

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE
SECRETARY OF REVENUE

IN THE MATTER OF:

The Proposed Assessment of Additional)
Sales and Use Tax for the Period January 1,)
2000 through January 31, 2005 by the)
Secretary of Revenue of North Carolina)
vs.)
Taxpayer)

FINAL DECISION
Docket No. 2005-416

This matter was heard before the Assistant Secretary of Revenue, Eugene J. Cella, in the City of Raleigh on March 9, 2006, upon an application for hearing by the Taxpayer, wherein he protested the proposed assessment of additional tax for the period January 1, 2000 through January 31, 2005. The hearing was held by the Assistant Secretary of Revenue under the provisions of G.S. 105-260.1 and was attended by W. Timothy Holmes, Assistant Director, and Ginny Upchurch, Administration Officer, representing the Sales and Use Tax Division. [Attorney], Attorney, represented the Taxpayer.

Pursuant to G.S. 105-241.1, the Department mailed a Notice of Sales and Use Tax Assessment to the Taxpayer on June 1, 2005 and on June 10, 2005, the Taxpayer requested a hearing before the Secretary of Revenue.

ISSUES

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

1. Is the Taxpayer a manufacturer making retail sales of cabinet doors, glass frames and cabinet drawer fronts to contractors and other cabinet companies for use and, therefore, required to collect the sales tax on sales of these items?
2. Is the Department barred from assessing the additional tax due to any advice rendered by the Department's employees?

EVIDENCE

The Sales and Use Tax Division introduced the following items 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) Copy of Auditor's Report – Sales and Use Tax dated May 20, 2005 covering the period January 1, 2000 through January 31, 2005, designated Exhibit E-2.
- (3) Copy of Notice of Sales and Use Tax Assessment dated June 1, 2005, designated Exhibit E-3.
- (4) Copy of a letter dated June 6, 2005 from the Taxpayer to Senator [Name], designated Exhibit E-4.
- (5) Copy of letters dated November 15, 2004 and June 10, 2005 received by facsimile from the Taxpayer to "To Whom It May Concern," designated Exhibit E-5.
- (6) Copy of a letter dated June 29, 2005 from the Sales and Use Tax Division (Division) to Senator [Name], designated Exhibit E-6.
- (7) Copy of a letter dated June 29, 2005 from the Division to the Taxpayer, designated Exhibit E-7.
- (8) Copy of a letter dated July 19, 2005 from the Taxpayer to the Division, designated Exhibit E-8.
- (9) Copy of a letter dated July 20, 2005 from the Taxpayer's representative to the Division, designated Exhibit E-9.
- (10) Copy of a letter dated August 29, 2005 from the Division to the Taxpayer's representative, designated Exhibit E-10.
- (11) Copy of a letter dated October 14, 2005 from the Division to the Taxpayer's representative, designated Exhibit E-11.
- (12) Copy of a letter dated December 21, 2005 from the Assistant Secretary of Revenue to the Taxpayer's representative, designated Exhibit E-12.

The following items were introduced into evidence by the parties after the hearing:

- (13) Copy of a letter dated April 5, 2006 and related attachments from the Taxpayer's attorney to the Assistant Secretary, designated Exhibit TP-1.

- (14) Copy of a letter dated April 11, 2006 from the Assistant Secretary of Administrative Hearings to the Assistant Director of the Sales and Use Tax Division, designated as Exhibit AS-1.
- (15) Copy of a memorandum dated April 21, 200[6] from the Division to the Assistant Secretary of Administrative Hearings, designated as Exhibit S-1.

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 a manufacturer of unfinished cabinet doors, glass frames and cabinet drawer fronts.
- (2) The doors manufactured by the Taxpayer were sold without hardware, paint or stain finishes, or sealer.
- (3) The Taxpayer made both wholesale and retail sales of unfinished cabinet doors, glass frames and cabinet drawer fronts to cabinet shops and contractors during the audit period.
- (4) At the time of the audit, the Taxpayer was not registered for sales and use tax purposes.
- (5) During the audit period, the Taxpayer did not collect sales tax on his sales of unfinished cabinet doors, glass frames and cabinet drawer fronts to contractors and other cabinet shops.
- (6) The Taxpayer obtained some Certificates of Resale during the audit period from cabinet shops that were purchasing the unfinished cabinet doors, glass frames and cabinet door fronts for resale.
- (7) The Taxpayer was unable to obtain Certificates of Resale from the customers remaining in the audit because they were purchasing the unfinished cabinet doors, glass frames and cabinet drawer fronts for use in fulfilling contractual obligations on which the sales tax is due. Tax was assessed on these transactions.
- (8) The Taxpayer did not request or receive a written ruling from the Department regarding the application of tax on sales of unfinished cabinet doors, glass frames and cabinet drawer fronts to contractors and cabinet shops.

- (9) The Department assessed sales tax on the Taxpayer's retail sales of unfinished cabinet doors, glass frames and cabinet drawer fronts made to contractors and cabinet shops for use or consumption.
- (10) The Taxpayer notified the Department on June 10, 2005 that he objected to the assessment and timely requested a hearing.
- (11) After the hearing was held, the Taxpayer's attorney submitted seven additional Certificates of Exemption for the Sales and Use Tax Division's consideration.
- (12) [Taxpayer's Customer] was not registered during the audit period and, consequently, the sales made to them remained a part of the audit.
- (13) The Certificate of Exemption executed by [Taxpayer's Customer] should be allowed and the Division has reduced the amount of tax due for the assessment in the amount of \$934.79.
- (14) The remaining Certificates of Exemption were issued by [Taxpayer's Customer]; [Taxpayer's Customer]; [Taxpayer's Customer]; [Taxpayer's Customer]; and [Taxpayer's Customer] and no tax was assessed on sales to these businesses in the audit report.

