

**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. 2006-147

This matter was heard before the Assistant Secretary of Revenue, Eugene J. Cella, in the City of Raleigh on October 10, 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 October 26, 2004. On November 23, 2004, 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 October 26, 2004 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 October 26, 2004 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 October 26, 2004 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 October 26, 2004 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 October 26, 2004 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 October 26, 2004 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 October 26, 2004 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 October 26, 2004 for the period July 1, 2002 through July 31, 2002, designated Exhibit E-9.
- (10) Copy of a letter dated November 23, 2004, and attachments, from the Taxpayer's attorney to the Sales and Use Tax Division (Division), designated Exhibit E-10.
- (11) Copy of a letter dated January 14, 2005 from the Division to the Taxpayer's attorney, designated Exhibit E-11.
- (12) Copy of the LLC's Articles of Organization originally filed with the Secretary of State's Office on October 22, 1999, designated Exhibit E-12.
- (13) Copy of the LLC's Operating Agreement dated October 22, 1999, designated Exhibit E-13.

- (14) Copy of a letter dated February 8, 2005 from the Division to the Taxpayer's attorney, designated Exhibit E-14.
- (15) Copy of a note dated February 17, 2005 made by an Administration Officer in the Division file regarding a telephone call from the Taxpayer's attorney, designated Exhibit E-15.
- (16) Copy of a letter dated April 7, 2005 from the Division to the Taxpayer's attorney, designated Exhibit E-16.
- (17) Copy of a [Financial Institution] Declaration of Unincorporated Business for Accounts, Borrowing, And Other Transactions dated May 24, 2000, designated Exhibit E-17.
- (18) Copy of a [Financial Institution] Account Signature Card dated May 24, 2000, designated Exhibit E-18.
- (19) Copy of the LLC's Annual Report dated October 9, 2001 filed with the Secretary of State, designated Exhibit E-19.
- (20) Copy of the LLC's Annual Report dated October 15, 2002 filed with the Secretary of State, designated Exhibit E-20.
- (21) Copy of a letter dated January 4, 2005 from a Revenue Officer/Teleworker to the Division, designated Exhibit E-21.
- (22) Copy of a letter dated July 27, 2002 from the Taxpayer to a Revenue Officer, designated Exhibit E-22.
- (23) Copy of an Interoffice Memorandum dated September 11, 2002 from one Revenue Officer to another Revenue Officer, designated Exhibit E-23.
- (24) Copy of a letter sent by facsimile dated September 26, 2002 from the Taxpayer to a Revenue Officer, designated Exhibit E-24.
- (25) Copy of a letter dated May 3, 2005 from the Taxpayer's attorney to the Division, designated Exhibit E-25.
- (26) Copy of a letter dated October 13, 2005 from the Division to the Taxpayer's attorney, designated Exhibit E-26.
- (27) (a) - 27(z) Copies of various checks written by the Taxpayer to the Department, designated Exhibits E-27(a) - E-27(z).
- (28) Copy of a letter dated October 19, 2005 from the Department to the Taxpayer, designated Exhibit E-28.

- (29) Copy of a letter dated December 30, 2005 from the Department to the Taxpayer, designated Exhibit E-29.
- (30) Copy of a letter dated May 5, 2006 from the Department to the Taxpayer, designated Exhibit E-30.
- (31) Copy of letter dated May 10, 2006 from the Assistant Secretary of Revenue to the Taxpayer's attorney, designated Exhibit E-31.
- (32) Copy of letter dated July 11, 2006 from the Taxpayer's attorney to the Assistant Secretary of Revenue, designated Exhibit E-32.
- (33) Copy of letter dated July 13, 2006 from the Assistant Secretary of Revenue to the Taxpayer's attorney, designated Exhibit E-33.

The following items were introduced into evidence by the Taxpayer's attorney:

- (34) Copy of a brief prepared by the Taxpayer's attorney, designated Exhibit TP-1.
- (35) Copy of a letter dated November 7, 2006 from the Taxpayer's attorney to the Assistant Secretary, designated Exhibit TP-2.

### **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 tax due and payable by the LLC remains unpaid.
- (5) The Taxpayer was a manager of the LLC and was responsible for filing and paying the sales taxes due the Department.
- (6) 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.

- (7) The Taxpayer was listed as one of the Organizers of the LLC on the [Financial Institution] Declaration of Unincorporated Business For Accounts, Borrowing, And Other Transactions.
- (8) The Articles of Organization for the LLC lists the Taxpayer as one of the organizers of the LLC as well as the initial registered agent 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 was named as a manager of the LLC on the Annual Report for the year ending December 31, 2000 and the year ending December 31, 2001.
- (11) The Taxpayer was the sole contact for the Department of Revenue.
- (12) The Taxpayer advised one of the Department's Revenue Officers of the date the LLC should be marked out-of-business for sales and use tax and withholding tax purposes and stated that the LLC had no assets.
- (13) The Taxpayer sent a second Revenue Officer a memorandum listing the amount of sales tax due the Department for the delinquent months of November 2001 through May 2002.
- (14) The Taxpayer sent a third Revenue Officer a facsimile indicating he had spoken with the other manager and that he would contact the Revenue Officer again after the other manager talked with his attorney.
- (15) The Taxpayer had check writing privileges on the LLC's checking account.
- (16) The Taxpayer signed almost all of the checks written to the Department on behalf of the LLC.
- (17) The Notices of Proposed Sales Tax Assessment against the Taxpayer as Responsible Officer were mailed to the Taxpayer on October 26, 2004.
- (18) The Taxpayer, through his attorney, objected to the assessments and timely requested a hearing.
- (19) The Taxpayer argues his role was purely ministerial, he was not in control of the LLC and he did not have the authority to pay sales tax due from the LLC.
- (20) The Taxpayer is unable to provide documentation supporting his contention that the other manager was in control of the business.

## **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 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.
- (4) 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 that his role was purely ministerial, that he was not in control of the LLC and that he did not have the authority to pay sales tax due from the LLC, there is no doubt that this Taxpayer was a manager and, therefore, is a

responsible officer of the LLC. The Taxpayer was listed as one of the organizers of the LLC, he owned 50% of the business and was listed as one of the managing partners in the LLC documents. He was the sole contact for the Department of Revenue staff and made representations to the Department's employees as to the financial condition of the business. The Taxpayer also signed a number of checks made out to the Department remitting sales tax. The evidence clearly indicates that he is a responsible officer and was not acting in a merely ministerial capacity that he now claims. The Taxpayer does not have any documentation supporting his contention that the other manager was in sole control of the business.

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 6<sup>th</sup> day of February, 2007.

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