STATE OF NORTH CAROLINA **BEFORE THE SECRETARY OF REVENUE**

COUNTY OF WAKE

IN THE MATTER OF:

The Proposed Assessment of Sales and Use Tax for the period November 1, 1999 through September 30, 2003, by the Secretary of Revenue of North Carolina	)	**FINAL DECISION** **Docket No. 2004-199**
vs.	)	
[Taxpayer]	)	

This matter was heard before the Assistant Secretary of Administrative Hearings, Eugene J. Cella, in the City of Raleigh, on June 22, 2004, upon application for hearing by the taxpayer wherein he protested the proposed assessment of tax, penalty and interest for the period November 1, 1999 through September 30, 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 Taxpayer was represented by [Taxpayer], owner.

Pursuant to G.S. 105-241.1, the Department mailed a Notice of Sales and Use Tax Assessment to the Taxpayer on November 20, 2003 assessing tax, penalty and interest in the amount of $4,697.09. The Taxpayer objected to the proposed assessment in a letter dated December 17, 2003 and timely requested a hearing.

ISSUES

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

(1) Is the Taxpayer making sales of taxable tangible personal property subject to sales tax or merely rendering a nontaxable service?

(2) Should the Taxpayer's videography business be treated the same as a photographer's business for sales and use tax purposes?

(3) Is the Taxpayer liable for past sales tax liabilities contending that other video production companies have not been responsible for collection and remission of the sales tax?

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 November 1, 1999 through September 30, 2003 dated October 24, 2003, designated Exhibit E-2.

(3) Copy of amended sales and use tax auditor's report for the period November 1, 1999 through September 30, 2003 dated October 24, 2003, designated Exhibit E-3.

(4) Copy of Notice of Amended Sales and Use Tax Assessment dated November 20, 2003, designated Exhibit E-4.

(5) Copy of letter dated December 17, 2003 from the Taxpayer to the Examination Division, designated Exhibit E-5.

(6) Copy of letter dated January 14, 2004 from the Sales and Use Tax Division to the Taxpayer, designated Exhibit E-6.

(7) Copy of letter dated February 18, 2004 from the Sales and Use Tax Division to the Taxpayer, designated Exhibit E-7.

(8) Copy of letter dated March 4, 2004 from the Taxpayer to the Sales and Use Tax Division, designated Exhibit E-8.

(9) Copy of letter dated March 16, 2004 from the Sales and Use Tax Division to the Taxpayer, designated Exhibit E-9.

(10) Copy of redacted Final Decision of the Secretary of Revenue, Docket Number 90-42 dated April 18, 1991, designated Exhibit E-10.

(11) Copy of redacted Final Decision of the Secretary of Revenue, Docket Number 93-39 dated August 4, 1993,designated Exhibit E-11.

(12) Copy of redacted Final Decision of the Secretary of Revenue, Docket Number 95-01 dated January 24, 1995, designated Exhibit E-12.

(13) Copy of letter dated April 2, 2004 from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-13.

(14) Copy of letter dated May 18, 2004 from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-14.

FINDINGS OF FACT

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

(1) The Taxpayer operates as a sole proprietorship engaged in the business of filming and selling professional wedding videos in North Carolina, South Carolina and Virginia.

(2) The additional tax due resulted from the Taxpayer's failure to collect and remit sales tax on retail sales of videos of weddings and other functions which he filmed and sold in North Carolina and for use tax due on out of state purchases.

(3) The Sales and Use Tax Division agrees that the Taxpayer is not a photographer. No distinction is made between photographs, videos or most other types of tangible personal property for taxation purposes.

(4) The Taxpayer's customers seek a videotape recording of their wedding or special event and not merely a service.

(5) The notice of amended Sales and Use Tax assessment was mailed to the Taxpayer on November 20, 2003.

(6) The Taxpayer notified the Department that it objected to the assessment on December 17, 2003 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) Prior to January 1, 2002, G.S. 105-164.3(16) defined "sales price," in part, as ". . . the total amount for which tangible personal property is sold including any charges for any services that go into the fabrication, manufacture or delivery of such tangible personal property and that are a part of the sale valued in money . . . "

(2) January 1, 2002, the definition of sales price was rewritten and recodified under G.S. 105-164.3(37) and provides, in part, that "sales price" is "The total amount or consideration for which personal property or services are sold, leased, or rented. The consideration may be in the form of cash, credit, property, or services . . . ."

(3) Like photographers, graphic artists and similar retailers, the Taxpayer must collect sales tax on the undiminished "sales price" of the taxable tangible personal property he sells.

(4) There is no distinction in the definition of "sales price" nor exemption in the sales and use tax laws for professional or creative services when such services contribute to the production of tangible personal property.

(5) The focus in this matter should be on the "sales price" of the true object of the transaction which is the completed and edited videotape rather than a service.

(6) The law makes no distinction regarding motives or reasons for the failure to collect and remit appropriate sales taxes and places the responsibility squarely upon the retailer to stay abreast of the sales and use tax applicable to its business and responsibly discharge its corresponding sales tax obligations.

(7) There have been three prior Final Decisions (Docket Numbers: 90-42, 93-39 and 95-01) which support the sales or use tax assessed on the full and undiminished "sales price" of videotapes and similar taxable tangible personal property.

