

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)
April 1, 1999 through February 28, 2002, by)
the Secretary of Revenue of North Carolina)
vs.)
[Taxpayer])

FINAL DECISION
Docket No. 2003-74

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, penalty, and interest for the period April 1, 1999 through February 28, 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 [Vice-President of Taxpayer].

Pursuant to G.S. 105-241.1, the Department mailed a Notice of Tax Assessment [North Carolina County] Sales and Use dated September 9, 2002 to the Taxpayer, assessing tax, penalty, and interest in the amount of \$16,513.69. The Taxpayer, in a letter dated October 3, 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 Taxpayer's sales of tangible personal property made from a [North Carolina County] location and delivered to purchasers in North Carolina but outside [North Carolina County] subject to [North Carolina County] Public Transportation sales and use 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 August 29, 2002 covering the period April 1, 1999 through February 28, 2002, designated Exhibit E-2.
3. Notice of Tax Assessment [North Carolina County] Sales and Use dated September 9, 2002, designated Exhibit E-3.
4. Letter dated August 27, 2002 from the Taxpayer to the Sales and Use Tax Division, designated Exhibit E-4.
5. Letter dated September 4, 2002 from the Sales and Use Tax Division to the Taxpayer, designated Exhibit E-5.
6. Letter dated September 18, 2002 from the Taxpayer to the Sales and Use Tax Division, designated Exhibit E-6.
7. Letter dated September 20, 2002 from the Sales and Use Tax Division to the Taxpayer, designated Exhibit E-7.
8. Letter dated October 3, 2002 from the Taxpayer to the Sales and Use Tax Division, designated Exhibit E-8.
9. Letter dated October 30, 2002 from the Sales and Use Tax Division to the Taxpayer, designated Exhibit E-9.
10. Letter dated October 29, 2002 from the Taxpayer to the Sales and Use Tax Division, designated Exhibit E-10.
11. Letter dated October 30, 2002 from the Sales and Use Tax Division to the Taxpayer, designated Exhibit E-11.
12. Letter dated November 12, 2002 with attachments from the Taxpayer to the Sales and Use Tax Division, designated Exhibit E-12.
13. Letter dated November 13, 2002 from the Taxpayer to the Sales and Use Tax Division, designated Exhibit E-13.
14. Letter dated November 21, 2002 from the Sales and Use Tax Division to the Taxpayer, designated Exhibit E-14.
15. Letter dated November 22, 2002 with attachments from the Taxpayer to the Sales and Use Tax Division, designated Exhibit E-15.
16. Letter dated January 16, 2003 from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-16.

The Taxpayer presented the following evidence at the hearing:

17. Newspaper article dated December 12, 2002 from [a newspaper], designated Exhibit TP-1.
18. Newspaper article dated February 7, 2002 from [a newspaper] designated Exhibit TP-2.

19. Sales and Use Tax Technical Bulletin Section 49, Local Government Public Transportation Sales Tax Act, dated March 15, 1999, designated Exhibit TP-3.

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 traffic control equipment and related products from its place of business in [North Carolina County] during the audit period.
2. The Taxpayer charged and collected the [North Carolina County] sales and use tax on sales of tangible personal property delivered or shipped to purchasers in [a North Carolina County], but did not charge or collect the [North Carolina County] sales and use tax on sales of tangible personal property delivered or shipped to purchasers who were located in North Carolina but outside [of the North Carolina County] during the audit period.
3. The Department assessed [North Carolina County] Public Transportation sales and use tax on sales of tangible personal property delivered to purchasers in North Carolina but outside [of the North Carolina County].
4. The notice of [North Carolina County] Transportation sales tax assessment was mailed to the Taxpayer on September 9, 2002.
5. The Taxpayer protested the assessment and, by letter October 3, 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. G.S. 105-509 imposes the [North Carolina County] Public Transportation sales and use tax at the ½% rate on the net taxable sales of tangible personal property subject to the general rate of State sales and use tax. The levy and collection of the [North Carolina County] Public Transportation sales and use tax shall be in accordance with other local sales and use taxes levied under Article 39 of Chapter 105.
2. G.S. 105-467 provides that the local sales tax to be imposed and levied under Article 39 applies to taxable transactions by retailers whose place of business is located within the taxing county and the situs of transactions is the location of the retailer's place of business.
3. The Taxpayer's retail sales of tangible personal property delivered to purchasers in North Carolina are subject to the [North Carolina County] sales tax.
4. The Notice of Tax Assessment [a North Carolina County] Proposed for the period of April 1, 1999 through February 28, 2002 was issued pursuant to G.S. 105-241.1.

