

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
21 REV 03759

Wireless Center of NC Inc Petitioner, v. NC Department of Revenue Respondent.	FINAL DECISION
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THIS MATTER came on for hearing before the Honorable Karlene S. Turrentine, Administrative Law Judge, on January 25, 2022 at the North Carolina Office of Administrative Hearings in Raleigh, Wake County, North Carolina.

APPEARANCES

For Petitioner: Wireless Center of NC, Inc., *pro se*
Faye Ngalandou,¹ Petitioner-Representative
(pursuant to N.C.G.S. § 150B-23(a))
1390 Walkup Avenue,
Monroe, North Carolina

For Respondent: Perry J. Pelaez, Special Deputy Attorney General
North Carolina Department of Justice
Raleigh, North Carolina

WITNESSES

For Petitioner:

The Petitioner presented testimony from: Faye Ngalandou, owner and operator of Wireless Center of NC, Inc.

¹ Many of the documents in this case, including the transcript reflect Petitioner's owner's name as Ngalandou Faye. However, when introducing himself to the Tribunal, he stated his name to be Faye Ngalandou. This name is also reflected in the Petitioner's Articles of Incorporation and Annual Reports filed with the NC Secretary of State, of which the undersigned takes official notice. The Undersigned notes, that during the trial, the parties and the Tribunal referred to him as "Mr. Faye."

For Respondent:

The Respondent presented testimony from: Andrew Furuseth, Director of Sales and Use Division of the NC Department of Revenue.

EXHIBITS

For Petitioner:

EXHIBIT NO.	PETITIONER'S EXHIBITS #1-3, 11 & 12 ADMITTED WITHOUT OBJECTION #4-10 ADMITTED OVER RESPONDENT'S OBJECTION OF HEARSAY—RESPONDENT HAVING ADMITTED IT RECEIVED ALL THE EXHIBITS AND CONSIDERED THEM IN ITS FINAL DECISION
1	Wireless store layout
2	Portion of Wireless' contract (pgs. 7-31)
3	Ltr. from Faye Ngalandou to OAH Clerk of Court—8 point argument
4	May 22, 2020 Certified ltr from Stanton P. Geller (former attorney for Wireless) to Edward Elliott, NC DOR Sales & Use Tax Division Administrative Officer
5	July 14, 2020 ltr from Stanton P. Geller (former attorney for Wireless) to Edward Elliott, NC DOR Sales & Use Tax Division Administrative Officer
6	Petitioner's October 23, 2019 Notice to Respondent of Specific Objections to its Notice of Proposed Assessment
7	October 15, 2019 Affidavit of Sprint/Boost Mobile's Senior State Tax Counsel Anthony M. Whalen
8	Boost Mobile's acknowledgement it collects all sales and use taxes beginning September 8, 2017 (Same as Respondent's Exh 4)
9	Emails & Sprint/T-Mobile ltr (May 14, 2021) confirming as of September 8, 2017, Boost relaunched as "tax inclusive" and collected taxes directly from customers, then reported those taxes in North Carolina through Sprint Spectrum, LP & SprintCom. After which time, dealers were responsible only for collection of sales tax on equipment sales. (Letter is same as Respondent's Exh 5).
10	November 23, 2001 ltr from Cathy E. Tucker, former Actify Wireless Account Manager
11	July 7, 2021 Notice of Final Determination (same as Resp's Exh 9)
12	NC DOR Sales & Use Tax Audit Remarks

For Respondent:

EXHIBIT NO.	RESPONDENT'S EXHIBITS ADMITTED OVER RESPONDENT'S OBJECTION
1	Sprint Prepaid Group (SPG) Retailer Acknowledgment to Participate in Branded Retailer Program (Effective 4/18/2016)

