

STATE OF NORTH CAROLINA

BEFORE THE ASSISTANT SECRETARY
OF REVENUE FOR ADMINISTRATIVE
TAX HEARINGS

COUNTY OF WAKE

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)
)
)
 vs.)
)
)
 [Taxpayer])

FINAL DECISION
Docket No. 2007-161

This matter was heard before the Assistant Secretary of Revenue for Administrative Tax Hearings, Eugene J. Cella, in the City of Raleigh, on October 10, 2007, upon application for hearing by the Taxpayer wherein it protested the assessment of tax, penalty, and interest for the period September 1, 2002 through August 31, 2005. The hearing was held via telephone by the Assistant Secretary pursuant to the provisions of G.S. 105-260.1. The Taxpayer was represented by [Taxpayer's CPA], [Corporation's President and his wife]. 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 March 14, 2006. The Taxpayer's CPA objected to the assessment in a letter dated March 10, 2006, and timely requested a hearing.

ISSUES

The issues to be decided are as follows:

- (1) Are the Taxpayer's rentals of tents, equipment, inflatable attractions, popcorn machines and cotton candy machines to customers subject to sales tax?
- (2) Are delivery charges associated with the rental of the Taxpayer's tangible personal property subject to sales tax?

- (3) If the Taxpayer's employees deliver, set up and maintain tangible personal property such as inflatable attractions for customers, is this considered equipment furnished with an operator?

EVIDENCE

The following items were introduced into evidence by the Department:

- (1) Memorandum dated July 2, 2007 from the Acting Secretary of Revenue to the Assistant Secretary of Administrative Tax Hearings (Assistant Secretary of Revenue), designated as Exhibit E-1.
- (2) Copy of Auditors Report Sales and Use Tax dated February 15, 2005, covering the period September 1, 2002 through August 31, 2005, designated as Exhibit E-2.
- (3) Copy of Notice of Sales and Use Tax Assessment dated March 14, 2006, designated as Exhibit E-3.
- (4) Copy of Notice of Sales and Use Tax Penalty Assessment dated May 2, 2006, designated as Exhibit E-4.
- (5) Copy of Final Notice—Sales and Use dated June 20, 2006, designated Exhibit E-5.
- (6) Copy of facsimile from Taxpayer's CPA to North Carolina Department of Revenue (Department) dated August 8, 2006, with the following attachments:
 - (a) Copy of letter from Taxpayer's CPA to the Department dated March 10, 2006, designated Exhibit E-6 (a).
 - (b) Copy of letter from the Taxpayer's CPA to the Department Field Auditor dated February 22, 2006, designated Exhibit E-6 (b).
 - (c) Copy of facsimile from Taxpayer's CPA to the Department Field Auditor dated January 23, 2006, designated Exhibit E-6 (c).
 - (i) Copy of letter from the Department Field Auditor to the Taxpayer's CPA dated January 23, 2006, designated Exhibit E-6 (c)(i).
 - (ii) Copy of Sales and Use Tax Technical Bulletin SECTION 23 LEASE OR RENTAL, designated E-6 (c)(ii).
 - (iii) Copy of G.S. 105-164.3 (17) DESIGNATED E-6(c)(iii).
 - (d) Copy of memo from Taxpayer's CPA to the Department Field Auditor dated November 5, 2005, designated E-6 (d).

