

STATE OF NORTH CAROLINA

**BEFORE THE
SECRETARY OF REVENUE**

COUNTY OF WAKE

IN THE MATTER OF:

The Proposed Assessment of Sales and Use)
 Tax for the period January 1, 2003 through)
 April 30, 2005, by the Secretary of)
 Revenue of North Carolina)
)
 vs.)
)
 [Taxpayer])
 d/b/a [Taxpayer's Company])

FINAL DECISION
 Docket No. 2006-177

This matter was heard before the Assistant Secretary of Administrative Hearings, Eugene J. Cella, in the City of Raleigh, on September 21, 2006, upon application for hearing by the Taxpayer wherein she protested the assessment of tax, penalty and interest for the period January 1, 2003 through April 30, 2005. The hearing was held by the Assistant Secretary pursuant to the provisions of G.S. 105-260.1. [Taxpayer] and her husband, [Taxpayer's representative], represented the business. Representing the Sales and Use Tax Division were W. Timothy Holmes, Assistant Director, and Dan R. Fulcher, Administration Officer.

Pursuant to G.S. 105-241.1, the Department mailed a Notice of Sales & Use Tax Assessment to the Taxpayer on July 19, 2005. The Taxpayer objected to the assessment in an undated letter postmarked August 10, 2005 and timely requested a hearing.

ISSUES

The issues to be decided are as follows:

- (1) Was the Taxpayer engaged in business as a retailer in North Carolina during the audit period?
- (2) Were the Taxpayer's retail sales of tangible personal property installed in customers' homes during the audit period subject to North Carolina sales and use tax?

EVIDENCE

The Sales and Use Tax Division introduced the following items 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 Field Auditor's report covering the period January 1, 2003 through April 30, 2005 dated July 8, 2005, designated Exhibit E-2.
3. Copy of Notice of Sales and Use Tax Assessment dated July 19, 2005, designated Exhibit E-3.
4. Copy of undated letter postmarked August 10, 2005 from the taxpayer to the Department, designated Exhibit E-4.
5. Copy of letter dated September 14, 2005 from the Sales and Use Tax Division (Division) to the Taxpayer, designated Exhibit E-5.
6. Copy of letter dated September 30, 2005 from the Taxpayer to the Division, designated Exhibit E-6.
7. Copy of letter dated September 30, 2005 from the Taxpayer to the Division with a copy of the Division's letter dated September 14, 2005, designated Exhibit E-7.
8. Copy of letter dated October 27, 2005 from the Division to the Taxpayer, designated Exhibit E-8.
9. Copy of letter dated November 4, 2005 from the Taxpayer to the Division, designated Exhibit E-9.
10. Copy of letter dated December 13, 2005 from the Division to the Taxpayer, designated Exhibit E-10.
11. Copy of letter dated February 8, 2006 from the Taxpayer to the Division, designated Exhibit E-11.
12. Copy of letter dated February 27, 2006 from the division to the Taxpayer, designated Exhibit E-12.
13. Copy of letter dated June 5, 2006 from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-13.

14. Copy of undated letter received June 15, 2006 from the Taxpayer to the Assistant Secretary of Revenue, designated Exhibit E-14.
15. Copy of letter dated June 15, 2006 from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-15.
16. Copy of Taxpayer invoice dated March 1, 2004, designated Exhibit E-16.
17. Copy of Sales and Use Tax Technical Bulletin 41-2 B., designated Exhibit E-17.
18. Copy of Individual Income Tax Return, Form D-400, designated Exhibit E-18.
19. Copy of letter dated October 9, 2006 from [Taxpayer's accountant] to the Assistant Secretary of Revenue for Administrative Hearings, designated Exhibit E-19.

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 within the definition of G.S. 105-164.3(9).
- (2) During the audit period the Taxpayer at all material times was engaged in business as a retailer who sold, delivered and installed window shutters at customers' residences in North Carolina. The Taxpayer used her own trucks to deliver the shutters to North Carolina and her own employees to install the shutters in North Carolina.
- (3) The Taxpayer was not registered for North Carolina sales and use tax at the time the audit was conducted.
- (4) The Taxpayer did not state her installation charges separately from her sales prices.
- (5) The Taxpayer did not collect or remit any sales tax on the sales of window shutters which were delivered and installed at customers' residences in North Carolina during the audit period.
- (6) The Department assessed additional tax against the Taxpayer for the audit period based on the Taxpayer's failure to collect and remit sales tax on the sales

of window shutters which were delivered and installed at customers' residences in North Carolina during the audit period.

- (7) The consumer use tax referenced in the instructions for North Carolina Individual Income Tax Return, Form D-400, is applicable in cases where an out-of-state retailer is not engaged in business in North Carolina and is not liable for collecting and remitting tax. The Taxpayer was engaged in business in North Carolina during the audit period and was responsible for collecting and remitting sales and use tax to the North Carolina Department of Revenue.
- (8) A notice of proposed sales and use tax assessment was mailed to the Taxpayer on July 19, 2005.
- (9) The Taxpayer notified the Department that she protested the assessment and timely requested a hearing.
- (10) The Taxpayer contends that she should not be held liable for taxes she did not charge or collect from North Carolina customers. She argues that her company was a [out-of-state] company physically located in [another state], her business checking account was with a [another state] bank and her company was registered for sales tax with the [another state] Department of Revenue.
- (11) The Taxpayer also claims she spoke with [out-of-state] Revenue Agents and was told that, since her business was located in [another state] but doing the majority of its business in North Carolina, there would be no sales tax due. In addition, the Taxpayer states that she relied on her attorney's advice that the responsibility for paying the sales tax supposedly falls on the purchaser when an out-of-state retailer does not collect North Carolina sales tax. The Taxpayer also claims all due diligence was taken in setting up her company.

CONCLUSIONS OF LAW

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

- (1) The Taxpayer's employees entered North Carolina using company vehicles, delivered window shutters to the jobsite and installed the window shutters during the audit period which brings the Taxpayer within the definition of engaged in business under G.S. 105-164.3(9).
- (2) The Taxpayer operated as a retailer during the audit period as defined in G.S. 105-164.3(35).

- (3) All gross receipts of retailers are presumed to be subject to the retail sales tax until otherwise established.
- (4) As a retailer engaged in the business of making retail sales of tangible personal property, the Taxpayer was responsible for collecting the applicable State and local sales tax on her sales pursuant to G.S. 105-164.4, G.S. 105-467, G.S. 105-483, and G.S. 105-498.
- (5) The Taxpayer's installation charges were taxable because they did not meet the exemption of G.S. 105-164.13(49).
- (6) The Taxpayer's erroneous beliefs that her customers were responsible for remitting use tax and that she was not responsible for collecting sales tax do not relieve the Taxpayer of her tax liability.
- (7) Notice of proposed sales and use tax assessment for the audit period was issued pursuant to G.S. 105-241.1

DECISION

The Taxpayer's employees entered North Carolina and delivered and installed window shutters to her customers. Based on these activities, the Taxpayer was engaged in business in North Carolina as a retailer under G.S. 105-164.3(9) and was responsible for charging and collecting North Carolina sales and use tax and remitting it to the Department. I find that the Department has correctly assessed the sales and use tax on the items in question.

Therefore, the assessment of tax and interest is deemed correct under the law and the facts and is hereby declared to be finally determined and immediately due and payable as allowed by law. Because the failure to pay the tax was not the result of a negligent or intentional act by the Taxpayer, I find reasonable cause to waive the

penalties. The proposed assessment of tax and accrued interest is hereby declared to be finally determined and immediately due and collectible with interest as allowed by law.

Made and entered this 16th day of January, 2007.

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