

STATE OF NORTH CAROLINA

BEFORE THE SECRETARY OF REVENUE

COUNTY OF WAKE

OF NORTH CAROLINA

IN THE MATTER OF:

The Proposed Assessment of Sales and Use )  
Tax for the period September 1, 2002 through )  
August 31, 2005, by the Secretary of )  
Revenue of North Carolina )

**FINAL DECISION**  
**Docket No. 2006-255**

vs. )

Taxpayer )

This matter was heard by the Assistant Secretary of Administrative Hearings, Eugene J. Cella, upon application for hearing by [(Taxpayer)] wherein they protested the proposed assessment of tax, penalty and interest for the period September 1, 2002 through August 31, 2005. The hearing was held 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 [President], President of the corporation, and [Secretary/Treasurer], Secretary/Treasurer of the corporation.

Pursuant to G.S. 105-241.1, the Department mailed a Notice of Proposed Assessment to the Taxpayer on November 8, 2005 and by letter dated November 14, 2005, the Taxpayer timely requested a hearing before the Secretary of Revenue

**ISSUES**

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

1. Are the Taxpayer's retail sales of seed and fertilizer after February 1, 2002 to customers who are not classified as farmers making purchases for agricultural purposes subject to sales tax?
2. Does the fact that the Taxpayer may not have received notification of the statutory change in application of tax to sales of seed and fertilizer absolve the Taxpayer of any failure to collect and remit tax on sales of these items?

## 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 Auditor's report Sales and Use Tax dated October 31, 2005 covering the period September 1, 2002 through August 31, 2005, designated Exhibit E-2.
3. Copy of Notice of Sales and Use Tax Assessment dated November 8, 2005, designated Exhibit E-3.
4. Copy of letter dated November 14, 2005 from the Taxpayer to the Sales and Use Tax Division ("Division"), designated Exhibit E-4.
5. Copy of letter dated December 7, 2005 from the Division to the Taxpayer, designated Exhibit E-5.
6. Copy of letter dated December 12, 2005 from the Taxpayer to the Division, Exhibit E-6.
7. Copy of letter dated January 3, 2006 from the Division to the Taxpayer, designated Exhibit E-7.
8. Copy of letter dated January 24, 2006 from the Taxpayer to the Division, designated Exhibit E-8.
9. Copy of letter dated January 31, 2006, from the Division to Taxpayer, Exhibit E-9.
10. Copy of letter dated June 14, 2006 from the Division to the Taxpayer, designated Exhibit E-10.
11. Copy of Taxpayer's Application for Sales and Use Tax Registration and Annual Wholesale License, designated Exhibit E-11.
12. Copy of screen print dated May 18, 2006 with a partial list of business classifications in Departmental records, designated Exhibit E-12.
13. Copy of screen print dated July 10, 2006 showing the Taxpayer's account detail in the Department's computer system, designated Exhibit E-13.
14. Copy of Form E-505 Supplemental dated January 2002, designated Exhibit E-14.
15. Copy of redacted Secretary of Revenue Final Decision Docket No. 2003-074, designated Exhibit E-15.

16. Copy of letter dated September 20, 2006 from the Taxpayer to the Assistant Secretary of Administrative Hearings, designated Exhibit E-16.
17. Copy of letter dated October 2, 2006 from the Assistant Secretary of Administrative Hearings to the Taxpayer, designated Exhibit E-17.
18. Copy of Brief for Tax Hearing prepared by the Division, designated Exhibit E-18.

### **FINDINGS OF FACT**

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

1. The Taxpayer is engaged in business as a retail garden center making retail sales of gardening supplies including fertilizer and seed, does landscape contracting, landscape maintenance and has a nursery and growing operations.
2. The Taxpayer was registered to collect North Carolina sales and use tax during the audit period.
3. On sales made prior to February 1, 2002, the Taxpayer did not collect sales or use tax on sales of (1) fertilizer on which the inspection tax was paid or (2) seed.
4. From February 1, 2002 through the end of the audit period, the Taxpayer did not collect sales or use tax on fertilizer or seed.
5. The Taxpayer has not produced any evidence that his sales of seed and fertilizer after February 1, 2002 were to farmers for agricultural purposes.
6. In January 2002, the Department mailed out form E-505 Supplement to taxpayers registered to collect North Carolina sales and use tax. The E-505 Supplement mailed in January 2002 contained information regarding the statutory change in application of tax to sales of seed and fertilizer.
7. The Taxpayer contends that the Department failed to notify him of the change in G.S. 105-164.13 and that he should not be held responsible for the tax due to the Department's failure to provide sufficient notification.
8. The Department proposed an assessment of additional tax, penalty, and interest in the amount of \$20,353.09 for the period September 1, 2002 through August 31, 2005.

9. The Notice of Sales and Use Tax Assessment was mailed to the Taxpayer on November 8, 2005.
10. The Taxpayer objected to the assessment by letter dated November 14, 2005 and made a timely request for hearing.

### **CONCLUSIONS OF LAW**

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

1. Prior to February 1, 2002, G.S. 105-164.13 exempted from sales and use tax sales of (1) fertilizer on which the inspection tax had been paid and (2) seed.
2. Effective February 1, 2002, G.S. 105-164.13 was amended to exempt from sales and use tax fertilizer and seed sold to farmers for agricultural purposes.
3. Effective February 1, 2002, sales of fertilizer and seed to purchasers other than farmers for agricultural purposes are subject to the general combined rate of State and local sales and use tax.
4. G.S. 105-164.26 provides that the gross receipts of a retailer are presumed taxable until the contrary is established by proper records.
5. The Taxpayer's sales of seed and fertilizer after February 1, 2002 are presumed to be taxable in the absence of documentation that they were made to farmers for agricultural purposes.
6. There is no statutory basis for voiding an assessment of tax because the Taxpayer may not have received notice of a change in a taxing statute.
7. The Taxpayer's sales of seed and fertilizer during the audit period are subject to North Carolina sales tax.
8. The assessment of tax is presumed to be correct and the burden is upon the Taxpayer to show the extent, if any, to which the assessment is in error.
9. The Notice of Proposed assessment was issued to the Taxpayer pursuant to G.S. 105-241.1.
10. The Taxpayer is liable for the general rate of State tax and applicable county tax assessed.

### **DECISION**

Therefore the proposed assessment of tax and interest is deemed correct under the law and the facts and is hereby sustained. 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 \_\_\_\_\_ day of \_\_\_\_\_, 2007.

---

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