

STATE OF NORTH CAROLINA

**BEFORE THE
TAX REVIEW BOARD**

COUNTY OF WAKE

IN THE MATTER OF:

The Refund Claims for Installment Paper)
Dealer Tax for the period beginning July 1,)
1997 through June 30, 2000 filed by)

**ADMINISTRATIVE DECISION
NUMBER: 418**

**CONSECO FINANCE SERVICING)
CORP.)**

vs.)

**NORTH CAROLINA DEPARTMENT)
OF REVENUE)**

This matter was heard before the Regular Tax Review Board (hereinafter "Board" in the City of Raleigh, Wake County, North Carolina on Tuesday, June 17, 2003 upon a petition filed pursuant to N.C. Gen. Stat. § 105-241.2(a)(2) by **Conseco Finance Servicing Corporation** (hereinafter "Taxpayer") for administrative review of the adverse decision entered by the Secretary of Revenue on April 4, 2002, sustaining the auditors' adjustment of the refund claimed on installment paper purchased from out-of-state dealers.

Conseco Finance Servicing Corporation ("Taxpayer") is engaged in the business of buying installment paper. Taxpayer is a subsidiary of Conseco Finance Corporation ("Finance") which is in business of financing mobile homes and other tangible personal property. Taxpayer has several offices in North Carolina, including Winston-Salem, Charlotte, Raleigh and Asheville. Taxpayer filed installment paper dealer tax returns for the period beginning July 1, 1997 through June 30, 2000.

Conseco ("Taxpayer") appeals from an adverse decision of the Assistant Secretary of Revenue entered on April 4, 2002 that sustained the Department of Revenue's partial denial of Taxpayer's claims for refund of installment paper dealer tax. Taxpayer submitted claims for a partial refund totaling \$313,425.68 for the overpayment of "Installment Paper Tax" purportedly assessed and paid pursuant to N.C. Gen. Stat. § 105-83 for the period at issue. During the course of examining Taxpayer's claim, the auditors discovered certain errors and reduced the claim by \$5,201.27. The Taxpayer does not dispute the adjustment. The auditors also discovered that the Taxpayer had under-reported its tax liability on its installment paper dealer tax returns by failing to include the face value of certain installment paper it had purchased. The refund claim was further reduced by \$129,220.67. The Taxpayer timely protested this adjustment and requested a hearing that was held by the Assistant Secretary on December 4, 2001. On April 4, 2002, the Assistant Secretary issued his final decision that sustained the partial

denial of the refund claim. Thereafter, the Taxpayer timely filed a petition for administrative review of the final decision with the Tax Review Board.

ISSUE

Is the Taxpayer required to include the face value of installment paper on property located in North Carolina and secured by a lien in this State in the calculation of the installment paper dealer tax if the property is purchased from an out-of-state retailer?

EVIDENCE

Pursuant to N.C. Gen. Stat. § 105-241.2(b), the Board reviewed all the documents, records, data, evidence and other materials that the parties presented at the hearing before the Assistant Secretary. Based upon the Board's review of the documentation, that evidence is incorporated by reference and is made a part of this administrative decision.

FINDINGS OF FACT

The Board reviewed and considered the following findings of fact entered by the Assistant Secretary in his decision regarding this matter:

1. Taxpayer (f/k/a Green Tree Financial Servicing Corporation) is a Delaware corporation engaged in the business of financing and leasing various types of tangible personal property, and purchasing installment paper.
2. Taxpayer is a subsidiary of Conseco Finance Corporation ("Conseco"), which is in the business of financing mobile homes and other tangible personal property.
3. Taxpayer has several offices in North Carolina, including Winston-Salem, Charlotte, Raleigh, and Asheville.
4. The Department conducted an audit at the corporate headquarters of Conseco in St. Paul, Minnesota.
5. During the audit, the Taxpayer provided copies of its Installment Paper Dealer Tax returns for the quarters ending September 1997 through 2000 along with the details for the tax returns including: listing region, territory, account number, state code, date of transaction, loan type, proceeds, and total amount financed.
6. Taxpayer also submitted two claims for partial refund of taxes paid during the period beginning July 1, 1997 through September 30, 1997 and the period beginning October 1, 1997 through June 30, 2000 in the amount of \$21,367.60 and \$292,058.08, respectively, pursuant to N.C. Gen. Stat. § 105-266.1.

