

**IN THE MATTER OF:** )  
 )  
 The Proposed Assessment of Unauthorized )  
 Substance Tax dated September 12, 2002 )  
 by the Secretary of Revenue of the )  
 State of North Carolina )  
 )  
 against )  
 )  
 [Taxpayer] )  
 )

**FINAL DECISION**

**Docket No. 2002-683**

**AN XXXXXX**

Upon the Taxpayer’s timely written request for an administrative tax hearing, and pursuant to N.C.G.S. 105-260.1, this matter came before the Assistant Secretary of Revenue, Eugene J. Cella, who conducted a hearing on March 25, 2003, in the City of Raleigh, North Carolina. For purposes of N.C.G.S. 105-241.1, the hearing concluded on April 24, 2003 after the record was held open for 30 days.

Pursuant to N.C.G.S. 105-113.111 and N.C.G.S. 105-241.1(a)&(b), a notice of proposed assessment was delivered to the Taxpayer by U.S. Mail sent to the Taxpayer’s last known address of [Street, City, State ZIP]. The notice alleged that on [Date] the Taxpayer was in unauthorized possession of 8,064 grams of marijuana, to which no tax stamps were affixed. The notice proposed an assessment comprised of excise tax in the amount of \$28,224.00, penalties totaling \$11,289.60, and interest in the amount of \$141.12, for a total proposed tax liability of \$39,654.72.

Two questions are at issue: (1) Did the Taxpayer have actual and/or constructive possession of marijuana without proper tax stamps affixed, and (2) Is the Taxpayer subject to the assessment of unauthorized substance excise tax?

**EVIDENCE**

A Brief for Tax Hearing was submitted by the Unauthorized Substances Tax Division and was accepted into the record of the hearing. The Brief’s exhibits were accepted into the record as evidence and are incorporated herein by reference. One exhibit was the [law enforcement agency] case report which stated the following: On [Date] officers with the law enforcement agency located an outdoor marijuana grow operation just off the curtilage of the Taxpayer’s property located at [Street, City, State ZIP]. The marijuana plants were very well tended, and were located in a plot at the end of a worn trail from the Taxpayer’s property. A search warrant was executed at the house on the property, and inside officers found over one pound of marijuana and an indoor grow room that was not in operation. The Taxpayer’s husband told investigators that he

grew the marijuana for personal use due to pain from an old back injury. He further stated that the Taxpayer had been opposed to him setting up the indoor grow operation. The officers cut the plants above the root ball and took them, as well as the marijuana in the house, to be weighed. The scales they used had once been certified in Texas, but were not certified in North Carolina. However, some time later a set of certified scales was obtained, with the assistance of the Taxpayer's attorney, and the marijuana was re-weighed. Officers took the opportunity to compare the original scales to the certified scales and found them to be accurate. NOTE: On the day after the North Carolina seizure, [another State's] authorities searched the Taxpayer's residence in [City] and located an additional pound of marijuana (that pound was not included in this assessment).

The following exhibits were submitted with the Division's brief:

- US-1 Form BD-10, "Notice of Unauthorized Substance Tax Assessment," dated September 12, 2002.
- US-2 Letter from the Taxpayer's attorney, dated September 30, 2002, requesting a hearing.
- US-3 Five letters regarding the scheduling of the hearing.
- US-4 Form BD-4, "Report of Arrest and/or Seizure Involving Nontaxpaid (Unstamped) Controlled Substances," which names the Taxpayer as the possessor of the controlled substance.
- US-5 Incident report by the [law enforcement agency], including the SBI lab report, reports of interviews with the Taxpayer and [her husband], and information regarding the property.
- US-6 Copy of the search warrant, including the inventory of seized property and crime scene sketches.
- US-7 Memorandum from E. Norris Tolson, Secretary of Revenue, dated May 16, 2001, delegating to Eugene J. Cella, Assistant Secretary of Administrative Hearings, the authority to hold any hearing required or allowed under Chapter 105 of the North Carolina General Statutes.
- US-8 Statement of Fact by [Agent] dated March 24, 2003 (introduced at hearing).

The Taxpayer did not attend the hearing, but was represented by [Attorney] of [City, State]. The Taxpayer's attorney argued that there was no evidence that the Taxpayer was in possession of the marijuana. He also argued nontaxable roots may have been included in the weight of the marijuana. He introduced a photograph that he alleged showed a root ball that was included in the weight. He also argued that the SBI lab did

not have certified scales and that the most accurate weight was the court-ordered reweighing that occurred December 19, 2002, which indicated a weight of 1.9 pounds.

On April 11, 2003, the Division submitted a Statement of Fact prepared by [Agent] on April 2, 2003. In his statement the agent states that he and other officers re-examined the marijuana and found that there were no root balls, dirt or other foreign materials present. He stated further that the "root ball" in [attorney's] photograph was in fact a marijuana stalk that had been hacked off right above the root ball. It weighed 1.2 ounces.

On April 24, 2003, the Taxpayer's attorney submitted additional written arguments, including one that claimed the Taxpayer's husband's plea agreement prohibited the tax from being imposed because it allowed no forfeitures. The Taxpayer's attorney also submitted a statement from the chemist who conducted the December 19, 2002, reweighing of the marijuana and a copy of the plea agreement.