2	Sprint Prepaid Group (SPG) Retailer Agreement to Participate in SPG's Retailer Program (Effective 5/9/2017)
3	Epay Merchant Services Agreement (Signed 11/17/2017)
4	Boost Mobile Template Letter (Included in Petitioner's Exh 8)
5	Sprint Letter dated May 14, 2021 (Included in Petitioner's Exh 9)
6	Wireless Center's Contention of Payments Processed on Behalf of Boost Mobile During the Audit Period
7	Commissions Paid by Boost to Wireless Center During Audit Period
8	Wireless Center's Attachment to Prehearing Statement, Petitioner's Position on the Assessment (filed October 7, 2021)
9	Notice of Final Determination dated July 7, 2021
10	Auditor's Report dated September 20, 2019
11	Petitioner's Responses to Respondent's First Request for Admissions
12	Petitioner's Answers to Respondent's First Set of Interrogatories
13	Petitioner's Responses to Respondent's First Request for Production of Documents
14	North Carolina Department of Revenue's Notice to Registered Taxpayers dated 09/2006
15	North Carolina Department of Revenue – Sales and Use Tax Division's Notice to Taxpayers dated 09/2012
16	North Carolina General Assembly Session 2001, Session 2001-430, House Bill 571
17	Excerpts of N.C.G.S. § 105-164.3 (2017) Definitions
18	N.C.G.S. § 105-164.4 (2017) Tax imposed on retailers
19	N.C.G.S. § 105-164.22 (2017) Record-keeping requirements
20	N.C.G.S. § 105-164.26 (2017) Presumption that sales are taxable
21	Excerpts from the Deposition of Ngalandou Faye - Pages 124-126; 143
22	North Carolina Department of Revenue's Notice to Registered Taxpayers dated 11/01
23	2001 Tax Law Changes – S.L. 2001-17, HB 193 – (Excerpts) Simply Taxes on Telecommunications
24	2006 Finance Law Changes – S.L. 2006-17, HB 1898 – (Excerpts) SSTA Sales Tax Defn/Sales Tax Payments
25	Letter dated 9/21/2020 from the NCDOR to Stanton P. Geller
26	Email dated 1/3/2022 from Edward K. Elliott to Perry Pelaez and Mark Brown

AFTER CAREFUL CONSIDERATION of the sworn witness testimony presented at the hearing, the documents and exhibits admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following:

FINDING OF FACTS

1. Petitioner Wireless Center of NC, Inc. (“Petitioner” or “Taxpayer”) is an independent contractor and agent of Boost Mobile, engaged in the business of retail sales of cellular phone equipment. Petitioner also sells prepaid wireless phone services, gift cards and RTRs for Boost Mobile; however, the Parties dispute whether Petitioner is the retailer for these additional services sold.

2. RTRs are defined as “real time replenishments of Airtime units for use on Sprint’s network.... With RTR, no Airtime vouchers are created, no inactive Airtime units are stored with a technology service provider, and Airtime is immediately added directly to a Customer Account when the Airtime is purchased.” Respondent’s Exh 2, p. 14 of 31.

3. At all times relevant hereto and through May 31, 2020, Boost Mobile was owned by Sprint (later T-Mobile/Sprint). Petitioner’s Exh 9, p.3. (Herein, “Sprint,” “Boost Mobile” and, “Sprint/Boost Mobile” are used interchangeably.)

4. Petitioner is contractually obligated to advertise and sell products and services for Sprint/Boost Mobile alone and no other wireless phone company. Petitioner sells items for Boost and deposits the proceeds therefrom into an account from which Boost promptly withdraws all proceeds except Petitioner’s commissions.

5. It is undisputed that, during the tax years of 2016, 2017 and, 2018 (together herein, “the period at issue”), while in the business of the retail sales outlined in paragraph 1 above, Petitioner collected and remitted to Respondent all sales tax required on phone equipment sold but Petitioner did *not* collect any sales tax on the sale of prepaid wireless phone service.

6. In its Notice of Final Determination (document constituting agency action) dated July 7, 2021, Respondent assessed Petitioner with additional tax, penalties, and interest in the amount of \$516,700.37 for the period at issue, based on Petitioner’s *gross* receipts. Respondent’s Exh 9. (Mr. Furuseth testified the Department used Petitioner’s 2016 and 2017 gross receipts—not just gross sales receipts—because Petitioner did not have separate records documenting such.)

7. Petitioner timely filed its Petition for a Contested Case Hearing on September 1, 2021 and its Prehearing Statement on October 7, 2021.

8. In its Petition, Petitioner challenged Respondent’s

“decision to use the gross receipts as reported on forms SD-401S []as arbitrary and capricious[, as well as...Respondent’s] inclu[sion]in the proposed tax assessment [of] substantial amounts that already have been collected and paid by Boost Mobile. ...Boost mobile [sic] as the owner of the network explicitly assumes responsibility

and agrees to be the retailer of those transactions and has been effectively collecting and remitting the related taxes.... By refusing to [deduct] such amounts [paid] from the proposed assessment[,], the department is in fact attempting to collect the sales tax twice on the same [transactions].”

