

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE
SECRETARY OF REVENUE

IN THE MATTER OF:

The Proposed Assessments of Withholding Tax,)
Penalty, and Interest for the Quarters Ending)
December 31, 1999, and March 31 and)
June 30, 2001, by the Secretary of Revenue)
of North Carolina)
vs.)
[Taxpayer])

FINAL DECISION
Docket No. 2001-611

This matter was heard before the Assistant Secretary for Administrative Tax Hearings, Eugene J. Cella, upon an application for a hearing by [Corporation], wherein Corporation protested the proposed assessment of the late payment penalty for the quarter ended December 31, 1999, and the proposed assessments of withholding tax plus penalty and interest for the quarters ended March 31 and June 30, 2001. At the request of [Corporation’s attorney], the hearing was conducted via written communication and is based on all information presented for the record as of January 31, 2002. The hearing was held by the Assistant Secretary under the provisions of G.S. 105-260.1.

ISSUE

The issue to be decided in this matter is as follows:

Are the withholding tax assessments proposed against Corporation lawful and proper?

EVIDENCE

The evidence presented by W. Edward Finch, Jr., Assistant Director of the Personal Taxes Division, included the following:

1. Memorandum from E. Norris Tolson, Secretary of Revenue, to Eugene J. Cella, Assistant Secretary for Administrative Tax Hearings, dated May 16, 2001, a copy of which is designated as Exhibit PT-1.
2. The Annual Withholding Reconciliation of Corporation for the tax year 1999, a copy of which is designated as Exhibit PT-2.

3. The Quarterly Income Tax Withholding Return of Corporation for the quarter ending March 31, 2001, a copy of which is designated as Exhibit PT-3.
4. The Quarterly Income Tax Withholding Return of Corporation for the quarter ending June 30, 2001, a copy of which is designated as Exhibit PT-4.
5. Notice of Tax Assessment for the quarter ending December 31, 1999, dated June 27, 2001, a copy of which is designated as Exhibit PT-5.
6. Notice of Penalty Assessment for the quarter ending December 31, 1999, dated August 15, 2001, a copy of which is designated as Exhibit PT-6.
7. Notice of Withholding-Immediate Jeopardy Tax Assessment for the quarter ending March 31, 2001, dated August 10, 2001, a copy of which is designated as Exhibit PT-7.
8. Notice of Withholding-Immediate Jeopardy Tax Assessment for the quarter ending June 30, 2001, dated August 10, 2001, a copy of which is designated as Exhibit PT-8.
9. Letter from Attorney to Department of Revenue dated August 21, 2001, a copy of which is designated as Exhibit PT-9.
10. Letter from W. Edward Finch, Jr., to Attorney, dated September 28, 2001, a copy of which is designated as Exhibit PT-10.
11. Letter from Attorney to W. Edward Finch, Jr., dated October 3, 2001, a copy of which is designated as Exhibit PT-11.
12. Supplement letter from Attorney to W. Edward Finch, Jr., dated October 3, 2001, a copy of which is designated as Exhibit PT-12.
13. Letter from Eugene J. Cella to Attorney dated October 8, 2001, a copy of which is designated as Exhibit PT-13.
14. Letter from W. Edward Finch, Jr., to Attorney dated October 26, 2001, a copy of which is designated as Exhibit PT-14.
15. Letter from Attorney to Eugene J. Cella dated November 12, 2001, a copy of which is designated as Exhibit PT-15.
16. Letter from Eugene J. Cella to Attorney dated November 14, 2001, a copy of which is designated as Exhibit PT-16.

In lieu of appearing at the hearing, Corporation requested that the matter be resolved via written communication. The Assistant Secretary granted the request and allowed Corporation until January 31, 2002, to submit for the record any additional arguments, documents, or other evidence in support of its objection to the assessments.

Corporation submitted the following for the record:

1. Letter with attachments from Attorney to Eugene J. Cella, dated December 10, 2001, copies of which are collectively designated as Exhibit TP-1.

2. Letter from Eugene J. Cella to Attorney dated December 21, 2001, a copy of which is designated as Exhibit TP-2.
3. Letter from Attorney to Eugene J. Cella dated January 30, 2002, a copy of which is designated as Exhibit TP-3.

The Assistant Secretary designated as Exhibit TP-4, a copy of his Final Decision dated October 18, 2001, in which he sustained jeopardy withholding tax assessments proposed against Corporation for the quarters ended March 31 and June 30, 2001.