7. Taxpayer claimed there were three categories of overpayment and provided the auditor with three separate schedules (A, B, and C) for each category, described as follows:

Schedule A lists payments of tax on contracts in which the buyer resided outside of North Carolina (property must be located in this State to be subject to the Installment Paper Dealer tax on the contract for the property);

Schedule B lists payments of tax on contracts with no dealer involvement (refinancing of existing contracts, where no third party from whom contract is purchased exists); and

Schedule C lists payments of tax on the finance charges on the installment contract (finance charges are not part of the face value or amount financed, upon which tax is due.)

8. The auditors requested a sample of contracts to confirm which type of overpayment was represented and examined the original installment paper tax returns to verify that the value of the installment paper had actually been included in those returns.
9. The auditors also examined motor vehicle titles registered with the North Carolina Division of Motor Vehicles (DMV). These motor vehicle titles showed the existence of a lien on the tangible personal property, and their title numbers were used to obtain names and dates of liens in order to request additional contracts to examine.
10. During the examination, the auditors determined that some of the installment paper in Taxpayer's Schedule A had been included in that refund category in error, since examination of the relevant documents showed that the purchaser had a North Carolina address.
11. An additional sample of that type of contract was requested and examined, and an error rate was determined on the basis of the errors found in the sample. The rate was applied to that refund category and the refund was reduced by \$5,201.37.
12. The auditors also discovered a number of liens associated with installments paper, which had not been reported on any of the Taxpayer's installment paper tax returns. The installment paper in this group involved property purchased by North Carolina residents from out-of-state dealers.
13. The auditors concluded that the unreported installment paper should have been included in Taxpayer's return since the property upon which the lien is taken was located in this State.

14. The auditors then further reduced the refund by \$129,220.67, the amount of the computed tax on the improperly excluded contracts.
15. In the final audit report dated August 14, 2001, the claim for refund was partially denied in the total amount of \$134,422.04.
16. The Taxpayer accepted the \$5,201.37 adjustment, but timely protested the adjustment of \$129,220.67 in its letter dated September 12, 2001.

CONCLUSIONS OF LAW

The Board reviewed and considered the following conclusions of law made by the Assistant Secretary in his decision regarding this matter:

1. N.C. Gen. Stat. § 105-83 states: “Every person engaged in the business of dealing in, buying, or discounting installment paper, notes, bonds, contracts, or evidences of debt for which, at the time of or in connection with the execution of the instruments, a lien is reserved or taken upon personal property located in this State to secure the payment of the obligations, shall submit to the Secretary...a full, accurate, and complete statement, verified by the officer, agent, or person making the statement, of the total face value of the obligations dealt in, bought, or discounted within the preceding three calendar months and, at the same time, shall pay a tax of two hundred seventy-seven thousandths of one percent (.277%) of the face value of these obligations.”
2. Pursuant to N.C. Gen. Stat. § 105-33(a), taxes imposed under Article 2 are imposed for the privilege of carrying on the business, exercising the privilege, or doing the act named.
3. The installment paper dealer tax levied under N.C. Gen. Stat. § 105-83 is a privilege tax imposed upon persons engaged in the business of dealing in, buying or discounting installment paper for the privilege of engaging in such business.
4. The business of “dealing in, buying, or discounting installment paper” neither begins nor ends with Taxpayer’s formal acceptance of the installment paper. Instead, it encompasses the entire range of conduct in furtherance of Taxpayer’s financing business.
5. The installment paper dealer tax is not a transactional tax.
6. Neither the underlying consumer purchase or the purchase of installment paper is the incidence of the tax.
7. The imposition of the privilege tax must be upheld if activity incident to and in furtherance of the business is conducted within the State notwithstanding that documents necessary to the business are executed, accepted, or transferred

elsewhere.

