

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE
SECRETARY OF REVENUE

IN THE MATTER OF:

The Proposed Refund of Sales and Use)
Tax for the period June 1, 1997 through)
March 31, 2000 by the Secretary of)
Revenue)
vs.)
[Taxpayer])

FINAL DECISION
Docket No. 2001-235

This matter was heard before the Acting Assistant Secretary of Revenue, Mrs. Marilyn R. Mudge, in the City of Raleigh, on May 15, 2001, upon application for hearing by the Taxpayer wherein it protested denial of a refund claimed for the period June 1, 1997 through March 31, 2000. A second hearing was held by the Assistant Secretary of Revenue, Mr. Eugene J. Cella on July 16, 2001 pursuant to the request of the Taxpayer. The hearings were held pursuant to G.S. 105-260.1. The Taxpayer was represented at the hearings by [Taxpayer's Vice President] and [the Chief Consultant for the Taxpayer]. The Sales and Use Tax Division was represented by Mr. W. Timothy Holmes, Assistant Director and Mr. William C. Shelton, Administration Officer. The final decision was rendered by Mr. Eugene J. Cella, the current Assistant Secretary of Revenue.

Pursuant to G.S. 105-266.1, the Department denied the Taxpayer's refund claim in the amount of \$79,100.88 on December 20, 2000. The Taxpayer filed a protest on July 13, 2001 to the denied refund claim and timely requested a hearing before the Secretary of Revenue.

ISSUES

The issues to be decided in this matter are as follows:

1. Is the Taxpayer entitled to retain tax collected from customers which is an amount in excess of the amount of tax paid on the cost of the tangible personal property used in the performance of a contract?
2. Was the tax erroneously collected by the Taxpayer?

EVIDENCE

The following items were introduced into evidence by the parties.

1. Copy of the Taxpayer's AS/RP-1, Registration Application, dated January 14, 1994, designated Exhibit E-1.
2. Taxpayer's claim for refund, Form E-588, Claim for Refund of State and County Sales and Use Taxes, and related backup documentation, dated May 5, 2000, designated Exhibit E-2.
3. Letter dated July 13, 2000 from the Taxpayer's representative to the Department, designated Exhibit E-3.
4. Letter dated August 10, 2000 from the Interstate Examination Division to the Taxpayer's representative, designated Exhibit E-4.
5. Power of Attorney dated September 5, 2000 from the Taxpayer's representative on behalf of the Taxpayer, designated Exhibit E-5.
6. Letter and monthly sales and use tax report documentation dated November 2, 2000 from the Taxpayer's representative to the Interstate Examination Division, designated Exhibit E-6.
7. Letter dated November 15, 2000 from the Taxpayer's representative to the Interstate Examination Division, designated Exhibit E-7.
8. Copy of the Taxpayer's procedures on lump sum contracts dated December 13, 2000, designated Exhibit E-8.
9. Letter dated December 20, 2000 from the Interstate Examination Division to the Taxpayer's representative, designated Exhibit E-9.
10. Letter dated January 2, 2001 from the Taxpayer's representative to the Secretary of Revenue, designated Exhibit E-10.
11. Facsimile transmittal sheet dated January 18, 2001 and refund summary sheet from the Taxpayer's representative to the Interstate Examination Division, designated Exhibit E-11.
12. Letter dated February 5, 2001 from the Sales and Use Tax Division to the Taxpayer's representative, designated Exhibit E-12.
13. Sales and Use Tax Bulletin No. 33 dated April 15, 1991, designated Exhibit E-13.
14. Sales and Use Tax Administrative Rule 17 NCAC 7B .2608 dated June 28, 1996, designated Exhibit E-14.
15. Sales and Use Tax Technical Bulletin 31-1 dated October 15, 1998, designated Exhibit E-15.