### **FINDINGS OF FACT**

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

1. On [Date] law enforcement officers executed a search warrant at [Street, City, State]. County tax records indicate this property is owned by the Taxpayer, [Taxpayer], and her husband, [Taxpayer's husband] (see US-5).
2. Officers recovered 11 to 13 well-tended marijuana plants growing a short distance from the edge of the Taxpayer's property. The plants were cut off above their root balls and seized.
3. The Taxpayer's husband admitted growing the marijuana plants and said he uses the marijuana to ease the pain from an old back injury. He said he smokes four to five marijuana cigarettes per day.
4. The Taxpayer's husband stated to law enforcement that Taxpayer "was against [her husband] growing any marijuana and had been giving him a hard time about setting [up the indoor grow operation]."
5. Inside the residence officers recovered additional marijuana weighing more than 1¼ pounds. Officers also located drug paraphernalia and materials for an indoor grow operation that were not in use.
6. On [Date] officers weighed the marijuana seized from the Taxpayer's [City] residence and determined the weight to be 17.75 pounds.

7. On [Date] law enforcement officers in [City, State], searched the Taxpayer's residence there and located approximately one pound of marijuana.
8. On September 12, 2002, an assessment of unauthorized substance tax was made against the Taxpayer comprised of excise tax in the amount of \$28,224.00, penalties totaling \$11,289.60, and interest in the amount of \$141.12, for a total proposed tax liability of \$39,654.72, based upon the Taxpayer's possession of 8,064 grams of marijuana. Notice of said assessment was delivered to the Taxpayer by U.S. Mail.
9. Upon being assessed, and in a timely manner, the Taxpayer requested in writing an administrative tax hearing.
10. On December 19, 2002, the marijuana was reweighed on certified scales. Officers then compared the original scales to the certified scales using a known one-pound weight. The original scales weighed the one-pound weight identical to the certified scales.
11. The Taxpayer did not submit reliable evidence that the taxed weight of the marijuana contained root balls or separated stems and stalks.
12. On [Date] the Taxpayer possessed 8,064 grams of taxable marijuana.
13. No tax stamps were purchased for or affixed to the marijuana as required by law.

### **CONCLUSIONS OF LAW**

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

1. A preponderance of the evidence supports the foregoing findings of fact, therefore the assessment of unauthorized substances tax against the Taxpayer is concluded to be correct.
2. As to the weight of the marijuana, N.C.G.S. §105-113.107(a1) states: "A quantity of marijuana [which includes all parts of the plant whether growing or not] . . . is measured by the weight of the substance whether pure or impure or dilute[. . . ] A quantity of a controlled substance is dilute if it consists of a detectable quantity of pure controlled substance and any excipients or fillers." Growing marijuana plants contain fluids such as water, which are not themselves controlled substances but which dilute or make impure the controlled substance. As such, the weight of the fluids is taxable. Therefore, growing marijuana plants are to be weighed for tax purposes at the time of report or seizure or as close thereto as possible rather than after they have partially or fully dried out. In other words, the taxable weight of marijuana includes the weight of the fluids contained within growing marijuana plants at the time of seizure. Thus, in Taxpayer's case, that the marijuana at issue

weighed 8,064 grams is both the best information available and is reasonable as it was based on what the seized marijuana weighed on a reliable scale the day after it was seized, and not on what the same marijuana, which included 11 to 13 growing plants, weighed over three months later after it had had time to dry out.

3. A proviso in a statute taxing certain possessions at a lower rate than that made applicable in general is a partial exemption and is, therefore, to be strictly construed against the claim for such special or preferred treatment. Because the Taxpayer presented no reliable evidence that separated marijuana stems and stalks comprised a portion of the marijuana that he is being taxed for possessing, the \$.40 per gram rate is not applicable. The applicable tax rate is the \$3.50 per grams rate generally applicable to marijuana.
4. An exemption is to be strictly construed against the claim for such special or preferred treatment. Because the Taxpayer presented no reliable evidence that root balls comprised a portion of the marijuana that he is being taxed for possessing or any evidence relating to the weight of the alleged root ball, no exemption is available. The applicable tax rate is the \$3.50 per grams rate generally applicable to marijuana.
5. A taxpayer has possession of an unauthorized substance when he has both the power and the intent to control its disposition or use, which power may be in him alone or in combination with another.
6. Based on (1) Taxpayer's husband's statement to law enforcement that Taxpayer "was against [her husband] growing any marijuana and had been giving him a hard time about setting [up the indoor grow operation]," and (2) the fact that Taxpayer's husband smoked 4-5 marijuana cigarettes a day, and (3) the fact that in both of Taxpayer's residences/homes over a pound of marijuana was found by law enforcement, Taxpayer, together with her husband, had control over the premises and thus knowledge and control over the seized marijuana and Taxpayer was therefore in constructive possession of said marijuana.
7. Without authorization, the Taxpayer constructively possessed 8,064 grams of marijuana on [Date] and was therefore a "dealer" as that term is defined in N.C.G.S. 105-113.106(3).
8. Imposition of a civil tax is not a forfeiture. A superior court judge's order forbidding forfeiture does not forbid the imposition of a civil tax by and through an unauthorized substances excise tax assessment.
9. The Taxpayer is liable for excise tax in the amount of \$28,224.00, penalties totaling \$11,289.60, and interest until date of full payment.

**DECISION**

Wherefore, an assessment based on possession of 8,064 grams of marijuana, comprised of excise tax in the amount of \$28,224.00 and penalties totaling \$11,289.60 is deemed to be proper under the law and the facts, and is sustained and declared to be final and immediately due and collectible, together with such interest as allowed by law.

This the \_\_\_\_\_ day of \_\_\_\_\_, 2003.

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Eugene J. Cella  
Assistant Secretary of Revenue