(8) Pursuant to G.S. 105-164.7, "Every retailer subject to the tax levied in G.S. 105-164.4 shall at the time of selling or delivering or taking an order for the sale or delivery of taxable tangible personal property . . . add to the sales price the amount of the tax due. . . . The retailer's failure to charge to or collect said tax from the purchaser does not affect such liability. . . ."

(9) The Division's position and the statute are buttressed by three court cases, Piedmont Canteen Serv., Inc. v. Johnson, 256 N.C. 155,123 S.E.2d 582 (1962), 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) and Fisher v. Jones, 15 N.C. App. 737, 190 S.E.2d 663 (1972).

(10) The Notice of amended Sales and Use Tax assessment was issued to the Taxpayer pursuant to G.S. 105-241.1.

DECISION

The Taxpayer is engaged in the business of filming and selling professional wedding videos in North Carolina, South Carolina and Virginia. The Taxpayer disagrees with the assessment because (1) he believes he qualifies more as a film production company than as a photography studio (2) he contends that most of what he provides for customers is characterized as a nontaxable "service" and (3) he objects to being held for past liabilities when he contends that the Department of Revenue "has not historically held those in his profession responsible for that collection liability."

The Sales and Use Tax Division ("Division") responds that the focus of the argument should be on the "sales price" of the true object of the transaction which is the completed and edited videotape rather than a service. Prior to January 1, 2002, G.S. 105-164.3(16) defined "sales price," in part, as " . . . the total amount for which tangible personal property is sold including any charges for any services that go into the fabrication, manufacture or delivery of such tangible personal property and that are a part of the sale valued in money whether paid in money or otherwise and includes any amount for which credit is given to the purchaser by the seller without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service costs, interest charged, losses or any other expense whatsoever. . . ."

Effective January 1, 2002, the definition of sales price was rewritten and recodified under G.S. 105-164.3(37) and provides, in part, that "sales price" is "The total amount or consideration for which personal property or services are sold, leased, or

rented. The consideration may be in the form of cash, credit, property, or services. The sales price must be valued in money, regardless of whether it is received in money.

a. The term includes all of the following:

1. The retailer's cost of the property sold.

2. The cost of materials used, labor or service costs, interest, losses, all cost of transportation to the retailer, all taxes imposed on the retailer, and any other expense to the retailer.

3. Charges by the retailer for any services necessary to complete the sale.

4. Delivery charges.

5. Installation charges.

6. The value of exempt personal property given to the consumer when taxable and exempt personal property are bundled together and sold by the retailer as a single product or piece of merchandise.

The Division correctly points out that the Taxpayer's customers seek a videotape recording of their wedding and not merely a service. The skilled and professional services provided by the Taxpayer all contribute to the ultimate production and delivery of the wedding videotape. Although the Division agrees that the Taxpayer is not merely a photographer, like photographers, graphic artists and similar retailers, the Taxpayer must collect sales tax on the undiminished "sales price" of the taxable tangible personal property he sells. There is no distinction in the aforementioned definition of "sales price" nor exemption in the sales and use tax laws for professional or creative services when such services contribute to the production of taxable tangible personal property.

The Division reinforces their primary argument with three prior Final Decisions (Docket Numbers: 90-42, 93-39 and 95-01) which support the sales or use tax assessed on the full and undiminished "sales price" of videotapes and similar taxable tangible personal property. Based on the statutory definition of "sales price" and the prior Final Decisions, I must agree with the Division that the Taxpayer's sales of videotapes are taxable and the undiminished "sales price" is the amount on which the tax is computed.

The Taxpayer also argues that he should not be held liable to pay the sales tax for past sales when they did not collect the tax from their customers. The Taxpayer also asserts that he could find no videographers in North Carolina who consider themselves responsible for the sales tax on their sales. The Division responds by citing G.S. 105-164.7 which provides, in part, that "Every retailer subject to the tax levied in G.S. 105-164.4 shall at the time of selling or delivering or taking an order for the sale or delivery of taxable tangible personal property . . . add to the sales price the amount of the tax due. The tax constitutes a part of the purchase price, is a debt from the purchaser to the retailer until paid, . . . The retailer is liable for the collection of the tax and for its payment to the Secretary. The retailer's failure to charge to or collect said tax from the purchaser does not affect such liability. . . . " The Division contends, and I agree, that most videographers in North Carolina collect the sales and use tax on their retail sales of wedding, training, educational and other videos.

The Division's position and the statute are buttressed by three court cases. 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).

If not for the sound and practical provisions of the statute and the case law established by Piedmont and the other cases, any retailer could merely refuse to collect and remit the sales tax by claiming that they overlooked or failed to collect said tax from the consumer or that they did not receive notification of an adverse change in the sales tax laws. The law makes no distinction regarding motives or reasons for the failure to collect and remit appropriate sales taxes and places the responsibility squarely upon the retailer to stay abreast of the sales and use taxes applicable to its business and responsibly discharge its corresponding sales tax obligations.

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 *1st* day of *September* 2004.

Eugene J. Cella
Assistant Secretary of Administrative Hearings