

3. Petitioner purchased the [sports vehicles] for a total of \$18,529.10, which included \$89.56 in South Carolina sales taxes paid by Petitioner.
4. Petitioner did not pay any North Carolina use taxes on these purchases.
5. The invoices bear only Petitioner's name and signature.
6. To pay for the [sports vehicles], Petitioner tendered a check, signed only by him, to [Vendor] in the amount of \$2,000.00.
7. The remaining portion of the purchase price, \$16,529.10, was paid using funds drawn from a [Bank] checking account on which Petitioner is listed as an account holder.
8. Upon purchase, [Vendor] delivered the [sports vehicles] to Petitioner at his residence in North Carolina.
9. By letter dated August 30, 2007, Respondent requested information from [the recreational vehicle manufacturer] regarding its sales of recreational equipment, including [sports vehicles], to North Carolina residents.
10. From this request, Respondent received information from [the recreational vehicle manufacturer] indicating Petitioner was the purchaser of two [sports vehicles] from [Vendor].

The Department takes exception to Finding of Fact No. 11 because this Finding of Fact is contrary to the preponderance of admissible evidence presented in this matter. The Department finds there is sufficient evidence to revise Finding of Fact No. 11 because Respondent's letter dated July 29, 2008 specifically notifies Petitioner that he owed \$2,345.61 in use taxes, penalties, and interest based on the [sports vehicles] Petitioner purchased from [Vendor] in 2006. See Affidavit of Ed Strickland, ¶¶ 7 and 8, Exhibit 3. For this reason, the Department rejects Finding of Fact No. 11 as set forth in the ALJ's Decision. The Department revises and rewrites said Finding of Fact to summarize the undisputed facts as follows:

11. Based on this information, by letter dated July 29, 2008, Respondent notified Petitioner that he owed ~~\$2,325.61~~ **\$2,345.61** in use taxes, **penalties, and interest** to Respondent based on the [sports vehicles] Petitioner purchased from [Vendor] in 2006.

The Department adopts the summary of the undisputed facts as set forth in Finding of Fact No. 12 in the Decision of the ALJ as follows:

12. In response, Petitioner submitted additional information regarding the [sports vehicles] to Respondent.

The Department takes exception to Finding of Fact No. 13 because this Finding of Fact is contrary to the preponderance of admissible evidence presented in this matter. The Department finds there is sufficient evidence to revise Finding of Fact No.13 because the September 10, 2008

assessment for \$2,208.59 not only included the additional use tax due on the [sports vehicles], but also interest and penalties. See Affidavit of Ed Strickland, ¶ 9, Exhibit 4. For this reason, the Department rejects Finding of Fact No. 13 as set forth in the ALJ's Decision. The Department revises and rewrites said Finding of Fact to summarize the undisputed facts as follows:

13. Upon review of all the information, on September 10, 2008, Respondent assessed Petitioner for \$2,208.59. ~~for~~ **This amount included** the additional use tax, **penalties, and interest** due on the [sports vehicles].

The Department adopts the summary of the undisputed facts as set forth in Finding of Fact No. 14 in the Decision of the ALJ as follows:

14. Respondent credited the South Carolina sales tax Petitioner paid on the [sports vehicles] against the use tax imposed by N.C. Gen. Stat. § 105-164.6(b), and only assessed Petitioner for the difference, \$2208.59.

The Department takes exception to Finding of Fact No. 15 because this Finding of Fact is contrary to the preponderance of admissible evidence presented in this matter. The Department finds there is sufficient evidence to revise Finding of Fact No. 15 because the June 12, 2009 Notice of Final Determination was in the amount of \$2,378.83, which represented the initial amount of tax, penalties, and interest from the September 10, 2008 assessment plus accrued interest. See Affidavit of Ed Strickland, ¶ 12, Exhibit 6. For this reason, the Department rejects Finding of Fact No. 15 as set forth in the ALJ's Decision. The Department revises and rewrites said Finding of Fact to summarize the undisputed facts as follows:

15. On June 12, 2009, Respondent issued a Notice of Final Determination to Petitioner, after noting Petitioner's objections to the above assessment, and upheld its initial **assessment of use tax, penalties, and interest, plus accrued interest, in the amount** ~~assessment of~~ **\$2,378.83** against Petitioner.

The Department adopts the summary of the undisputed facts as set forth in Finding of Fact No. 16 in the Decision of the ALJ as follows:

16. On July 28, 2009, Petitioner appealed Respondent's use tax assessment by filing a petition with the Office of Administrative Hearings.