- (i) Copy of North Carolina Administrative Rule 17 NCAC 07B, designated E-6 (d)(i).
 - (ii) Copy of G.S. 105-164.3 (46), designated E-6 (d)(ii).
 - (iii) Copy of Commerce Clearing House paragraph 60-460 Leases and Rentals, designated E-6 (d)(iii).
 - (iv) Copy of Commerce Clearing House paragraph 64-930 North Carolina Sales and Use Taxes Administrative Rules, designated E-6 (d)(iv).
 - (v) Copy of North Carolina Administrative Rule 17 NCAC 07B .4404 Equipment Furnished with Operator, designated E-6 (d)(v).
 - (vi) Copy of G.S. 105-164.3 (1), G.S. 105-164.3 (25), G.S. 105-164.3 (25a), G.S. 105-164.3 (26) and G.S. 105-164.3 (46), designated E-6 (d)(vi).
 - (vii) Copy of G.S. 105-164.4, designated E-6 (d)(vii).
 - (viii) Copy of G.S. 105-164.6, designated E-6 (d)(viii).
 - (ix) Copy of G.S. 105-262, designated E-6 (d)(ix).
 - (x) Copy of letter from Taxpayer's CPA to the Department dated March 10, 2006, designated Exhibit E-6, designated E-6 (d)(x).
- (7) Copy of letter from the Sales and Use Tax Division (Division) to the Taxpayer's CPA dated August 30, 2006, designated Exhibit E-7.
 - (8) Copy of Notice of Amended Sales and Use Tax Assessment dated October 5, 2006, designated Exhibit E-8.
 - (9) Copy of letter from the Division to the Taxpayer's CPA dated December 21, 2006, designated Exhibit E-9.
 - (10) Copy of Auditor's Report Sales and Use Tax Amendment dated January 26, 2007, designated Exhibit E-10.
 - (11) Copy of Notice of Amended Sales and Use Tax Assessment dated February 20, 2007, designated Exhibit E-11.
 - (12) Copy of letter from the Division to the Taxpayer's CPA dated March 29, 2007, designated Exhibit E-12.
 - (13) Copy of letter from the Taxpayer's CPA to the Division dated April 26, 2007, designated Exhibit E-13.
 - (14) Copy of facsimile from Taxpayer's CPA to the Division dated April 27, 2007, with the attached letter from the Taxpayer's CPA to the Division dated April 26, 2007, designated Exhibit E-14.

- (15) Copy of letter from the Division to the Taxpayer's CPA dated June 13, 2006, designated Exhibit E-15.
- (16) Copy of facsimile from the Taxpayer's CPA to the Division dated June 27, 2007, with the attached copy of a letter from the Taxpayer's CPA to the Division dated June 26, 2007, designated Exhibit E-16.
- (17) Copy of letter from the Taxpayer's CPA to the Division dated June 26, 2007, designated Exhibit E-17.
- (18) Copy of Sales and Use Tax Technical Bulletin 23-1 LEASE RECEIPTS, designated Exhibit E-18.
- (19) Copy of Sales and Use Tax Technical Bulletin 23-6 EQUIPMENT FURNISHED WITH AN OPERATOR, designated Exhibit E-19.
- (20) Copy of letter dated July 27, 2007 from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-20.
- (21) Copy of letter dated September 4, 2007 from the Secretary of Revenue to the Taxpayer, designated Exhibit E-21.
- (22) Copy of a facsimile dated September 19, 2007 from the Taxpayer to the Division, designated Exhibit E-22.
- (23) Copy of a facsimile dated October 9, 2007 from the Taxpayer's CPA to the Division, designated Exhibit E-23.

The following information was presented at the hearing by the Taxpayer:

- (24) Copy of a facsimile dated October 10, 2007 from the Taxpayer's CPA to the Assistant Secretary of Revenue, designated TP-1, with the following attachments:
 - (a) Response to hearing from the Taxpayer's CPA, designated Exhibit TP-1 (a).
 - (b) Copy of Amusement Device Safety Act and Administrative Rules, designated Exhibit TP-1 (b).

The following information was furnished by the parties after the hearing was held:

- (25) Copy of a facsimile dated October 18, 2007 from the Taxpayer's CPA to the Assistant Secretary of Revenue, designated TP-2, with the following attachments:

