

IN THE MATTER OF:)
)
The Jeopardy Assessments of Withholding)
Tax for the tax periods March 28 – March 31,)
2001 and June 27 – June 30, 2001 by the)
Secretary of Revenue of the State of)
North Carolina)
)
vs.)
)
[Taxpayer])

**REVIEW OF JEOPARDY
ASSESSMENT**
Docket No. 2001-610

This matter came before the Assistant Secretary of Revenue, Eugene J. Cella, upon the timely request for a review of two jeopardy assessments issued on August 10, 2001. Two identical assessments were computer-generated and issued on August 25, 2001. The review was held by the Assistant Secretary pursuant to the provisions of G.S. 105-241.1(g). Both the Taxpayers and the Personal Taxes Division submitted written memoranda in support of their respective positions.

Pursuant to G.S. 105-241.1, two jeopardy assessments were issued to the Taxpayer for unpaid taxes for the tax period March 28, 2001 through March 31, 2001 in the amount of \$1,459.81 and unpaid taxes for the tax period June 27, 2001 through June 30, 2001 in the amount of \$6,233.87.

ISSUES

Were the two jeopardy assessments reasonable under all the circumstances?

Were the amounts assessed in the two jeopardy assessments reasonable under all the circumstances?

EVIDENCE

Under this review, all evidence accepted and reviewed will be considered exhibits for the Secretary of Revenue (SOR).

- SOR-1 Form RO-1072, "Notice of Withholding – Immediate Jeopardy Assessment" dated August 10, 2001 in the amount of \$1,459.81.
- SOR-2 Form RO-1072, "Notice of Withholding – Immediate Jeopardy Assessment" dated August 10, 2001 in the amount of \$6,233.87.
- SOR-3 Letter from counsel for the Taxpayer, dated September 18, 2001, requesting a review of the jeopardy assessments.

- SOR-4 Letter from the undersigned to counsel for the Taxpayer dated September 25, 2001.
- SOR 5 Letter to counsel for the Taxpayer from W. Edward Finch, Jr., Assistant Director, Personal Taxes Division, dated September 28, 2001.
- SOR-6 Memorandum from Mr. Finch to the undersigned outlining the Personal Taxes Division's position dated October 2, 2001.
- SOR-7 Memorandum and attached exhibits submitted on behalf of the Taxpayer to the undersigned dated October 8, 2001.
- SOR-8 Memorandum from E. Norris Tolson, Secretary of Revenue, dated May 16, 2001, delegated to Eugene J. Cella, Assistant Secretary of Administrative Tax Hearings, the authority to hold any hearing required or allowed under Chapter 105 of the North Carolina General Statutes.

In order to facilitate the collection of taxes due, the General Assembly has given the Secretary of Revenue (Secretary) significant powers and procedures. In particular, G.S. 105-241.1(g) authorizes the Secretary to "immediately assess any tax" due if he "determines that collection of the tax is in jeopardy and immediate assessment is necessary in order to protect the interest of the State." The interests of the taxpayer are also protected in that the taxpayer may request an internal review by the Secretary, the findings of which may be reviewed in Superior Court, (see, G.S. 105-241.5). The scope and standard of the Secretary's review is dictated by G.S. 105-241.1(g) which states, in pertinent part, "... the Secretary must determine whether making the jeopardy assessment was reasonable under all the circumstances and whether the amount assessed is reasonable under all the circumstances." A review of the circumstances surrounding these two jeopardy assessments based on the evidence submitted by the parties is as follows.

During the month of January 2000, and continuing through the month of October 2000, representatives of the Department were in contact with [the President of the Taxpayer] in an attempt to bring it into compliance for nonpayment of calendar year 1997 withholding taxes, which were in excess of \$14,000. In addition to this, the Department sought answers as to why no payments had been made for the calendar years 1998, 1999, 2000, and forward.

During the month of October 2000, [the President of the Taxpayer] admitted to continuing to have employees but had no explanation for not reporting or paying the withholding tax. Later that month, [the President of the Taxpayer] sold a parcel of real estate and paid the 1997 liability in full.

In June of this year, the Department again contacted [the President of the Taxpayer] to pursue the remaining tax liability for 1998, 1999, 2000, and 2001. A number of meetings and conversations between the Department, [the President of the Taxpayer], and his counsel since June have not resolved these matters. The Department alleges that the total liability assessed now is \$88,610.10 with no payment having been made since the June 30, 2001 assessment. The Department further alleges that the Taxpayer has \$54,000 in accounts receivable but because there are also Federal withholding tax liabilities, these receivables are potentially subject to levy by the Internal Revenue Service (Exhibit SOR-4).

