

Filed

STATE OF NORTH CAROLINA 2013 FEB 11 PM 1: 58

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 REV 2218

COUNTY OF WAKE

Office of
Administrative Hearings

JAMES M. SLOWIN,
REFS LLC

Petitioner,

v.

N.C. DEPARTMENT OF REVENUE,

Respondent.

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FINAL DECISION

This matter came to be heard before Fred G. Morrison Jr, Senior Administrative Law Judge, on December 3, 2012, at the Office of Administrative Hearings located in Raleigh, North Carolina, and after considering the entire record in this case, hereby enters the following decision.

Petitioner was present throughout the hearing and appeared *pro se*. The North Carolina Department of Revenue ("Department") was represented by Perry J. Pelaez of the North Carolina Attorney General's Office.

At issue in this contested case is whether Petitioner, as a manager of REFS, LLC ("REFS"), is a responsible person for the sales and use tax liabilities incurred by REFS for the periods from December 1, 2009, through January 31, 2010, and March 1, 2010, through March 31, 2010 ("Periods at Issue").

The applicable statute is N.C. Gen. Stat. § 105-242.2, entitled "Personal Liability When Certain Taxes Not Paid," which provides that "each responsible person in a business entity is personally and individually liable for all of the taxes listed in this subsection." N.C. Gen. Stat. § 105-242.2(b).

FINDINGS OF FACT

Petitioner testified at the hearing. Ginny Upchurch, Assistant Director of the Sales and Use Tax Division of the North Carolina Department of Revenue, also testified at the hearing.

Based on a review of all the evidence, and after evaluating the credibility of the witnesses, the undersigned makes the following findings of fact:

1. Petitioner filed a timely appeal to the Office of Administrative Hearings from the Notice of Final Determination issued by the Department on February 28, 2012.
2. REFS, LLC was a limited liability company that was formed on or about July 2009 by Petitioner and several other individuals.
3. Petitioner invested \$75,000.00 in REFS, which provided him with a 30% ownership interest in the company.
4. REFS was a manager-managed limited liability company. Petitioner was appointed a manager of the company. At all times during the Periods at Issue, Petitioner served as manager of REFS.
5. REFS was established to operate a restaurant/sports bar in Greensboro, North Carolina, and opened for business in September 2009.
6. During the Periods at Issue, REFS sold food and beverages at the restaurant/sports bar, collected the sales tax, and did not remit the sales tax to the Department.
7. REFS failed to timely file its North Carolina Sales and Use Tax returns and failed to pay the sales tax for October, November, and December 2009, and January and March 2010.
8. For the Periods at Issue, REFS submitted untimely Sales and Use Tax Returns to the Department without payment. The returns reflected that there was a tax due for the Periods.

9. At all times during the Periods at Issue, Petitioner served as manager and was a member of REFS when the company failed to pay sales tax.

10. On or about May 19, 2010, Petitioner, on behalf of REFS, entered into an Installment Agreement to repay the outstanding sales tax, including interest and penalties, for the Periods at Issue. Petitioner made good faith efforts to get payments made to the Respondent.

11. On or about June 13, 2010, Petitioner entered into an agreement to transfer his ownership interest in REFS to several other individuals who agreed to fulfill the Installment Agreement and indemnify Petitioner as needed in the future. The Department was not a party to this agreement, but it knew about it and continued to accept payments under it.

12. During the month of November 2010, REFS' new managers ceased its business operations and closed the doors to the restaurant without having paid the taxes due on the returns for the Periods at Issue as they had agreed. Revenue was lax in enforcing the Installment Agreement and not seizing REFS' assets under its lien.

13. At the time when REFS ceased its business operations, REFS failed to repay in full the sales tax for the Periods at Issue as required by the Installment Agreement dated May 19, 2010, or any amendments thereto. In November 2010, there remained due and owing to the Department, outstanding sales tax, interest, and penalties for the Periods at Issue.