FINDINGS OF FACT

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

1. During the calendar year 1999, Corporation paid North Carolina income tax withheld of \$460.30. On February 29, 2000, Corporation filed its annual withholding reconciliation for tax year 1999 reflecting total North Carolina income tax withheld of \$23,609.46.
2. A Notice of Tax Assessment for the underpayment of tax withheld of \$23,149.16 (\$23,609.46 - \$460.30) plus accrued interest was mailed to Corporation on June 27, 2001. Because Corporation did not pay the proposed assessment nor request a hearing within 30 days, the late payment penalty of ten percent of the tax was assessed as required by G.S. 105-236(4). A Notice of Penalty Assessment was mailed to Corporation on August 15, 2001.
3. Corporation objected to the assessment of penalty and timely requested an administrative tax hearing before the Secretary of Revenue.
4. Corporation filed income tax withholding returns for the quarters ended March 31 and June 30, 2001, reflecting income tax withheld of \$4,348.01 and \$5,348.48 respectively; however, Corporation did not include payment with the returns. Payment for the tax of \$4,348.01 withheld for the quarter ended March 31, 2001, was received by the Department on August 1, 2001.
5. Pursuant to G.S. 105-241.1(g), Notices of Withholding-Immediate Jeopardy Tax Assessment for the quarters ended March 31 and June 30, 2001, were mailed to Corporation on August 10, 2001. In error, the jeopardy assessments included late filing penalties of \$869.60 and \$267.42. The late filing penalties were subsequently abated.
6. Corporation objected to the basis of the jeopardy assessments and filed a timely request for an administrative tax hearing before the Secretary of Revenue pursuant to the provisions of G.S. 105-241.1(c).
7. Corporation also objected to the reasonableness of the jeopardy assessments and requested the Secretary to review the action taken pursuant to the provisions of G.S. 105-241.1(g). Upon review, the Assistant Secretary deemed the jeopardy assessments reasonable and proper. The Assistant Secretary's final decision sustaining the reasonableness of the jeopardy assessments was mailed to Attorney on October 18, 2001.

CONCLUSIONS OF LAW

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

1. A penalty of ten percent of the tax is required for failure to pay any tax when due. The penalty does not apply when the tax due but not shown on a return is assessed by the Secretary and is paid within 30 days after the date of the proposed notice of assessment of the tax. Because Corporation did not pay the tax of \$23,149.16 reflected on the assessment notice for the period ended December 31, 1999, within 30 days of the date of the notice, the late payment penalty of \$2,314.92 was properly assessed.
2. The Secretary of Revenue is authorized to waive or reduce any penalty if the taxpayer establishes reasonable cause for waiver or reduction.
3. An employer is required to deduct and withhold North Carolina income tax from the wages paid to its employees. The amount of taxes withheld by an employer is held in trust for the Secretary.
4. An employer who withholds an average of at least \$2,000.00 of State income taxes from wages each month is required to pay the tax withheld at the same times it is required to pay the tax withheld on the same wages for federal income tax purposes. Because Corporation did not meet this requirement, the late payment penalty assessed for the quarters ended March 31, and June 30, 2001 is proper.
5. The proposed assessments for the quarters ended December 31, 1999 and March 31 and June 30, 2001, were properly issued and are, under the facts, lawful and proper.

DECISION

Corporation has not presented any substantial basis for its objections to the tax assessed other than to reiterate its previous arguments against the reasonableness of the jeopardy assessments. The reasonableness of the jeopardy assessments has previously been sustained for the reasons stated in the Assistant Secretary's final decision dated October 18, 2001 (Exhibit TP-4) pursuant to the provisions of G.S. 105-241.1(g). The present hearing is held pursuant to the provisions of G.S. 105-241.1(c). Corporation has not carried its burden of proof to show that the assessments are in error. The law requires that income tax withheld be held in trust for the Secretary of Revenue and paid when due. Corporation did not meet these requirements nor has it met its burden of proof to establish that the amount of tax assessed is in error. In fact, the proposed assessments for the quarters ended March 31 and June 30, 2001,

are based on the amount of tax withheld as reported by Corporation on the returns it filed. Rather than holding the tax withheld in trust for the Secretary of Revenue as required, Corporation evidently elected to utilize the funds for its own purposes, but now requests waiver of the late payment penalties on the basis of insufficient funds. Pursuant to the Department's Penalty Waiver Policy, lack of funds is not adequate reason to waive or reduce a penalty. Further, Corporation does not qualify for waiver under the Department's policy because Corporation has other outstanding tax liabilities. Therefore, Corporation's request to waive the penalties is declined.

The assessments for the quarters ended December 31, 1999 and March 31 and June 30, 2001 are hereby sustained in their entireties, and are finally determined to be due, and collectible, as allowed by law.

Made and entered this 11th day of April, 2002.

Signature _____

Eugene J. Cella

Assistant Secretary for Administrative Tax Hearings
North Carolina Department of Revenue