

**STATE OF NORTH CAROLINA**

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

**COUNTY OF WAKE**

**IN THE MATTER OF:**

The Proposed Assessment of Sales and Use )  
Tax for the period July 1, 2000 through )  
June 30, 2003, by the Secretary of Revenue )  
of North Carolina )  
 )  
 )  
vs. )  
 )  
Taxpayer )

**FINAL DECISION**  
**Docket No. 2005-208**

This matter was heard by the Assistant Secretary of Administrative Hearings, Eugene J. Cella, upon application for hearing by (Taxpayer) wherein she protested our proposed assessment of tax, penalty and interest for the period July 1, 1995 through June 30, 2001. The hearing was held on November 9, 2005, by the Assistant Secretary pursuant to the provisions of G.S. 105-260.1 and was attended by W. Timothy Holmes, Assistant Director, and Richard C. Stewart, Administration Officer, representing the Sales and Use Tax Division. The Taxpayer was represented by [Corporate President], president of the corporation.

Pursuant to G.S. 105-241.1, the Department mailed a Notice of Proposed Assessment to the Taxpayer on June 15, 2004, assessing additional tax, penalty and interest of \$16,498.50 for the period July 1, 2000 through June 30, 2003. The Taxpayer, in a letter dated December 28, 2004, objected to the assessment and timely requested a hearing before the Secretary of Revenue.

**ISSUES**

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

1. Is the Taxpayer's assessment of sales and use tax based on the best information available?
2. Are the Taxpayer's retail sales of tangible personal property subject to sales tax?
3. Are the Taxpayer's purchases of tangible personal property for use or consumption subject to use tax?

## **EVIDENCE**

The following items were introduced into evidence at the hearing:

1. Copy of memorandum dated May 16, 2001 from the Secretary of Revenue to the Assistant Secretary of Administrative Hearings, designated Exhibit E-1.
2. Copy of the Field Auditor's report dated May 28, 2004 covering the period July 1, 2000 through June 30, 2003, designated Exhibit E-2.
3. Copy of Notice of Sales and Use Tax Assessment dated June 15, 2004, designated Exhibit E-3.
4. Copy of letter dated December 28, 2004, from the Taxpayer to the Sales and Use Tax Division, designated Exhibit E-4.
5. Copy of letter dated January 28, 2005, from the Sales and Use Tax Division to the Taxpayer, designated Exhibit E-5.
6. Copy of letter dated March 22, 2005, from the Sales and Use Tax Division to the Taxpayer, designated Exhibit E-6.
7. Copy of letter dated June 15, 2005, from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit-7.
8. Copy of letter dated August 10, 2005, from the Taxpayer to the Assistant Secretary of Revenue, designated Exhibit-8.
9. Copy of letter dated August 18, 2005, from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-9.
10. Copy of letter dated August 19, 2005, from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-10.
11. Copy of Sales and Use Tax Technical Bulletin 23-1, dated February 1, 2004, designated Exhibit E-11.
12. Copy of Sales and Use Tax Technical Bulletin 23-15, dated June 1, 2002, designated Exhibit E-12.
13. Brief for Hearing, prepared by the Sales and Use Tax Division, Docket No. 2005-2008, Designated, Exhibit E-13.

## **FINDINGS OF FACT**

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

1. The Taxpayer was engaged in business as an indoor skating rink.
2. The Taxpayer was engaged in the business of making retail sales of food products at concession stands.
3. The Taxpayer had video games in operation at the skating rink.
4. The Taxpayer was engaged in the business of renting inline skates to customers.
5. The Taxpayer gave away prizes to customers on which no North Carolina sales or use tax was paid.
6. The Taxpayer made purchases of maintenance supplies on which no North Carolina sales or use tax was paid.
7. The Taxpayer made purchases of office supplies and computer software on which no North Carolina sales or use tax was paid.
8. The Taxpayer was not able to produce records to show that North Carolina sales or use tax was paid by the Taxpayer or the Taxpayer's contractor on purchases of materials used to build the skate park.
9. The Taxpayer was given credit for tax paid on purchases of food products that were resold at the Taxpayer's concession stands.
10. The Taxpayer did not file or pay sales and use tax returns for the months of March 2003, June 2003 or July 2003.
11. The Taxpayer produced records adequate to determine the sales and use tax liability incurred for the months of March 2003, June 2003 and July 2003.
12. A notice of sales and use tax assessment was mailed to the Taxpayer on June 15, 2004.
13. The Taxpayer submitted a letter of objection on December 28, 2004 and timely requested a hearing.

## **CONCLUSIONS OF LAW**

1. The Taxpayer's food sold at a concession stand falls within the definition of "tangible personal property" defined in G.S. 105-164.3(46).
2. The Taxpayer's sales of food are subject to North Carolina sales tax pursuant to G.S. 105-164.4, G.S. 105-467, G.S. 105-483, G.S. 105-498 and G.S. 105-517.
3. Prizes given to customers without charge are subject to North Carolina use tax on their purchase price.
4. The Taxpayer is liable for use tax on the purchase price of maintenance supplies, office supplies, and computer software purchased from vendors outside North Carolina.
5. The Taxpayer is liable for North Carolina use tax on purchases of building materials, whether by the owner or the contractor, on which no North Carolina sales or use tax has been paid, used to construct the skate park under the provisions G.S. 105-164.6 (b).
6. The Taxpayer produced no evidence to overcome the presumption of correctness of the assessment set out in G.S. 105-241.1.
7. The Taxpayer is liable for the applicable State and county additional tax assessed for the audit period.
8. The Notices of Proposed assessment were issued pursuant to G.S. 105-241.1.

## **DECISION**

Under the provisions of G.S. 105-241.1, the Secretary of Revenue must base a proposed assessment on the best information available and a proposed assessment of the Secretary is presumed to be correct.

The Taxpayer's invoices and general ledger were used to determine use tax liability on purchases of stuffed animals given away as prizes, on general maintenance supplies and on general office supplies. The depreciation schedule on the Taxpayer's corporate tax returns and purchase invoices were used to determine the additional use tax due on purchases of computer software and skate park materials. Tax was also assessed on the Taxpayer's rental of inline skates to customers based on the

Taxpayer's records. The tax due for the delinquent periods of March, June and July 2003 was provided by the Taxpayer to the auditor, who verified the information by checking the Taxpayer's month end reports.

The auditor determined that the Taxpayer was paying sales tax on purchases of food products that were being resold at the skating rink concession stand. Credit was allowed the Taxpayer for the tax paid in error on purchases of food for resale during the audit period.

The Taxpayer does not contest the findings of the audit and concedes that the audit is correct. At the hearing the Taxpayer outlined the financial difficulties encountered and requested waiver of the penalties. The Taxpayer also requested that the Department allow her to liquidate the liability through a payment plan or similar arrangement.

I find that the assessment of additional sales and use tax was, in fact, based on the best information available. No information or arguments were presented at the hearing which would call into question the correctness of the assessment. Wherefore the assessment of tax and interest is sustained, and is declared to be final and immediately due and collectable. Since there was no intentional disregard of the law, penalties are waived.

This 8th day of December 2005.

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Eugene J. Cella  
Assistant Secretary of Administrative Hearings