8. N.C. Gen. Stat. § 105-83 does not require that the property securing the obligation be purchased in North Carolina.
9. Taxpayer is engaged in the business of dealing in, buying, or discounting installment paper in North Carolina.
10. At the time of or in connection with the execution of all of the instruments included in the calculation of the tax, a lien was reserved or taken upon personal property located in this State to secure the payment of the obligations.
11. Taxpayer is subject to the installment paper dealer tax under N.C. Gen. Stat. § 105-83.
12. Taxpayer is required to include the total face value of all obligations bought which are secured by property located in this State in the calculation of the installment paper dealer tax.
13. A finding that Taxpayer is entitled to a refund of taxes paid on installment paper purchased from out-of-state dealers because the tax violates the Commerce Clause requires a ruling or declaration by the Secretary that N. C. Gen. Stat. § 105-83 operates in an unconstitutional manner as to the Taxpayer.
14. The Secretary has no authority under N.C. Gen. Stat. § 105-266.1 to order the refund of an invalid or illegal tax, since questions of constitutionality are for the courts.
15. N.C. Gen. Stat. § 105-266.1 does not provide an exception to the general rule that voluntary payments of unconstitutional tax are not refundable.
16. The only remedy for challenging a tax provision as being unlawful or invalid as opposed to being excessive or incorrect is found in N.C. Gen. Stat. § 105-267.
17. Taxpayer has the burden of establishing that its claim for refund under N.C. Gen. Stat. § 105-266.1 results from paying an incorrect or excessive tax computed in accordance with the applicable statutory provisions.
18. Taxpayer has not established that the auditors' \$129,220.67 reduction of the refund claim was incorrect.
19. The auditors properly adjusted the refund claim to include installment paper purchased from out-of-state dealers secured by property located in North Carolina.

DECISION

The scope of administrative review for petitions filed with the Tax Review Board is governed by N.C. Gen. Stat. § 105-241.2(b2). After the Tax Review Board conducts an administrative hearing, this statute provides in pertinent part:

(b2). “The Board shall confirm, modify, reverse, reduce or increase the assessment or decision of the Secretary.”

This case involves the question of whether the face value of installment paper on property located in North Carolina and secured by a lien in this State is includible in the calculation of the installment paper dealer tax imposed under N.C. Gen. Stat. § 105-83 if the property is purchased from an out-of-state retailer.

Taxpayer is in the business of financing and leasing various types of tangible personal property, and purchasing installment paper. Taxpayer has several offices in North Carolina, including Winston Salem, Charlotte, Raleigh, and Asheville.

The Taxpayer contends that the installment paper purchased from mobile home retailers located outside of North Carolina is beyond the reach of the statute notwithstanding that the property securing the obligation is located in the state. The Taxpayer also contends that, concerning the sales of installment paper at issue, it conducted no activity in North Carolina, which is “incident to the buying and selling of such installment paper.” The Taxpayer argues that the incidence of the tax is the assignment of the installment paper, which it contends occurred outside of North Carolina. Thus, the Taxpayer argues that the face value of the installment paper that was assigned to it outside the state should be excluded from the calculation of the tax imposed by N.C. Gen. Stat. § 105-83.

The Department of Revenue, through counsel, argues that the Assistant Secretary properly found that, as an installment paper dealer engaged in business in this state, the Taxpayer was required to include the face value of all installment obligations it bought which were secured by property located in North Carolina in the calculation of the tax imposed by N.C. Gen. Stat. § 105-83. In support of this argument, the Department of Revenue notes that the Court of Appeals has rejected the very same argument raised by the Taxpayer in its Petition in Chrysler Financial Company v. Offerman, 138 N.C. App. 268, 531 S.E.2d 223, rev. denied, 352 N.C. 588, 544 S.E.2d 777 (2000). In that case, the Court recognized that where the assignment of the installment paper occurs is not determinative; and that the activity triggering the tax is not limited to the actual transfer of the paper. The “tax is to be assessed for engaging in the business of dealing in installment paper in North Carolina.” Id., 138 N.C. App. at 273, 531 S.E.2d at 226.

It is the function of this Board, upon administrative review, to review the record and determine whether the final decision is proper based upon the evidence presented at the hearing before the Assistant Secretary. Thus, the Board having conducted an administrative hearing in this matter, and having considered the petition, the briefs, the whole record and the Assistant Secretary’s final decision, concludes that the findings of fact made by the Assistant Secretary were supported by competent evidence in the record; that based upon the findings of fact, the Assistant Secretary’s conclusions of law were fully supported by the findings of fact; therefore the decision of the Assistant Secretary should be confirmed.

WHEREFORE, THE BOARD ORDERS that the Assistant Secretary’s final decision be confirmed in every respect.

Made and entered into the _____ day of _____ 2003.

TAX REVIEW BOARD

Signature _____
Richard H. Moore, Chairman
State Treasurer

Signature _____
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature _____
Noel L. Allen, Appointed Member