16. Sales and Use Tax Technical Bulletin 31-2 dated October 15, 1998, designated Exhibit E-16.
17. Sales and Use Tax Technical Bulletin 31-3 dated October 15, 1998, designated Exhibit E-17.
18. Redacted Final Decision, Docket No. 94-10 dated October 17, 1994, designated Exhibit E-18.
19. Memorandum dated March 13, 2001 from the Secretary of Revenue to the Acting Assistant Secretary of Tax Administration, designated Exhibit E-19.
20. Letter dated March 26, 2001 from the Acting Assistant Secretary of Revenue to the Taxpayer's representative, designated Exhibit E-20.
21. Memorandum dated May 16, 2001 from the Secretary of Revenue to the Assistant Secretary of Administrative Hearings, designated Exhibit E-21.
22. Letter and documentation dated May 26, 2001 from the Taxpayer's Vice President and General Manager to the Acting Assistant Secretary of Revenue, designated Exhibit E-22.
23. Memorandum dated June 8, 2001 and attached copies of various Taxpayer's invoices from the Sales and Use Tax Division to the Acting Assistant Secretary of Revenue, designated Exhibit E-23.
24. Letter dated June 26, 2001 from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-24.
25. Letter dated July 3, 2001 from the Assistant Secretary of Revenue to the Taxpayer, designated Exhibit E-25.

Evidence presented by the Taxpayer at the Hearing on May 15, 2001 consisted of the following:

1. Construction contract between the Taxpayer and a sub-contractor dated December 21, 1998, designated Exhibit TP-1.
2. Subcontract agreement between the Taxpayer and a sub-contractor dated October 7, 1999, designated Exhibit TP-2.
3. Subcontract agreement between the Taxpayer and a sub-contractor dated February 12, 2001, designated Exhibit TP-3.

FINDINGS OF FACT

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

1. The Taxpayer is a contractor and subcontractor that constructs and erects customized concrete structural buildings such as those used in buildings, stadiums, and parking garages.
2. The Taxpayer's concrete products are produced at the Taxpayer's [out-of-state manufacturing facility] and erected or installed at the customers' job sites in North Carolina pursuant to performance contracts.
3. The Taxpayer calculated "sales tax" on manufacturing labor and marked-up the cost of the tangible personal property used in its performance contracts. The sales tax was separately stated on the Taxpayer's invoices provided to its customers. Charges for erection labor were excluded from sales tax on the Taxpayer's invoices.
4. The charge labeled "sales tax" on the Taxpayer's invoices to its customers was equal to the amount of applicable State and local sales tax.
5. The Taxpayer collected no more money from its customers than the total fixed contract amount agreed upon by its customers.
6. The Taxpayer refused to refund its customers the amount of the sales tax charged on invoices and collected in excess of the actual use tax due on its cost of materials used in its performance contracts.
7. No written advice regarding the correct application of tax to the Taxpayer's business, in particular its billing practices, was sought by the Taxpayer or received from the Department.
8. Portions of the refund amount claimed by the Taxpayer have already been refunded to a church or local governmental organizations based upon the invoices the Taxpayer furnished to its customers. This refund was obtained by the church and governmental organizations based on the information furnished by the Taxpayer's customers.
9. The Taxpayer's refund claim was timely filed pursuant to G.S. 105-266.1.

CONCLUSIONS OF LAW

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

1. The Taxpayer did not request or receive written advice on his business and billing practices from the Department to protect him pursuant to G.S. 105-264.
2. The amount of sales tax collected by the Taxpayer from its customers in excess of the amount of use tax due on its purchases of materials used in its performance contracts represents an erroneous collection pursuant to G.S. 105-164.11.

3. Portions of the refund amount claimed by the Taxpayer have already been refunded to a church or governmental organization pursuant to G.S. 105-164.14.
4. The refund claim was timely filed pursuant to G.S. 105-266.1.

