

STATE OF NORTH CAROLINA

BEFORE THE
SECRETARY OF REVENUE

COUNTY OF WAKE
IN THE MATTER OF:

The Business Claim for Refund of Sales and Use Taxes for the period December 1, 2003 through December 31, 2003, denied by the Secretary of Revenue)
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vs.)
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Taxpayer)

FINAL DECISION
Docket No. 2005-145

This matter was heard before the Assistant Secretary of Revenue for Administrative Hearings, Eugene J. Cella, in the City of Raleigh, on June 15, 2005, upon application for hearing by (Taxpayer). The Taxpayer objected to the denial of a business claim for refund of sales tax and interest for the period December 1, 2003 through December 31, 2003. The hearing was held by the Assistant Secretary pursuant to the provisions of G.S. 105-260.1. The Taxpayer represented himself. Representing the Sales and Use Tax Division were W. Timothy Holmes, Assistant Director, and Amy A. McLemore, Administration Officer.

Pursuant to G.S. 105-266.1, the Department advised the Taxpayer in an audit data report provided to the Taxpayer on July 9, 2004 that the Taxpayer's business claim for refund of sales and use taxes was denied. The Taxpayer objected to the audit report in a letter dated July 23, 2004 and timely requested a hearing.

ISSUES

The issues to be decided are as follows:

- (1) Whether Taxpayer owes State sales tax where Taxpayer and buyers entered into a sales contract in the State for tangible personal property and the property was moved to the buyers' home in [another state].
- (2) Whether the contractors who moved the tangible personal property from the State of North Carolina to [another state] were agents for Taxpayer.

EVIDENCE

The following items were introduced into evidence by the Department:

- (1) Memorandum dated May 16, 2001 from the Secretary of Revenue to the Assistant Secretary for Administrative Hearings, designated as Exhibit E-1.
- (2) Copy of Business Claim for Refund State and County Sales and Use Taxes dated April 29, 2004, covering the period December 1, 2003 through December 31, 2003, designated as Exhibit E-2.
- (3) Copy of Audit Data Report dated July 9, 2004, covering the period December 1, 2003 through December 31, 2003, the attached invoices from the Taxpayer's customers to [Installer] and to [Installer], and the invoice from [a truck leasing company] to [Installer], designated as Exhibit E-3.
- (4) Letter dated July 23, 2004, from the Taxpayer to the Department, designated as Exhibit E-4.
- (5) Letter dated August 31, 2004, from the Sales and Use Tax Division to the Taxpayer, designated as Exhibit E-5.
- (6) Letter dated September 14, 2004, from the Taxpayer to the Sales and Use Tax Division, designated as Exhibit E-6.
- (7) Letter dated October 1, 2004, from the Sales and Use Tax Division to the Taxpayer, designated as Exhibit E-7.
- (8) Letter dated October 14, 2004, from the Taxpayer to the Sales and Use Tax Division and the attached invoices numbered 16106, 16107, 16132, 16150, 16151, 16152, 16153, 16154, 16155, 16156, 16157, 16158, 16159, 16160, 16161, 16162, 16163, 16164, designated Exhibit E-8.
- (9) Letter dated November 4, 2004, from the Sales and Use Tax Division to the Taxpayer, designated Exhibit E-9.
- (10) Letter dated December 7, 2004, from the Sales and Use Tax Division to the Taxpayer, designated Exhibit E-10.
- (11) Letter dated January 25, 2005, from the Sales and Use Tax Division to the Taxpayer, designated Exhibit E-11.
- (12) Letter dated March 2, 2005, from the Sales and Use Tax Division to the Taxpayer, designated Exhibit E-12.

- (13) Copy of North Carolina Sales and Use Tax Technical Bulletin 42-1 D, designated Exhibit E-13.
- (14) Letter dated April 20, 2005, from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-14.
- (15) Copy of Brief for Tax Hearing, Docket No. 2005-145, held on June 15, 2005, designated as Exhibit E-15.

FINDINGS OF FACT

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

- (1) During the period of the business refund claim, the Taxpayer sold furniture, draperies, fabric, and other tangible personal property.
- (2) Husband and wife buyers (“Buyers”) selected merchandise from Taxpayer in the State.
- (3) The Taxpayer and the Buyers entered into a contract for the sale of the tangible personal property in the State.
- (4) The Taxpayer routinely used _____ of [a city], North Carolina (“Installer”) to install draperies, cornices, rods, and other window treatments.
- (5) The Buyers hired [Installer] to transport and install the tangible personal property in their [another state] home.
- (6) [Installer] leased a vehicle from [truck leasing company] in [a city in North Carolina], loaded the tangible personal property, and drove to the Buyers’ home in [another state].
- (7) [Installer] delivered and installed the furniture and draperies in the Buyers’ home in [another state]. [Installer] had his son assist with the delivery and installation.
- (8) [Installer] and his son each presented an invoice to the Buyers, who paid each man for their work.
- (9) [Installer] and his son were not employees of the Taxpayer.
- (10) [Installer] and his son were not acting under a contract with Taxpayer.