The Department rejects Finding of Fact No. 17 as set forth in the Decision of the ALJ as it would be more properly denoted as a Conclusion of Law. In its stead, the Department decides there is a preponderance of admissible evidence in the whole record to find the following facts with regard to Petitioner's explanation and/or affirmative defense as to why he does not believe he owes North Carolina use taxes. These facts are designated as Findings of Fact Nos. 17 – 21 as follows:

17. **Petitioner began receiving social security disability benefits in 2004. (Petitioner's Response to Respondent's First Set of Interrogatories to Petitioner, ¶ 2 attachment,**

Letter dated 11/10/2008, Exhibit 1.) ~~Based on the foregoing Findings of Fact, there are no genuine issues of material fact remaining in this case.~~

- 18. Petitioner's wife, [Wife's Name], served as representative payee for Petitioner's social security disability benefits from approximately 08/13/2004 – 11/14/2007. (Petitioner's Response to Respondent's First Set of Interrogatories to Petitioner, ¶ 2 attachments, Letters dated 01/29/2008 and 11/10/2008, Exhibit 1.)**
- 19. Petitioner has been payee for his social security disability benefits from January 2008 through the time of the November 10, 2008 letter from the Social Security Administration. (Petitioner's Response to Respondent's First Set of Interrogatories to Petitioner, ¶ 2 attachment, Letter dated 11/10/2008, Exhibit 1.)**
- 20. No evidence has been presented by Petitioner to show he was incompetent during the time he had a Social Security Administration designated representative payee. (See whole record.)**
- 21. Petitioner relied on the following statutes: 42 U.S.C. § 1007, 42 U.S.C. § 1007(j) and (l), and 42 U.S.C. § 407(a). (Petitioner's Prehearing Statement, ¶¶ 1 and 2 on additional page, Exhibit 2; Prehearing Statement Addendum; Petitioner's Request Motion for Summary Judgment, ¶ 2; Petitioner's Response to Respondent's First Request for Production of Documents, ¶ 2, Exhibit 2; Petitioner's Response to Respondent's Motion for Summary Judgment; Petitioner's letter dated 12/21/2009 and attachments.)**

CONCLUSIONS OF LAW

With regard to the ALJ's Conclusions of Law and based upon the foregoing Findings of Fact, the Department decides as follows:

The Department adopts Conclusion of Law No. 1 of the ALJ's Decision as follows:

1. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." Forbis v. Neal, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (citing N.C. Gen. Stat. § 1A-1, Rule 56(c)).

The Department determines that a portion of Conclusion of Law No. 2 is partially erroneous since the N.C. Administrative Code cited refers to an administrative law judge and would not apply to an agency final decision-maker. Therefore, the Department modifies Conclusion of Law No. 2 as follows:

2. Moreover, pursuant to N.C. Gen. Stat. § 1A-1, Rule 56, N.C. Gen. Stat. § 150B-36 and 26 N.C.A.C. 3.0115, the ~~undersigned~~ **administrative law judge** has the authority to grant Summary Judgment in this matter.

The Department adopts Conclusion of Law No. 3 of the ALJ's Decision as follows:

3. Because there are no genuine issues of material fact, the only question is whether Petitioner is liable for use taxes on the purchase of two [sports vehicles] under N.C. Gen. Stat. § 105-164.6.

The Department determines that a portion of Conclusion of Law No. 4 is erroneous in that the portion of the statute quoted varies from the actual wording and punctuation found in the statute. Therefore, the Department modifies Conclusion of Law No. 4 as follows:

4. N.C. Gen. Stat. § 105-164.6 levies a use tax on “tangible personal property purchased inside or outside ~~the~~ **this** State for storage, use, or consumption in this State” at the same rate that “would apply to the sale of the product.”

The Department adopts Conclusions of Law Nos. 5-7 of the ALJ's Decision as follows:

5. Liability for payment of use tax is upon “the person who purchases...tangible personal property.” N.C. Gen. Stat. § 105-164.6(b).
6. A “purchase” of tangible personal property takes place when it is “acquired for a consideration.” N.C. Gen. Stat. § 105-164.3(32).
7. Acquisitions for consideration include (a) transfers of title or possession, or both, and (b) absolute or conditional transfers regardless of the means by which they are effected. Id.