DECISION

The Taxpayer corporation is a contractor and sub-contractor that produces and erects customized concrete structural buildings and components such as those used in buildings, stadiums, and parking garages. The product is produced at the Taxpayer's [out-of-state manufacturing facility] and erected or installed at various job sites in North Carolina and other states pursuant to performance contracts. In its billings to its sub-contractor customers, the Taxpayer calculated "sales tax" on manufacturing labor and marked-up the cost of the tangible personal property used in its performance contracts and set this amount out separately on the invoices provided to its customers. Charges for erection labor were excluded from sales tax on the Taxpayer's invoices. As a contractor, the Taxpayer was only liable for remitting use tax on the cost basis of the raw materials used in its performance contracts in North Carolina.

The amount claimed on the refund represents the excess of the erroneous "sales tax" collected from its customers and the use tax which would actually have been due on the cost of the raw materials. On at least three instances, the sales tax listed on the Taxpayer's invoices was reflected in refund claims filed with the Department by a church or governmental organizations pursuant to G.S. 105-164.14. The sales tax information was obtained by the church or governmental organizations from the Taxpayer's contractor and sub-contractors customers based on the Taxpayer's invoices furnished to their customers and in turn summarized to the church or governmental organizations by the Taxpayer's customers. The statutes do not permit the Secretary to refund the same funds to the church, governmental organizations, and the Taxpayer.

The Taxpayer responds that a signed contract with an agreed fixed amount is in place between the Taxpayer and its customer before sales taxes are ever computed. The Taxpayer

also asserts that it is only obligated to remit to the Department the tax computed on the cost basis of the materials used in the jobs. The Taxpayer collected no more than the fixed total contract amount agreed upon by its customer. The Taxpayer initially argued that its customers never received any invoices listing the “sales tax” separately; however, an investigation by the Sales and Use Tax Division proved otherwise. In fact, during the refund period, the Taxpayer’s customers received invoices from the Taxpayer setting forth the marked-up materials price with the “sales tax” set forth separately thereon. The Taxpayer no longer sends invoices to its customers.

The Department argues that a refund is not due since the Taxpayer is unwilling to refund its customers for the excess “sales tax” collected. The amount of sales tax collected by the Taxpayer from its customers in excess of the amount of use tax due on its purchases of materials used in its performance contracts represents an erroneous collection pursuant to G.S. 105-164.11. The statute prohibits a refund unless the purchaser has either received credit or has been refunded for the amount of the tax erroneously charged.

G.S. 105-164.11 is reinforced and supported by Sales and Use Tax Technical Bulletins 31-2 and 31-3 as well as Sales and Use Tax Administrative Code 17 NCAC 7B .2608. The statute, technical bulletins, and administrative rules prevents a Taxpayer from financially benefiting from any excessive or erroneous collection of taxes, whether inadvertent or intentional.

G.S. 105-264 provides a means for Taxpayers to both educate and protect themselves with respect to the manner and means with which they conduct business. Simply put, a written opinion from the Department is binding upon the Department. The Taxpayer had full access to advice from the Sales and Use Tax Division but no evidence has been presented by either party to show that the Taxpayer availed itself of the general statutes, administrative rules, technical bulletins, written opinions, or other free informational services offered by the Department. The

Taxpayer would be protected by G.S. 105-264 had it sought a written opinion from the Department on its method of billing its customers.

The Taxpayer clearly charged its customers an amount equal to the amount of sales tax applicable to the transaction, exclusive of erection labor, and then labeled that charge as "sales tax" on the invoice. The Taxpayer's sub-contractor and contractor customers could only logically believe that they were remitting the sales tax shown on their invoices to the Taxpayer. I do understand that the total amount collected by the Taxpayer represents only the amount of the written agreement between Taxpayer and its customers; however, the amount depicted as "sales tax" on the Taxpayer's invoices is an erroneous collection which is clearly addressed by G.S. 105-164.11. The statutes simply do not permit the Taxpayer to benefit from its method of invoicing customers, to the detriment of its customers, notwithstanding that the error was unintentional. For this reason, I must sustain the Sales and Use Tax Division's position and deny the refund claimed.

This 28th day of August, 2001.

Signature _____

Eugene J. Cella
Assistant Secretary of Administrative Hearings