CONCLUSIONS OF LAW

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

- (1) G.S. 105-164.3(35) provides, in part, that retailer "means and includes every person engaged in the business of making sales of tangible personal property at retail . . . and every manufacturer, producer or contractor engaged in business in this State and selling . . . tangible personal property for use in this State. . . ."
- (2) G.S. 105-164.3(52) provides that a wholesale sale is "a sale of tangible personal property by a wholesale merchant to a . . . registered wholesale or retail merchant, for the purpose of resale but does not include a sale to users or consumers not for resale."
- (3) G. S. 105-164.26 provides, in part, that ". . . it shall be presumed that all gross receipts of wholesale merchants and retailers are subject to the retail sales tax until the contrary is established by proper records as required in this Article. . . ."

- (4) Sales and Use Tax Technical Bulletin 41-3 A. provides, in part, that “Cabinetmakers who fabricate and sell cabinets to . . . contractors and others for use in this State are liable for collecting and remitting the general rate of State tax and any applicable local sales or use tax on the sales price of such property. . . .”
- (5) Sales and Use Tax Technical Bulletin 41-3 B. provides, in part, that “Cabinetmakers who, pursuant to a construction or performance-type contract . . . install or affix . . . cabinets, in or to real property are liable for tax on the cost or purchase price of materials and other such property used in performing the contract.”
- (6) Sales and Use Tax Technical Bulletin 31-1 provides that contractors are deemed to be the users or consumers of the tangible personal property that they use in fulfilling contracts and are, therefore, liable for the sales or use tax on the cost of the tangible personal property.
- (7) The Taxpayer is a retailer and is liable for collecting and remitting the applicable State and local rates of sales tax on his retail sales of tangible personal property made to contractors and cabinet shops for their use or consumption.
- (8) Sales of unfinished cabinet doors, glass frames and cabinet door fronts to contractors and cabinet shops for use in performance contracts are retail sales subject to sales tax.
- (9) The Taxpayer’s sales of unfinished cabinet doors, glass frames and cabinet door fronts to cabinet shops for resale are considered wholesale sales. Wholesale sales must be supported by properly completed Certificates of Resale at the time of sale.
- (10) G. S. 105-264 does provide 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 in writing in response to a taxpayer’s request and the taxpayer must furnish adequate and accurate information to the Department on which the advice is based.
- (11) The State is not barred from collecting sales or use tax on transactions even if erroneous verbal advice was given the Taxpayer by agents of the Department.
- (12) The Notice of Proposed Assessment for the period January 1, 2000 through January 31, 2005 was properly issued pursuant to G.S. 105-241.1.

DECISION

The Taxpayer was a manufacturer making both retail and wholesale sales of unfinished cabinet doors, glass frames and cabinet drawer fronts during the audit period. The Taxpayer failed to collect and remit sales tax on his sales of these items to cabinet shops and contractors. Sales of tangible personal property to cabinet shops and contractors for use in fulfilling performance contracts are classified as retail sales; therefore, the Department has correctly assessed sales tax on the Taxpayer's sales in the audit report.

Sales for resale are exempt from tax provided such sales are supported by properly completed Certificates of Resale or Streamlined Sales Tax Agreement Certificates of Exemption. The Taxpayer obtained some Certificates of Resale during the audit period to document wholesale sales made to cabinet shops for resale. However, the Taxpayer was unable to obtain Certificates of Resale or Certificates of Exemption for the other sales made during the audit period and these are the transactions on which sales tax is assessed. After the hearing was held, the Taxpayer's attorney submitted seven additional Certificates of Exemption for the Sales and Use Tax Division's consideration. It was determined that [Taxpayer's Customer] was not registered during the audit period and, consequently, the sales made to them remain a part of the audit. The Division determined the Certificate of Exemption executed by [Taxpayer's Customer] should be allowed and the Division has reduced the amount of tax due for the assessment in the amount of \$934.79. The remaining Certificates of Exemption were issued by [Taxpayer's Customer]; [Taxpayer's Customer]; [Taxpayer's

Customer]; [Taxpayer's Customer]; and [Taxpayer's Customer], and no tax was assessed on sales to these businesses in the audit report.

The second issue, 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 does provide 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 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. The Taxpayer did not make a written request to obtain a written ruling regarding his sales tax liability. Since the Department did not furnish a written response regarding the tax liability of the Taxpayer, the provisions of G.S. 105-264 are not applicable.

Therefore, I find that the proposed assessment of additional sales and use tax, as adjusted by the Sales and Use Tax Division, plus accrued interest is deemed to be correct under the facts and is hereby sustained. Because the Taxpayer did make a good faith attempt to comply with the North Carolina Statutes, I find reasonable cause to waive the penalties. The proposed assessment, as adjusted, is hereby declared to be finally determined and immediately due and collectible with interest thereon as permitted by law.

Made and entered this 24th day of July, 2006.

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