14. On March 2, 2011, the Department issued proposed assessments against Petitioner, as a responsible person, for the balances due for the Periods at Issue.

CONCLUSIONS OF LAW

1. The parties are properly before the undersigned Administrative Law Judge and jurisdiction and venue are proper.

2. Under Article 5 of the North Carolina Revenue Act (“Act”), N.C. Gen. Stat. § 105-164.1 *et. seq.*, retailers have a statutory duty to collect “the tax due on an item when the item is sold at retail.” N.C. Gen. Stat. § 105-164.7.

3. Retailers act as trustees on behalf of the state and hold taxes collected in trust for the state. *See* N.C. Gen. Stat. § 105-164.7 (“A retailer is considered to act as a trustee on behalf of the state when it collects tax from the purchaser of a taxable item.”).

4. To prevent these trustees from diverting the taxes collected in trust for the state to their own personal use, North Carolina has extended the statutory duty to collect and hold such taxes in trust for the state to certain responsible persons within the business entity.

5. N.C. Gen. Stat. § 105-242.2, entitled “Personal liability when certain taxes not paid,” specifically addresses responsible person liability, which provides that “each responsible person in a business entity is personally and individually liable for all of the taxes listed in this subsection.” N.C. Gen. Stat. § 105-242.2(b).

6. These taxes include, “all sales and use taxes collected by the business entity upon its taxable transactions.” N.C. Gen. Stat. § 105-242.2(b)(1).

7. A “responsible person” is defined as “[a] manager of a limited liability company.” N.C. Gen. Stat. § 105-242.2(a)(2)b.

8. Pursuant to N.C. Gen. Stat. § 105-242.2(a)(2)b, Petitioner, as a manager of the limited liability company, is a responsible person for the tax due on the returns of REFS during the Periods at Issue. During the Periods at Issue, REFS collected the sales tax and did not remit the tax to the Department. As a manager of REFS, Petitioner is a responsible person as defined by N.C. Gen. Stat. § 105-242.2(a)(2) and the assessments for sales taxes, penalties, and interest

against Petitioner are lawful and correct under the statutes. Petitioner is liable for tax as assessed, including penalties and interest. N.C. Gen. Stat. § 105-228.90(b)(7).

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby determines that while the Department did not err in issuing its Notice of Final Determination, it is recommended that the parties enter into negotiations toward a 24-month payment plan which includes waiver of penalties due to Petitioner's good faith efforts to get the taxes paid.

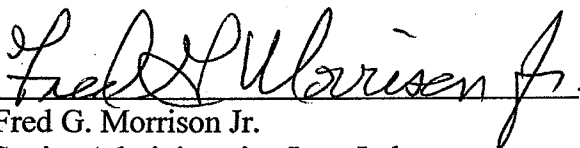
NOTICE

Pursuant to N.C. Gen. Stat. § 150B-45, a party who desires to appeal this Final Decision 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 and in accordance with the procedures for a mandatory business case set forth in N.C. Gen. Stat. § 7A-45.4(b) through (f) within 30 days after being served with a written copy of this Final Decision. Before filing a Petition for Judicial Review, a taxpayer must pay the amount of taxes, penalties, and interest that this Final Decision states is due. N.C. Gen. Stat. § 105-241.16. The tax, penalties, interest, and rate of interest accrues are calculated as of January 10, 2012 as follows:

State Tax (as shown on Notice of Final Determination)	\$16,325.31
County Tax (as shown on Notice of Final Determination)	\$5,678.37
Penalties (as shown on Notice of Final Determination)	\$5,746.72
Interest (updated through January 10, 2013) *	<u>\$3,810.35</u>
Total due as of January 10, 2013	\$31,560.75

***Plus daily interest which accrues at the rate of \$3.01 per day.**

This the 14 day of February, 2013.


Fred G. Morrison Jr.
Senior Administrative Law Judge