

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 January 1, 2003 through)
 December 31, 2004, by the Secretary of)
 Revenue of North Carolina)
)
 vs.)
)
 [Taxpayer])

FINAL DECISION
 Docket No. 2007-69

This matter was heard before the Assistant Secretary of Administrative Hearings, Eugene J. Cella, in the City of Raleigh, on May 16, 2007, upon application for hearing by the Taxpayer wherein it protested the assessment of tax, penalty and interest for the period January 1, 2003 through December 31, 2004. The hearing was held by the Assistant Secretary pursuant to the provisions of G.S. 105-260.1. [Taxpayer] and [Taxpayer's CPA], the Taxpayer's Certified Public Accountant, 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 January 18, 2006. The Taxpayer's representative objected to the assessment in a letter dated February 8, 2006, and timely requested a hearing.

ISSUES

The issues to be decided are as follows:

- (1) Did the Taxpayer maintain shipping documentation adequate to exempt retail sales of boats and other tangible personal property made and delivered to customers out-of-state?
- (2) Are the Taxpayer's sales of used boats and motors taken in trade subject to North Carolina sales tax?

- (3) Is the Department barred from assessing the Taxpayer the additional tax as a result of erroneous verbal advice rendered by an employee of the Department of Revenue?

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 the auditor's report sales and use tax dated January 6, 2006 covering the period January 1, 2003 through December 31, 2004, designated Exhibit E-2.
3. Copy of Notice of Sales and Use Tax Assessment dated January 18, 2006, designated Exhibit E-3.
4. Copies of letters from the Department's examining auditors to some of the Taxpayer's customers located out of state returned to the Department with responses to the Department's questions:
 - a. Purchases made during the period January 2003 through December 2004 that indicate the items were delivered to an out of state location.
 - b. Purchases made during the period January 2003 through December 2004 that indicate merchandise was picked up at the Taxpayer's North Carolina location.
 - c. Purchases made during the period January 2003 through December 2004 for which no response was received, designated as Exhibit E-4.
5. Copy of letter dated January 9, 2006 from Taxpayer's Certified Public Accountant (CPA) to the Sales and Use Tax Division (Division) along with the following:
 - a. Copy of cover sheet of Auditor's Report Sales and Use Tax dated January 6, 2006.
 - b. Copy of Form Gen-58 Power of Attorney and Declaration of Representative signed by Taxpayer dated November 30, 2005, designated Exhibit E-5.

6. Copy of letter dated February 23, 2006 from the Division to the Taxpayer's CPA, designated Exhibit E-6.
7. Copy of letter dated August 4, 2006 from the Division to the Taxpayer's CPA, designated Exhibit E-7.
8. Copy of letter dated October 18, 2006 from the Division to the Taxpayer's CPA, designated Exhibit E-8.
9. Copy of letter dated October 25, 2006 from the Taxpayer's CPA to the Division, designated Exhibit E-9
10. Copy of letter dated December 18, 2006 from the Division to the Taxpayer's CPA, designated Exhibit E-10.
11. Copy of Form E-505 (Rev. 9/99) To Registered Taxpayers, designated Exhibit E-11.
12. Copy of Sales and Use Tax Technical Bulletin 35-8 BOATS, BOAT TRAILERS, PARTS AND ACCESSORIES, revised effective February 1, 2004, designated Exhibit E-12.
13. Copy of Sales and Use Tax Technical Bulletin 40-1 TRADE-INS, revised effective February 1, 2004, designated Exhibit E-12.
14. Copy of letter dated March 23, 2007 from the Assistant Secretary of Administrative Hearings to the Taxpayer's CPA, designated Exhibit E-14
15. Copy of facsimile dated March 26, 2007, with attachment, from the Taxpayer's CPA to the Assistant Secretary of Administrative Hearings, designated Exhibit E-15.
16. Copy of letter dated March 27, 2007 from the Assistant Secretary of Administrative Hearings to the Taxpayer's CPA, designated Exhibit E-16.

FINDINGS OF FACT

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

- (1) Throughout the assessment period, the Taxpayer operated a boat dealership as a sole proprietor.

- (2) The Taxpayer made retail sales of boats, motors and other items to customers located in North Carolina and customers located out of state.
- (3) The auditors assessed tax on the sale of boats, motors and other items to North Carolina customers on which the Taxpayer had failed to collect and remit the sales tax due and on the Taxpayer's retail sale to out-of- state customers who picked up the items purchased at the Taxpayer's North Carolina business location.
- (4) The auditors mailed letters to the Taxpayer's out-of-state customers to determine where their purchases from the Taxpayer were delivered. The letter gave the following four choices for the customer to check:
 - a. I picked up the item(s) at the place of business of [Taxpayer] in, North Carolina.
 - b. An employee or representative of [Taxpayer] delivered the item(s) to me in the state of _____.
 - c. A common carrier or U.S. Postal Service delivered the item(s) to me in the state of _____.
 - d. None of the above. Please Explain. _____
- (5) The auditors assessed sales tax on invoices for customers that indicated that they had picked up their merchandise at the Taxpayer's North Carolina business location. If an out-of-state customer did not respond to the letter mailed by the auditors or responded that the purchase was delivered outside North Carolina, the sale was not taxed in the audit report.
- (6) The Taxpayer's method of recording sales made it difficult to determine whether particular sales during the audit period were consignment sales.
- (7) After the audit was concluded, the Taxpayer furnished additional documentation to show that some sales during the audit period were not consignment sales, and any taxes based on such sales were removed from the assessment.
- (8) The Taxpayer stated that he was advised by the Department when he opened his business that he could collect sales tax in one of two ways. He chose to use the method of collecting the sales tax on the gross sales amount of an item and not allow any trade-in value. When the item taken as a trade-in was sold the Taxpayer did not collect sales tax.
- (9) The Taxpayer stated that he was never advised of the change in the taxability of the sales of trade-in items.
- (10) Form E-505 (Rev. 9/99) was mailed to registered taxpayers to advise of law changes including the fact that the sale of a used article taken in trade as a credit on the sale of a new article would no longer be exempt from tax

- (11) A notice of proposed sales and use tax assessment was mailed to the Taxpayer on January 18, 2006.
- (12) The Taxpayer's CPA notified the Department that it objected to the assessment 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) 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 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) The Taxpayer, after October 1, 1999, was liable to collect and remit sales tax on sales of used boats.
- (4) There is no provision in the Statutes for abatement of sales and use tax because a taxpayer did not receive a notice of change.
- (5) Notice of proposed sales and use tax assessment for the audit period was issued pursuant to G.S. 105-241.1.
- (6) The Department is not estopped from assessing tax on sales tax based on erroneous verbal advice given by an employee.
- (7) The Taxpayer owes tax on its retail sales of boats and motors during the audit period.

DECISION

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.

This 6th day of September 2007.

Eugene J. Cella
Assistant Secretary of Administrative Tax Hearings