Petition, Reasons for Appeal.

9. On October 8, 2021, Respondent filed its Prehearing Statement and Document Constituting Agency Action. In its Prehearing Statement, Respondent asserted that the issues to be resolved were: a) whether Petitioner is liable for the “additional sales tax, penalties and interest assessed [by Respondent] for the period [of] January 1, 2016 through December 31, 2018 (‘Period at Issue’)[, and; b) whether the assessed amount] is incorrect, where Petitioner failed to collect and remit sales tax to the State.” Resp. Prehearing Statement, ¶ 1.

10. This Tribunal finds there are four (4) issues to be determined:

a) Whether Respondent correctly determined that the Petitioner owed additional sales tax, interest, and penalties for wireless phone services, including RTRs sold during tax years 2016, 2017, and 2018;

b) Whether Boost Mobile paid to Respondent the taxes it collected September 8, 2017 through December 31, 2018 for services sold by Petitioner, and;

c) If Boost Mobile did pay the taxes, what portion, if any, of the newly assessed taxes, interest, and penalties for the period at issue is still owing?

d) Thus, the final issue to be determined is whether *the amount* of Respondent’s assessment of income tax, interest and penalties is correct or should any or all of Respondent’s determination be reversed.

11. Sometime in 2017, Boost Mobile noticed all its retailers that

“...effective September 8, 2017, Boost will discontinue the sale of Prepaid Credits and begin selling cards and digital replenishments (including PIN’s and RTRs) which are equivalent to, and treated at the point of sale as, stored-value cards.... Further, beginning September 8, 2017, Boost will begin collecting all taxes that apply to the sale and use of Stored-Value Cards [prepaid phone cards] at the time Stored-Value Cards are redeemed for Boost’s products and services.”

Petitioner’s Exh 8.

12. In an Affidavit dated October 15, 2019, Senior State Tax Counsel for Sprint, Anthony M. Whalen averred that he was “responsible for indirect taxes for Sprint’s lines of business, including Boost Mobile. Indirect taxes include sales taxes, telecommunications taxes, 911 fees, and similar charges.” Petitioner’s Exh 7, Whalen Affidavit. He continued:

Boost is the brand name under which Sprint sells contractless, low cost, telecommunications and related products and services. These services include wireless voice services, internet access service, text messaging, games, applications, ringtones, equipment insurance plans, and a variety of other electronically delivered services. Boost markets and advertises its services as ‘tax inclusive,’ which means the total price paid for each service includes a charge for applicable taxes and fees. Boost’s customer Terms and Conditions clearly reflect that applicable taxes and fees are being collected from customers at the time of redemption: ‘The total price you pay includes a charge for any products and services provided by Boost and a charge for any applicable taxes and fees.’

Boost customers can choose whether and when to purchase services as they need them, with no obligation for future or ongoing purchases. Boost customers must first add money to their accounts through a replenishment process [even if the first time], either by obtaining physical stored value cards or using an electronic replenishment process, effectuated either through Boost or its third-party dealers. **Boost replenishments, whether cards or electronic, represent an intangible right, can be used to purchase other products and services, and are not limited to purchasing telecommunications services. Replenishments operate for tax purposes like stored value cards, gift cards, or gift certificates, where no tax is due or collected on the initial sale, rather, tax is collected and due when the credits are redeemed at Boost and the customer selects the products or services they want to buy.**

Boost credits are added to customer’s account for future use. Using their online account, customers can use their credits to purchase service plans, add-ons, or other products or services.

Once a customer selects and purchases products or services, Boost [then] calculates the taxes and fees that apply to the purchase. Following the selection and payment, customers are able to access a summary of charges to their account. The summary displays both the charge for goods or services and separately stated charges for the applicable taxes, which together total the advertised tax-inclusive price. ...