The initial jeopardy assessments were issued on August 10, 2001 in the amounts of \$1,459.81 (Exhibit SOR-1) and \$6,233.87 (Exhibit SOR-2). The identical jeopardy assessments were again issued on August 25, 2001.¹ On September 18, 2001, the Taxpayer, through its counsel, requested a review of both jeopardy assessments (Exhibit SOR-3). In its letter of September 28, 2001, the Department revised the liability to \$546.22 and \$6,014.53 respectively (Exhibit SOR-5).

For its part, the Taxpayer has alleged an abuse of power on the part of the Department. Its counsel further contends that Department personnel were discourteous² and did not follow statutory provisions. Counsel contends that the Department did not provide a written statement of the information relied upon by the Secretary within the five days required by G.S. 105-241.1(g). The Department would contend that the assessment documents themselves contain five stated reasons for a jeopardy assessment and that this would satisfy the explanation requirement (Exhibits SOR 1 & 2). Counsel goes on to insist that the tax that can be jeopardy assessed does not include penalty and interest (Exhibit SOR-6).

FINDINGS OF FACT

Based upon the foregoing evidence of record, the Assistant Secretary makes the following findings of facts:

1. On May 16, 2001, E. Norris Tolson, Secretary of Revenue, designated Eugene J. Cella as Assistant Secretary of Revenue and bestowed on him the authority to hold any hearing required or allowed under Chapter 105 of the North Carolina General Statutes.
2. On August 10, 2001, two jeopardy assessments were made against the Taxpayer in the respective sums of \$1,459.81 and \$6,233.87.
3. On August 25, 2001, the identical two jeopardy assessments were again issued.
4. On September 18, 2001, the Taxpayer requested that the Secretary review the jeopardy assessments.
5. On September 28, 2001, the Department amended the two jeopardy assessments to the respective sums of \$546.22 and \$6,014.53.
6. The Taxpayer made a timely request for review of this action.
7. The Taxpayer has had tax law compliance problems since 1997.

¹ In the Department's letter of September 28, 2001, Assistant Director Finch explained that the August 10, 2001 assessments were manually assessed and the August 25, 2001 notices were computer-generated and inadvertently sent. While inadvertent the effect of the second notices was to re-start the period within which to request a review.

² Counsel's complaint about staff conduct has been forwarded to the Director of the Collection Division for review.

8. The Department has been attempting to bring the Taxpayer into compliance with its tax liabilities since January 2000.
9. While the 1997 liability was paid in June 2001, the efforts to bring the Taxpayer into compliance for 1998, 1999, 2000 and 2001 have been unsuccessful and there remains a liability in excess of \$88,000 with no payment made since June 30, 2001.
10. The Taxpayer has offered little or no explanation as to why it has not reported or paid withholding tax.
11. The Taxpayer's actions have established a pattern of noncompliance with the tax laws.
12. The actions of the Department in issuing the jeopardy assessments were reasonable under all the circumstances and in the best interest of the State.
13. The amounts of the jeopardy assessments are reasonable under all the circumstances.

CONCLUSIONS OF LAW

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

1. An assessment of tax is presumed to be correct.
2. The burden is upon the Taxpayer who objects to an assessment to overcome that presumption. This burden was not met.
3. G.S. 105-241.1(g) does require that the Department furnish the Taxpayer a written statement of the information relied upon in making the assessment. While the Department would contend that the information contained on the face of the jeopardy assessment complies with this requirement, it is not necessary to make that determination in this matter. Even if there was a failure to comply with the five-day requirement, it would not be fatal to the jeopardy assessment. The requirement merely extends the time period within which a taxpayer may request a review of this nature. Since the Taxpayer has been granted a review, it has received the intended benefit of the statute.
4. The "tax" in G.S. 105-241.1(g) includes tax, penalty and interest. Counsel's protestations to the contrary notwithstanding, the definition of "tax" contained in G.S. 105-228.90(7) states, in pertinent part, "Unless the context clearly requires otherwise, the terms 'tax' and 'additional tax' include penalties and interest as well as the principal amount." The context of G.S. 105-241.1(g) does not require a different interpretation from the above quoted definition.
5. The Department's actions in making the two jeopardy assessments are in compliance with G.S. 105-241.1(g).

DECISION

Wherefore the two jeopardy assessments against the Taxpayer are deemed to be reasonable and proper under the law and facts and are sustained.

Done and ordered in Raleigh, North Carolina this the 18th day of October, 2001.

Signature _____

Eugene J. Cella
Assistant Secretary of Revenue