DECISION

The Taxpayer makes retail sales of traffic control equipment and related items from its location in [North Carolina], which is in [a North Carolina County]. Sales are made to purchasers in [the North Carolina County] as well as in other counties in North Carolina and to purchasers outside the State. The Taxpayer collected and remitted the [North Carolina County] Public Transportation sales tax on sales that were delivered to purchasers in [the North Carolina County], but did not collect or remit the [North Carolina County] Public Transportation sales tax on sales that were delivered to purchasers at locations in other counties in North Carolina.

Prior to January 1, 2002, G.S. 105-467 under Article 39 provided that the situs of a transaction is the location of the retailer's place of business. For the purpose of applying county sales tax, prior to this date, a retailer was liable for collecting the sales tax levied in the county in which the retailer was located notwithstanding the disposition of the property sold. A retailer with a place of business in [the North Carolina County] was required to collect the local sales tax imposed in [the North Carolina County] even if the retailer delivered or shipped the goods sold to purchasers in another county. Since the [North Carolina County] Public Transportation sales and use tax is to be administered in accordance with Article 39, the provisions of G.S. 105-467 apply to the [North Carolina County] Public Transportation sales and use tax with regard to the situs of a retail sale. Accordingly, the [North Carolina County] Public Transportation sales and use tax was due on sales of tangible personal property made from a business located in [a North Carolina County], notwithstanding that the property was delivered or shipped to a purchaser in another county in North Carolina.

Prior to the hearing the Taxpayer contended that the [North Carolina County] Public Transportation sales and use tax was unconstitutional and that the Department had failed to provide notification to the Taxpayer that the sales receipts on its sales and use tax returns did not match the receipts on its [North Carolina County] Public Transportation sales and use tax returns. At hearing the Taxpayer conceded that the [North Carolina County] Public

Transportation tax was due, but felt it should receive some consideration in that it did not purposefully seek to avoid or evade the tax. The Taxpayer notes that it has filed returns timely and faithfully, remitting to the Department that tax it understood to be due on its sales transactions to North Carolina purchasers. Further, the Taxpayer argues that the State's statutes that determine the situs of a business transaction have changed over the years and notes that in January 1, 2002, the law changed again so that it was no longer required to collect [North Carolina County] taxes on sales delivered to purchasers outside the county.

The facts of this assessment are not in dispute and it is clear that, under the statutes, prior to January 1, 2002 sales delivered from the Taxpayer's location in [the North Carolina County] to purchasers in North Carolina are subject to the [North Carolina County] Public Transportation sales and use tax. While this assessment of the [North Carolina County] Public Transportation sales and use tax, penalty, and interest is correct and lawful, the Secretary is vested with discretionary powers with the regard to the negligence penalties. In this instance, I find that waiver of the negligence penalty included in the assessment is justified.

Therefore, the assessment of tax is proper under the law and the facts and is hereby declared to be finally determined and immediately due and payable together with interest as allowed by law. Because the failure to pay the tax was not the result of an intentional disregard of the law, the penalties proposed to be assessed are hereby waived.

Made and entered this 28th day of April, 2003.

Signature _____

Eugene J. Cella
Assistant Secretary of Administrative Tax Hearings