

2. N.C. Gen. Stat. § 105-164.4 provides, “A privilege tax is imposed on a retailer at the following percentage rates of the retailer’s net taxable sales or gross receipts, as appropriate.”

3. The term “retailer” is defined by N.C. Gen. Stat. § 105-164.3, in pertinent part:

Means and includes every person engaged in the business of making sales of tangible personal property at retail, either within or without this State . . . and every manufacturer, producer or contractor engaged in business in this State and selling, delivering, erecting, installing or applying tangible personal property for use in this State notwithstanding that said property may be permanently affixed to a building or reality or other tangible personal property.

4. N.C. Gen. Stat. § 105-164.26 reads in pertinent part:

For the purpose of the proper administration of this Article and to prevent evasion of the retail sales tax, it shall be presumed that all gross receipts of wholesale merchants and retailers are subject to the retail sales tax until the contrary is established by proper records as required in this Article. It shall be prima facie presumed that tangible personal property sold by any person for delivery in this State, however made, and by carrier or otherwise, is sold for storage, use, or other consumption in this State, and a like presumption shall apply to tangible personal property delivered outside this State and brought to this State by the purchaser.

5. Under the sales tax statutes, Petitioner’s sales of its stone products are “retail sales” subject to sales tax. N.C. Gen. Stat. §§ 105-164.4 and -164.26.

6. Our courts have held that the burden of showing exemptions or exceptions from a taxing statute is upon the one asserting the exemption or exclusion. Telerent Leasing Corp v High, 8 N.C. App. 179, 174 S.E.2d 11 (1970). Petitioner must first show that it is not subject to the sales tax before the application of use tax ever becomes an issue. See Robinson & Hale, Inc. v. Shaw, 242 N.C. 486, 87 S.E.2d 909 N.C. (1955).

7. In this case, Petitioner failed to overcome the statutory presumption enumerated in N.C. Gen. Stat. § 105-164.26, by showing that the retail sales of its stone products are not subject to the sales tax. Specifically, Petitioner’s evidence was insufficient to overcome the clear language of the sales tax statute and the statutory presumption in favor of sales tax liability. Respondent’s evidence, and Petitioner’s own documents, showed the sales of Petitioner’s stone products were for fixed prices, and for specific terms. Petitioner’s own evidence showed that Petitioner’s standard contract provisions do not include provisions that Respondent requires in a contract for a contract to be considered a performance contract under Respondent’s Sales and Use Tax Technical Bulletin 31-1.

8. Further, Petitioner admitted that the number of sales on which Respondent based its assessment is correct.

9. *The uncontroverted evidence supports there is no genuine issue of material fact, and Respondent is entitled to summary judgment as a matter of law.*]

DECISION

The Department hereby decides that Respondent was entitled to summary judgment as a matter of law. The Department therefore upholds the Decision of the ALJ in the above captioned case granting Respondent's Motion for Summary Judgment. The Notice of Final Determination dated November 20, 2008 issued by the Department to Petitioner is sustained as to the tax, penalties, and interest shown due, plus interest accruing until the tax is paid in full.

APPEAL

Pursuant to N.C. Gen. Stat. § 150B-45, a party wishing to appeal the final decision of the Department in a contested tax case arising under N.C. Gen. Stat. § 105-241.15 may commence such an appeal by filing a Petition for Judicial Review in the Superior Court of Wake County within 30 days after being served with a written copy of this Final Agency Decision. A taxpayer who files a petition for judicial review must pay the amount of tax, penalties, and interest the final decision states is due. N.C. Gen. Stat. § 105-241.16. The Department will calculate accrued interest and provide a payoff amount upon request.

Under N.C. Gen. Stat. § 150B-47, the Department is required to file the official record in the contested case under review, any exceptions, proposed findings of fact, or written arguments submitted to the Department, as well as the Department's Final Agency Decision, with the Clerk of Wake County Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the petition must be sent to the following address: North Carolina Department of Revenue, ATTN: Janice W. Davidson, 1429 Rock Quarry Road, Suite 105, Raleigh, North Carolina 27610, at the time the appeal is initiated to insure timely filing of the record.

This the 14th day of January, 2010.

NORTH CAROLINA DEPARTMENT OF REVENUE

/s/ Janice W. Davidson

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North Carolina Department of Revenue