Pursuant to G.S. 105-164.4(a)(2), the Taxpayer would have been liable for the sales tax on the undiminished gross receipts from the lease or rental of the toilets. However, the examining auditor did not hold the Taxpayer liable for the gross receipts as permitted by the law. Rather, the examining auditor multiplied the Taxpayer's gross receipts by a percentage rate of 18.75% and used the result as taxable receipts. The 18.75% figure was arrived at by using the actual \$60.00 monthly charge made for use of the toilets divided into a standard industry average for rentals of portable toilets of \$11.25. The \$11.25 average is based on a five-year useful life of the portable toilets plus a fair mark-up.

The Taxpayer disagrees that any portion of the revenue received for the toilet rental is subject to sales tax. Although there was no written contract between the Taxpayer and its customers, they contend that the funds which they bill and collect are solely for non-taxable cleaning of the portable toilets. The Taxpayer also contends that it should not have to remit sales tax which they failed to collect from its customers and that it paid income tax on their

revenue. They also object to the five year depreciation period used by the auditor in arriving at the percentage of gross taxable receipts.

While the Taxpayer's activity does include the service, or "cleaning" by emptying of waste from the toilet holding tanks, waste removal is not the essence of the transactions in question. The toilet units are more than receptacles. They are enclosures designed for the comfort and privacy of the user. What the customer contracts for is the facility itself and not mere waste removal. The removal of the waste, like the provision of chemicals and toilet paper, is simply routine maintenance necessary to render the toilets usable. Further, there is nothing in the record to suggest that the Taxpayer's customers were given the option of renting the portable toilets from the Taxpayer and performing their own cleaning or hiring a different company to clean the units.

The Sales and Use Tax Division's position on the issue of the taxability of the receipts for the use of portable toilets has been addressed in three hearings before the Assistant Secretary and all three Final Decisions supported the State's position in this issue. (Exhibits E-12, E-13 and E-14.) The Tax Review Board's Administrative Decision number 278 rendered on February 7, 1994, further buttresses the State's position (Exhibit E-15).

G.S. 105-164.7 clearly provides that the Taxpayer cannot claim that it failed to collect the sales tax from the customer in order to avoid assessment of sales tax on taxable transactions. It is also well established in case law that 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). Thus, the fact that the Taxpayer failed to collect and remit the tax for the use of the toilets does not relieve it of the liability for such taxes.

With respect to the Taxpayer's contention that the entire amount of the charges represent non-taxable cleaning charges, the Sales and Use Tax Division responds that this issue was addressed with the publication of "Important Notice: To All Portable Toilet Businesses" on May 13, 2002. The Important Notice was sent to all portable toilet rental businesses known to the Department which included all members provided by [a North Carolina organization]. Information from this Important Notice was included in a revision dated June 1, 2002 to Sales and Use Tax Technical Bulletin 34-17, which, along with the Important Notice, was posted on the Department's web site. Further, seminars in [North Carolina] were held by the Sales and Use Tax Division for members of [the organization] to explain and reinforce the aforementioned important notice. The Department provided copies of the Important Notice: To All Portable Toilet Businesses" in exhibits to its brief. There is no evidence that the Taxpayer received or complied with the more lenient guidelines of the Important Notice and Sales and Use Tax Technical Bulletin 34-17.

Given that the examining auditor could have properly assessed sales tax on the entire amount of the taxable gross receipts from the toilet rentals, the Taxpayer's argument about the depreciation period for the toilets seems inappropriate. The Taxpayer derived the income tax benefit from the depreciation deduction but must pay sales tax on the auditor's greatly diminished computation of taxable "gross" receipts for portable toilet rentals. Also, the fact that the Taxpayer paid income tax on the profits from its business receipts has no bearing whatsoever on the sales and use tax determination. The Taxpayer paid no sales tax when it purchased the portable toilet units, but the Taxpayer's invoices indicate that it did remit tax on purchases of supplies such as toilet tissue, chemicals and paper towels. I must agree with the Sales and Use Tax Division that sales tax was due on the rental of the portable toilets and I

concur with the examining auditor's lenient, sound and practical method of determining the taxable gross receipts.

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

This 25th day of February, 2004.

Signature _____

Eugene J. Cella
Assistant Secretary of Administrative Tax Hearings