- (a) Copy of letter dated October 18, 2007 from the Taxpayer's CPA to the Assistant Secretary of Revenue, designated Exhibit TP-2 (a).
 - (b) Copy of letter dated October 16, 2007 from the North Carolina Department of Labor to the Taxpayer, designated Exhibit TP-2 (b).
- (26) Copy of Memorandum dated October 24, 2007 from the Division to the Assistant Secretary of Revenue, designated 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 is engaged in the business of producing magic shows and selling and renting party equipment.
- (2) The Taxpayer rented tents, equipment, inflatable attractions, a rock climbing wall, popcorn machines and cotton candy machines during the audit period.
- (3) The Taxpayer was registered for sales and use tax purposes during the audit period.
- (4) The Department assessed the Taxpayer additional tax for the State and county sales tax it failed to collect and remit to the Department on gross receipts derived from the rental of tents, equipment, inflatable attractions, a rock climbing wall, popcorn machines and cotton candy machines.
- (5) A Notice of Sales and Use Tax Assessment dated March 14, 2006 was mailed to the Taxpayer.
- (6) A Notice of Sales and Use Tax Penalty Assessment dated May 2, 2006 was mailed to the Taxpayer. The penalty was assessed because the assessment was not paid within 30 days.
- (7) A Final Notice--Sales and Use dated June 20, 2006 was mailed to the Taxpayer.
- (8) The Taxpayer's CPA notified the Department via facsimile on August 8, 2006 that the Taxpayer had objected to the assessment and timely requested a hearing in a letter dated March 10, 2006.
- (9) The penalty was removed when the Taxpayer's timely filed protest letter of March 10, 2006 was produced.

- (10) The Auditor's Report Sales and Use Tax was amended on January 26, 2007 to remove the rock climbing wall rentals from the assessment because they were rented with an operator employed by the Taxpayer to run the attraction.
- (11) The Taxpayer objects to a portion of the amended assessment because they believe that they are renting equipment with an operator. The Taxpayer maintains that it used its own employees or volunteers, who were trained by the Taxpayer, for the events for which it furnished inflatables and equipment.
- (12) There was evidence presented, based on employees' time cards that the Taxpayer's employee remained on site to supervise any volunteers operating inflatable attractions during the audit period.
- (13) The Department agreed that the Taxpayer provided an operator who was on site at all events and was either an employee or a volunteer trained by the Taxpayer.
- (14) The Taxpayer does not dispute the assessment on the rental of tents, candy machines and popcorn machines.
- (15) The Taxpayer has requested a waiver of the penalties included in the assessment.

CONCLUSIONS OF LAW

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

- (1) The Taxpayer operated as a retailer during the audit period as defined in G.S. 105-164.3(35).
- (2) As a retailer engaged in the business of making retail sales and rentals of tangible personal property, the Taxpayer was liable for collecting the applicable State and local sales tax on its retail sales pursuant to G.S. 105-164.4, G.S. 105-467, G.S. 105-483, and G.S. 105-498.
- (3) To qualify for the exemption of a lease of equipment with an operator, pursuant to G.S. 105-164.3 (17) (c), the operator must do more than maintain, inspect or set up the inflatable devices.
- (4) The North Carolina Department of Labor Administrative Rules lists specific procedures for pre-opening inspection and rules for proper set-up of inflatable devices, which include being in control of the attractions at all times and during specific emergency procedures. In other words, the North Carolina Department of Labor requirements that operators do more than just set-up, inspect and maintain inflatable devices.

- (5) Accordingly, because the Taxpayer furnished operators with the inflatable devices who were required to do more than set-up, inspect and maintain the inflatable devices, these rentals are exempt from sales tax.
- (6) The Taxpayer is liable for the applicable State and county additional tax as assessed on its rental of tents, candy machines and popcorn machines and other items which did not require an operator during the audit period.
- (7) Based on the Taxpayer's good faith effort to comply with applicable law, the penalties assessed against the Taxpayer are waived pursuant to G.S. 105-237(a).

DECISION

The assessment of tax and interest is on rental of tents, candy machines and popcorn machines 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. The Assistant Secretary directs that the assessment be amended to remove inflatable devices that were rented with an operator. Because the failure to pay the tax was not the result of an intentional act by the Taxpayer, reasonable cause exists to waive the penalties. Therefore, the assessment, as amended, is hereby declared to be finally determined and immediately due and collectible with interest thereon as permitted by law.

This 11TH day of December 2007.

Eugene J. Cella
Assistant Secretary of Administrative Hearings