- (11) [Installer] and his son were independent contractors hired by Buyers and acting under a contract between [Installer] and the Buyers.
- (12) [Installer] and his son were acting as agents of the Buyers when [Installer] and his son took possession of the tangible personal property in the State and transported it to [another state].
- (13) The Taxpayer did not collect any sales or use tax from the husband and wife buyers for this transaction.
- (14) The Taxpayer did include sales tax for the sale of tangible personal property along with Taxpayer's December 2003 sales and use tax return and remitted sales tax to the Department.
- (15) The Taxpayer filed a Business Claim for Refund of State and County Sales and Use Taxes for the sales tax remitted with Taxpayer's December 2003 report for the sales of the property in question.
- (16) In May of 2004, the Department initiated an examination of the Taxpayer's financial records.
- (17) The Business Claim for Refund was denied by the auditor on July 9, 2004.
- (18) The Taxpayer timely requested a hearing in a letter dated July 23, 2004.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Assistant Secretary makes the following conclusions of law:

- (1) Sales of tangible personal property delivered in this State to the buyer or his agent, if such agent is not a common carrier, are subject to the general rate of State tax and any applicable local sales or use tax, notwithstanding that the buyer may subsequently transport, or employ someone else to transport, the property out of this State.
- (2) Taxpayer made a sale of tangible personal property in the State subject to State sales tax when Taxpayer and the husband and wife buyers reached an agreement and entered into a sales contract.
- (3) The Buyers' later transport of the property to [another state] does not affect the application of the State sales tax, since the Taxpayer sold the property to the Buyers in the State and the Buyers, through their agent [Installer], took possession in the State.

- (4) Under the contract to deliver and install the property, [Installer] had the authority, as Buyers' agent, to take possession from Taxpayer in the State of the Buyers' property.
- (5) [Installer] was acting as the agent for the Buyers when [Installer] took possession from Taxpayer in the State.
- (6) The sales tax is a tax imposed on the retailer and is a privilege tax for engaging in business.
- (7) The retailer is obligated for State sales tax regardless of whether the retailer collected the tax from the buyer.
- (8) The Taxpayer is liable for the State and applicable county sales tax.

FINAL DECISION

Sales of tangible personal property delivered in this State to the buyer or his agent, if such agent is not a common carrier, are subject to the general rate of State tax and any applicable local sales or use tax, notwithstanding that the buyer may subsequently transport, or employ someone else to transport, the property out of this State. The Taxpayer argues that [Installer] was his agent, and the Taxpayer's agent delivered the tangible personal property to the Buyers outside the State. In fact, [Installer] and his son were acting as agents of the Buyers when [Installer] and his son took possession of the tangible personal property in the State and transported it to [another state].

Taxpayer made a sale of tangible personal property in the State subject to State sales tax when Taxpayer and the husband and wife buyers reached an agreement and entered into a sales contract. The Buyers' later transport of the property to [another

state] does not affect the application of the State sales tax, since the Taxpayer sold the property to the Buyers in the State and the Buyers, through their agent [Installer], took possession in the State.

The Taxpayer also argues that the sales contract did not require full payment from the Buyers until after the merchandise had been delivered to [another state]. Assuming the sales contract allowed the Buyers to make two payments and gave the Buyers a return period, the Taxpayer still completed a taxable sale of tangible personal property in the State, and Buyers, not Taxpayer, contracted with [Installer] to transport the property to [another state]. [Installer] acted on behalf of the Buyers and was compensated by the Buyers. Exhibit E-3. The Taxpayer had a retail sales contract with the Buyers. [Installer] had a separate contract with the Buyers as an independent contractor to deliver and install the property. [Installer] rented a vehicle in his name to provide the services [Installer] promised the Buyers. Under the authority of the contract to deliver and install the property, [Installer], as Buyers' agent, took possession from Taxpayer in the State of the Buyers' property.

Although the Taxpayer did not collect the sales tax from the Buyers, Taxpayer did correctly remit the tax to the Department with Taxpayer's December 2003 sales and use tax report. The Taxpayer is a retailer, and Taxpayer is liable for the sales tax.

Therefore, the denial of the business claim for refund is sustained in its entirety, and the sales tax already paid on the property is declared to be final.

Made and entered this 12th day of September, 2005.

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