

STATE OF NORTH CAROLINA

**BEFORE THE
SECRETARY OF REVENUE**

COUNTY OF WAKE

IN THE MATTER OF:

The Proposed Assessment of Additional)
Sales Tax for the period November 1,)
2001 through March 31, 2002 and)
May 1, 2002 through July 31, 2002)
by the Secretary of Revenue)
)
vs.)
)
[Taxpayer], Responsible Officer)

FINAL DECISION
Docket No. 2006-145

This matter was heard before the Assistant Secretary of Revenue, Eugene J. Cella, in the City of Raleigh on July 18, 2006, upon an application for hearing by the Taxpayer, wherein he protested the proposed assessments of tax for the period November 1, 2001 through March 31, 2002 and May 1, 2002 through July 31, 2002. The hearing was held by the Assistant Secretary of Revenue under the provisions of G.S. 105-260.1. Representing the Sales and Use Tax Division were W. Timothy Holmes, Assistant Director, and Ginny Upchurch, Administration Officer. The Taxpayer was present as was [Taxpayer Representative], Attorney for the Taxpayer.

Pursuant to G.S. 105-241.1, the Department mailed Notices of Sales and Use Tax Assessment to the Taxpayer on April 26, 2005. On May 23, 2005, the Taxpayer's attorney protested the assessments and timely requested a hearing before the Secretary of Revenue.

ISSUE

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

As a managing member of the LLC, is the Taxpayer a responsible officer and, therefore, liable for the unpaid sales taxes of the LLC?

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 Notice of Sales and Use Tax Assessment dated April 26, 2005 for the period November 1, 2001 through November 30, 2001, designated Exhibit E-2.
- (3) Copy of Notice of Sales and Use Tax Assessment dated April 26, 2005 for the period December 1, 2001 through December 31, 2001, designated Exhibit E-3.
- (4) Copy of Notice of Sales and Use Tax Assessment dated April 26, 2005 for the period January 1, 2002 through January 31, 2002, designated Exhibit E-4.
- (5) Copy of Notice of Sales and Use Tax Assessment dated April 26, 2005 for the period February 1, 2002 through February 28, 2002, designated Exhibit E-5.
- (6) Copy of Notice of Sales and Use Tax Assessment dated April 26, 2005 for the period March 1, 2002 through March 31, 2002, designated Exhibit E-6.
- (7) Copy of Notice of Sales and Use Tax Assessment dated April 26, 2005 for the period May 1, 2002 through May 31, 2002, designated Exhibit E-7.
- (8) Copy of Notice of Sales and Use Tax Assessment dated April 26, 2005 for the period June 1, 2002 through June 30, 2002, designated Exhibit E-8.
- (9) Copy of Notice of Sales and Use Tax Assessment dated April 26, 2005 for the period July 1, 2002 through July 31, 2002, designated Exhibit E-9.
- (10) Copy of a letter dated May 23, 2005 from the Taxpayer's attorney to the Sales and Use Tax Division (Division), designated Exhibit E-10.
- (11) Copy of a letter dated June 6, 2005 from the Division to the Taxpayer's attorney, designated Exhibit E-11.
- (12) Copy of a letter dated July 6, 2005 from the Division to the Taxpayer's attorney, designated Exhibit E-12.
- (13) Copy of a letter dated July 7, 2005 from the Taxpayer's attorney to the Division, designated Exhibit E-13.

- (14) Copy of a letter dated July [sic] 15, 2005 and a copy of a letter dated July 14, 2005 with attachments from the Taxpayer's attorney to the Division, designated Exhibit E-14.
- (15) Copy of a letter dated August 18, 2005 from the Division to the Taxpayer's attorney, designated Exhibit E-15.
- (16) Copy of a letter dated September 13, 2005 from the Taxpayer's attorney to the Division along with the attached [Taxpayer's Corporation ("LLC")] Operating Agreement (Exhibit A) and checks written to the N. C. Department of Revenue (Exhibit B), designated Exhibit E-16.
- (17) Copy of a letter dated October 13, 2005 from the Division to the Taxpayer's attorney, designated Exhibit E-17.
- (18) Copy of a letter dated November 23, 2005 from the Taxpayer's attorney to the Division, designated Exhibit E-18.
- (19) Copy of a letter dated January 4, 2006 from the Division to the Taxpayer's attorney, designated Exhibit E-19.
- (20) Copy of a letter dated April 6, 2006 from the Division to the Taxpayer's attorney, designated Exhibit E-20.
- (21) Copy of the Sales and Use Tax application for the LLC dated November 15, 1999, designated Exhibit E-21.
- (22) Copy of the LLC's Articles of Organization originally filed with the Secretary of State's Office on October 22, 1999, designated Exhibit E-22.
- (23) Copy of the Department of the Secretary of State information page on the LLC, designated Exhibit E-23.
- (24) Copy of the LLC's Annual Report dated October 9, 2001 by the Taxpayer, designated Exhibit E-24.
- (25) Copy of the LLC's Annual Report dated October 15, 2002 by the Taxpayer, designated Exhibit E-25.
- (26) Copy of the 2000 Partnership Income Tax Return dated October 9, 2001 signed as managing partner by the Taxpayer, designated Exhibit E-26.
- (27) Copy of the 2001 Partnership Income Tax Return dated October 15, 2002 signed as managing partner by the Taxpayer, designated Exhibit E-27.