The Department determines that a portion of Conclusion of Law No. 8 is erroneous in that the portion of the statute quoted varies from the actual wording found in the statute. Therefore, the Department modifies Conclusion of Law No. 8 as follows:

8. Consideration “is a price or rental **in** money or by way of exchange or barter.”

The Department adopts Conclusions of Law Nos. 9-11 of the ALJ's Decision as follows:

9. Under N.C. Gen. Stat. § 105-164.6(c)(2), a credit is allowed against the use tax imposed on a person's storage, use, or consumption of tangible personal property in this State, for any sales tax paid on such property to another state.
10. If “the amount of the tax paid to the other state is less than the amount of tax imposed under [N.C. Gen. Stat. § 105-164.6], the difference is payable to [North Carolina].” N.C. Gen. Stat. § 105-164.6(c)(2).

11. Based on the plain language of N.C. Gen. Stat. § 105-164.6, as well as the undisputed facts, Petitioner is liable for use tax on his purchases of two [sports vehicles] from [Vendor] in [Town], South Carolina on May 27, 2006.

The Department determines that a portion of Conclusion of Law No. 12 should be placed in quotation marks to show the wording is the actual wording used by Petitioner and not a term of art used by the ALJ or the Department. Additionally, the Department determines that Conclusion of Law No. 12 should be expanded to include paragraph “b” below which further clarifies the Social Security Administration’s designation of a “representative payee.” Therefore, the Department modifies and expands Conclusion of Law No. 12 as follows:

12. Petitioner argues that he is not liable for paying the use tax on the [sports vehicles], because, under Social Security law, he purchased them “under the ward” of a Social Security representative payee. That argument is without merit as a matter of law.

- a. Specifically, 42 U.S.C. § 1007, entitled “Representative Payees,” has no bearing on or relevance to North Carolina Revenue Laws, including the use tax levied in N.C. Gen. Stat. § 105-164.6.

- b. The Social Security Administration may designate a representative payee “regardless of the legal competency or incompetency” of the individual qualified to receive the social security benefits. 42 U.S.C. § 1007(a).**

- c. Moreover, 42 U.S.C. § 1007 contains no provision allowing Petitioner to shift his use tax liability due under N.C. Gen. Stat. § 105-164.4(b) on two [sports vehicles] onto his representative payee.

13. Furthermore, Petitioner’s reliance on 42 U.S.C. §§ 1007(j) and (l), which pertains to misused social security benefits, is in error.

- a. While 42 U.S.C. § 1007(j) sets forth what constitutes a “misuse of benefits” by a representative payee, 42 U.S.C. § 1007(l) only makes a representative payee liable to a social security beneficiary for misused social security benefits.

- b. Neither statutory provision, however, allows a North Carolina taxpayer who happens to be a social security beneficiary to shift his liability for taxes onto his “representative payee” under federal law. 42 U.S.C. §§ 1007(j) and (l).

- c. Further, 42 U.S.C. § 1007(l) is applicable only when the Social Security Administration or a court of competent jurisdiction has determined that a representative payee misused funds received on behalf of a social security beneficiary. Petitioner has no such determination. Even if Petitioner had such a determination, it would be irrelevant to his use tax liability under N.C. Gen. Stat. § 105-164.4.

The Department determines that a Conclusion of Law should be added with regard to Petitioner's reliance on 42 U.S.C. § 407. Therefore, the Department adds Conclusion of Law No. 14 as follows:

14. In addition, Petitioner's reliance on 42 U.S.C. § 407, which pertains to the assignment and collection of social security benefits, is in error.

a. Entitled "Assignment [of benefits]," 42 U.S.C. § 407 provides, in part, that social security benefits "shall not be transferable or assignable, at law or in equity."

b. In addition, 42 U.S.C. § 407(a) states that social security benefits shall not be subject to "execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law."

c. 42 U.S.C. § 407(a) is not applicable here because Respondent is not attempting to subject Petitioner's social security benefits to "execution, levy, attachment, garnishment, or other legal process." Rather, Respondent is assessing Petitioner for the use tax due on his purchases of two [sports vehicles] from [Vendor].

d. 42 U.S.C. § 407(a) has no bearing or relevance to North Carolina Revenue Laws and is irrelevant to Petitioner's use tax liability under N.C. Gen. Stat. § 105-164.4.

The Department adopts Conclusion of Law No. 14 of the ALJ's Decision which is denoted as Conclusion of Law No. 15 as follows:

15. The uncontroverted evidence supports there are no genuine issues of material facts, 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, to the extent it is not revised by this Final Agency Decision. The Final Determination dated June 12, 2009 issued by Respondent 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 3rd day of February, 2010.

NORTH CAROLINA DEPARTMENT OF REVENUE

/s/ Janice W. Davidson

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