Boost dealers are independent third party-owned businesses that sell Boost branded products including Boost replenishments and other items such as phones and accessories. **Boost dealers are responsible for charging, collecting, and remitting any appropriate taxes on all items sold in their stores. However, since replenishments, whether cards or electronic, operate for tax purposes like stored value cards, gift cards, or gift certificates, no tax is due on the initial sale at the Boost dealer. Boost is responsible for charging, collecting, and remitting any taxes that apply when the customer redeems the replenishment and selects the product or service they want to buy. Since Boost is a brand of Sprint, such taxes are remitted on Sprint’s tax returns.**

Id. (emphasis added).

13. During Respondent’s audit of Petitioner, Sprint/T-Mobile issued a letter, dated May 14, 2021,

“to clarify the roles and responsibilities Sprint (now of T-Mobile, USA) entities had with respect to Boost Mobile transactions. T-Mobile/Sprint sold its Boost line of business to Dish, which sale was effective June 1, 2020. For periods after that sale, Dish is the proper party to provide support and clarification of business practices, remittances, entities, and relationships.

Under Sprint’s ownership, there are two relevant periods—before and after September 8, 2017 (the date Boost was relaunched as a ‘tax inclusive’ offer to its customers). For all periods, **any taxes collected by Sprint/Boost from customers were reported in North Carolina by one of two legal entities**—Sprint Spectrum, LP (North Carolina registration number 600075926) and SprintCom, Inc. (North Carolina registration number 600135375).

For sales made before the change to ‘tax inclusive’ on September 8, 2017, the items sold by our dealer partners in their stores—physical top-up cards, RTR’s, PINs, other electronic replenishments, and equipment—should have been treated as prepaid wireless calling cards which, in North Carolina, were subject to either the POS 911 and sales tax (or both) at retail sale and dealers were obligated to collect tax on any taxable sales they made. Boost’s taxable sales would be limited to its direct sale of such top-ups, cards, RTRs, PINs, other electronic replenishments, and equipment sold to customers.

For sales made after September 8, 2017, as described in the affidavit previously shared, as part of the change to tax-inclusive, the timing of the taxable sale changed, as did the nature of the items sold by our dealer partners. Physical top-up cards, RTRs, PINs, and other electronic replenishments should have been treated as something akin to gift cards or stored value cards from a taxability perspective at dealer locations. When customers later selected service plans or related products for purchase, Boost would collect tax on taxable items and display the calculated tax to customers in their My Account page. Dealers would still have been responsible for the collection of sales tax on equipment sales.’

Petitioner’s Exh 9 (emphasis added).

14. Relying on N.C.G.S. § 105-164.4, Respondent argued prepaid wireless phone services are taxable at the point of sale not at the point of redemption.

“(a) A **privilege tax** is imposed on a retailer engaged in business in the State at the percentage rates of the retailer’s net taxable sales or gross receipts, listed in this

subsection. The general rate of tax is four and three-quarters percent (4.75%). The percentage rates are as follows:

(4d) The general rate applies to the gross receipts derived from the sale or recharge of prepaid telephone calling service. The tax applies regardless of whether tangible personal property, such as a card or a telephone, is transferred. **The tax applies to a service that is sold in conjunction with prepaid wireless calling service. Prepaid telephone calling service is taxable at the point of sale instead of at the point of use** and is sourced in accordance with G.S. 105-164.4B. Prepaid telephone calling service taxed under this subdivision is not subject to tax as a telecommunications service.

(b) The tax levied in this section shall be collected from the retailer and paid by him at the time and in the manner as hereinafter provided. A person engaging in business as a retailer shall pay the tax required on the net taxable sales of the business at the rates specified when proper books are kept showing separately the gross proceeds of taxable and nontaxable sales of items subject to tax under subsection (a) of this section in a form that may be accurately and conveniently checked by the Secretary or the Secretary's duly authorized agent. If the records are not kept separately, the tax shall be paid on the gross sales of the business and the exemptions and exclusions provided by this Article are not allowed. The tax levied in this section is in addition to all other taxes whether levied in the form of excise, license, privilege, or other taxes. The requirements of this subsection apply to facilitators liable for tax under this Article.

N.C.G.S. § 105-164.4(a) and (b) (emphasis added).

15. Respondent appears to ignore that as of September 8, 2017, Boost Mobile ceased selling prepaid wireless phone cards (“the nature of the items sold through [its] dealer partners[]” changed) and essentially converted all such cards into gift cards which could be used to later purchase phone service **or** equipment. See FOF #12 and #13 above. This is problematic because Respondent provided no evidence that the whole of the assessed tax was for a service that is sold in conjunction with prepaid wireless calling service, as required by N.C.G.S. § 105-164.4(a)(4d).