- (28) Copy of the 2002 Partnership Income Tax Return dated November 11, 2004 signed as managing partner by the Taxpayer, designated Exhibit E-28.
- (29) Copy of the [Financial Institution] Bank Account Signature Card for the LLC dated May 24, 2000 and Declaration of Unincorporated Business For Accounts, Borrowing, And Other Transactions dated May 24, 2002, designated Exhibit E-29.
- (30) Copy of letter dated May 8, 2006 from the Assistant Secretary of Revenue to the Taxpayer's representative, designated Exhibit E-30.

The following evidence was introduced by the Taxpayer's attorney at the hearing:

- (31) Copy of a facsimile of a [Tradenname] Employer Services Agreement, 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's Corporation ("LLC")] made retail sales of clothing during the period covered by the assessments.
- (2) The LLC collected the sales tax on its retail sales of clothing but failed to remit the sales tax to the Department.
- (3) The LLC closed its business in August 2002.
- (4) The Taxpayer was a manager of the LLC and was responsible for the purchasing and merchandising of the products for the stores and developing the store locations.
- (5) The Taxpayer was assessed the sales tax as a responsible officer after the LLC failed to pay the Department the sales taxes it had collected.
- (6) The Taxpayer did not have, in his possession, any financial records for the LLC or possession of the LLC's checkbook.
- (7) The Taxpayer is the only person listed under the section for "Corporate Officers" on the sales and use tax registration application and listed his title as managing member.
- (8) The Articles of Organization for the LLC lists the Taxpayer as one of the organizers of the LLC.

- (9) Article VIII, Managers, Section 8.2(b) of the Operating Agreement for the LLC provides that the Taxpayer is appointed one of the managers of the LLC and by signing the agreement, he accepted the appointment.
- (10) The Taxpayer is listed as the registered agent of the LLC on the Secretary of State's website.
- (11) The LLC's registered agent was changed to the Taxpayer on the LLC's Annual Report for the fiscal year ending December 31, 2000 dated October 9, 2001.
- (12) The Taxpayer signed the Annual Report for the year ending December 31, 2000 consenting to the appointment of himself as the new registered agent and he signed the Annual Report as Managing Member.
- (13) The Taxpayer signed the partnership income tax returns as the managing partner for the calendar years ending December 31, 2000, December 31, 2001 and December 31, 2002.
- (14) The Taxpayer had check writing privileges on the LLC's checking account.
- (15) The Notices of Proposed Sales Tax Assessment against the Taxpayer as Responsible Officer were mailed to the Taxpayer on April 26, 2005.
- (16) The Taxpayer, through his attorney, objected to the assessments and timely requested a hearing.

CONCLUSIONS OF LAW

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

- (1) G.S. 105-253(b) provides that each responsible officer of a limited liability company is personally and individually liable for all sales taxes collected by the limited liability company.
- (2) The term "responsible officer" is defined to include the manager of a limited liability company. The Taxpayer therefore is a responsible officer, and as such is liable for the State and applicable county sales taxes collected by the LLC but never remitted to the Department.
- (3) The Taxpayer was a manager of the limited liability company.

- (4) The Notices of Proposed Assessment for the period November 1, 2001 through March 31, 2002 and May 1, 2002 through July 31, 2002 were properly issued pursuant to G.S. 105-241.1.
- (5) Reasonable cause exists to waive the penalties.

DECISION

The LLC was engaged in the retail clothing business. The LLC collected the sales tax on its retail sales of clothing but failed to remit the sales tax to the Department. After the LLC closed in August 2002, the Taxpayer was assessed for the sales tax of the LLC as a responsible officer.

G.S. 105-253(b) authorizes the Department to assess a responsible officer for the unpaid sales taxes of a corporation or a limited liability company. The term “responsible officer” is defined to include the manager of a limited liability company. Even though the Taxpayer states he was not responsible for collecting and remitting the sales taxes, there is no doubt that this Taxpayer was a manager and therefore is a responsible officer of the LLC. The Taxpayer is the only officer listed on the sales and use tax registration application and his title is listed as Managing Member. He signed the LLC’s Operating Agreement acknowledging his appointment as manager. Finally, the Taxpayer signed the LLC’s annual reports as Managing Member, and the LLC’s tax returns as Managing Partner.

Therefore, I find that the proposed assessments of additional sales tax and accrued interest are deemed to be correct under the facts and are hereby sustained.

Based on the facts, I find reasonable cause to waive the penalties. The proposed assessments are hereby declared to be finally determined and immediately due and collectible with interest thereon as permitted by law.

Made and entered this 7th day of November, 2006.

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