

STATE OF NORTH CAROLINA

BEFORE THE SECRETARY OF REVENUE

COUNTY OF WAKE

OF NORTH CAROLINA

IN THE MATTER OF:

The Proposed Assessment of Sales and Use)
Tax for the period December 1, 2002 through)
January 31, 2004, by the Secretary of)
Revenue of North Carolina)

FINAL DECISION
Docket No. 2004-350

vs.)

[Taxpayer])

This matter was heard by the Assistant Secretary of Administrative Hearings, Eugene J. Cella, upon application for hearing by the Taxpayer wherein he protested our proposed assessment of tax, penalty and interest for the periods December 1, 2002 through January 31, 2004. The hearing was conducted by mail and was held by the Assistant Secretary pursuant to the provisions of G.S. 105-260.1

Pursuant to G.S. 105-241.1, Notices of Sales and Use Tax Assessment were mailed to the Taxpayer on April 6, 2004 for each of the periods from December 2002 through January 2004. The Taxpayer's representative, in a letter dated May 7, 2004, objected to the assessments and timely requested a hearing before the Secretary of Revenue.

ISSUE

The issue to be decided in this matter is as follows:

Is the Department estopped from assessing the additional tax due as a result of erroneous verbal advice rendered by an employee of the Department of Revenue?

EVIDENCE

The following items were introduced into evidence 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. Sales and use tax returns or remittance documents and checks for the periods of December 2002 through January 2004, designated Exhibit E-2.
3. Notice of Sales and Use Tax Assessments dated April 6, 2004 for the periods December 2002 through January 2004, designated Exhibit E-3.
4. Letter dated April 12, 2004, from the Taxpayer to the Department with attached copy of Important Notice: Additional ½% County Sales and Use Tax, designated Exhibit E-4.
5. Facsimile letter dated May 7, 2004, from the Taxpayer to the Sales and Use Tax Division, designated Exhibit E-5.
6. Letter dated May 11, 2004, from the Sales and Use Tax Division to the Taxpayer, designated Exhibit E-6.
7. Letter dated August 10, 2004, from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-7.
8. Brief For Tax Hearing prepared by the Sales and Use Tax Division, Docket No. 2004-350, designated as Exhibit E-8.
9. Letter dated October 5, 2004, from the Taxpayer to the Assistant Secretary of Revenue, 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 at all material times was engaged in business as a sports bar making retail sales of prepared meals, liquor, beer, and wine.
2. The Taxpayer's business is located in [an area in North Carolina] County.
3. On December 1, 2002, the general rate of county sales and use tax rate for [an area in North Carolina] County increased from 2% to 2½%.

4. In November 2002, the Department mailed a notice to all registered taxpayers, including the Taxpayer, regarding the increase in county sales and use tax in many counties, including [an area in North Carolina] County. The notice stated that effective December 1, 2002, "The additional county tax will apply only to sales of tangible personal property and other transactions that are subject to the State 4½% rate of sales and use tax."
5. The Taxpayer did not request or receive a written ruling from the Department regarding the applicable tax rate on sales of prepared food and drink.
6. The Taxpayer continued to collect county tax at a rate of 2% on sales of prepared food and drink after December 1, 2002.
7. The Taxpayer did not request a written ruling from the Department to clarify their confusion regarding the applicable rate of tax due on sales of prepared food or drink.
8. Notices of sales and use tax assessment were mailed to the Taxpayer on April 6, 2004.
9. The Taxpayer's representative submitted a letter of objection on May 7, 2004 and timely requested a hearing.

CONCLUSIONS OF LAW

1. The food and drink sold by the Taxpayer constitutes "prepared food" as defined in G.S.105-164.3(28).
2. The exemption from State sales or use tax for food in G.S. 105-164.13(B) does not apply to prepared food.
3. Effective December 1, 2002, the county rate of tax for sales of prepared food in [an area in North Carolina] County increased from 2% to 2½%.
4. G.S. 105-264 provides that advice from the Department must be in writing to protect the Taxpayer from additional tax liability.
5. The State is not estopped to collect sales or use tax on transactions where erroneous verbal advice was given the Taxpayer by agents of the Department.
6. Notices of proposed assessment were issued pursuant to G.S. 105-241.1.

7. The Taxpayer is liable for additional ½% [an area in North Carolina] County sales tax for sales of prepared food and drink.

DECISION

The Taxpayer does not dispute that tax should have been collected and remitted at the general sales tax rate of 7% (4½% State and 2½% local) on sales of prepared food and beverages effective December 1, 2002. The protest is based on erroneous advice received from personnel in the Department's Taxpayer Assistance Division regarding the increase in the county sales and use tax rate. It is the Taxpayer's position that they did not understand the notice and were not sure if the additional ½% county tax applied to sales of prepared food or beverages. Accordingly, the Taxpayer states, on December 3, 2002, they called the Taxpayer Assistance Division to get clarification and were advised by Department personnel that the additional tax did not apply to sales by the Taxpayer's business. Based on this information, the Taxpayer states they continued to collect and remit sales tax at the combined State and county rate of 6½% rather than the 7% rate.

The question of whether or not the State may assess tax in instances of erroneous verbal advice is not a new one. In Henderson v. Gill, 229 N.C. 313, 49 S.E. 2d 754 (1948), the Supreme Court established that the erroneous advice of an agent of the Department does not relieve a taxpayer of its liability for collecting and remitting sales tax even though the retailer could not recover the tax from its customers. G.S. 105-264 provides taxpayers with a measure of protection from the assessment of additional tax based on erroneous advice given by the Department. However, the

advice must be issued in writing in response to a taxpayer's written request and the taxpayer must furnish adequate and accurate information to the Department on which the advice is based.

There has been no evidence presented to document that the Taxpayer made a telephone inquiry regarding the tax rate increase. Moreover, even if the inquiry was made as described by Taxpayer, since the Department did not furnish a written report or statement, the provisions of G.S. 105-264 which estop the assessment of tax based on written advice issued by Department are not applicable. Notwithstanding any discussions the Taxpayer and personnel in the Department's Taxpayer Assistance Division may have had concerning the application of county tax to prepared food and beverages, the issue of erroneous verbal advice is well decided.

Wherefore the assessment is sustained in its entirety, and is declared to be final and immediately due and collectable.

This 21st day of December 2004.

Eugene J. Cella
Assistant Secretary of Revenue For
Administrative Tax Hearings