16. Mr. Furuseth testified that Boost’s new tax-inclusive policy is “against North Carolina law” because it did not require Petitioner to collect taxes at the point of sale. This assertion is based on the idea that the time of sale triggers the tax’s *collection* but this is only true for *sales tax*. Though both sales and privilege taxes are based on the point of sale, since the privilege tax is not required to be collected from the consumer at the point of sale, a taxpayer would not be out of line with the law so long as the tax is *paid on time*. Respondent offered no information or evidence of when the assessed tax actually came due to be paid.

17. Mr. Faye testified that Boost considers RTRs as gift cards on which taxes were not to be collected until customers redeemed them with Boost at a later time (at which time, Boost collects the sales tax). This position is supported by Sprint/Boost's tax specialist in the Affidavit of Anthony M. Whalen, dated October 15, 2019. *See* Petitioner's Exh 7, and; FOF #12 and #13 above. However, it is plain from Mr. Whalen's Affidavit that he is averring for how Boost conducted its business after September 8, 2017 when it went to a tax-inclusive business model. *Id.*

18. Mr. Furuseth testified there is no difference between RTRs and prepaid wireless service—a position that appears to hold true regarding the services sold by Petitioner prior to Boost Mobile's going tax-inclusive in its customer servicing on September 8, 2017. *See* Petitioner's Exh 9, p.3, Sprint/T-Mobile letter dated May 14, 2021 (emphasis added) and, FOF #13 above. Respondent confirms this is its position in its Proposed Decision, FOF #3, filed April 1, 2022.

19. There was no question at hearing regarding whether Petitioner had filed its returns in a timely manner for the years at issue. Further, it is uncontested that Petitioner paid all taxes due for equipment sold by it.

20. Throughout the audit as well as during the hearing, Petitioner asserted that RTRs were gift cards and challenged Respondent as to why it had not attempted to determine how much of the tax assessed Boost Mobile had paid. Petitioner consistently asserted Respondent should have inquired of Boost its payments for the allegedly owed taxes.

21. Our appellate courts have long held that:

“G.S. § 105-164.7 requires every retailer to a[ttach] the sales tax to the price of the article. Though stated and charged separately from the sales price, the sales tax constitutes a part of the purchase price. Notwithstanding that it is the intent of the law that the sales tax shall be passed on to the customer and that it not be borne by the retailer, the retailer is liable to the [Secretary] for the tax if he fails to collect it....”

Long Mfg. Co. v. Johnson, 264 N.C. 12, 16, 140 S.E.2d 744, 747 (1965).

“...[T]he intent of the law is that the sales tax be passed on to the consumer. N.C. Gen. Stat. 105-164.7; *Manufacturing Co. v. Johnson, Comr. of Revenue*, 264 N.C. 12, 140 S.E.2d 744 (1965). The law requires retailers to add the sales tax to the price of the article or items purchased. *Id.* Further, it is a misdemeanor for a retailer to offer to absorb the sales tax for the customer. N.C. Gen. Stat. 105-164.9. However, the retailer's failure to collect the sales tax does not excuse the retailer's liability for the tax. N.C. Gen. Stat. 105-164.7.”

Rent-A-Car Co. v. Lynch, 39 N.C. App. 709, 712, 251 S.E.2d 917, 920, *rev'd on other grounds*, 298 N.C. 559, 259 S.E.2d 564 (1979).

22. Petitioner admitted that it did not collect or pay taxes for RTRs or prepaid calling services at *any time* during the period at issue but asserts that Respondent should have and most likely did collect such tax from Boost (or Sprint, as noted in Mr. Whalen's Affidavit). Just as it had done with Respondent during and after the audit, Petitioner consistently directed the Tribunal to the letters, emails, advertisements & Affidavit of Sprint/Boost employees which reflect that Boost was collecting and remitting the taxes for such services sold by (or through) Petitioner.

23. Respondent ignores the fact that Sprint/T-Mobile is clear that “**[f]or sales made after September 8, 2017**, ... [including p]hysical top-up cards, RTRs, PINs, and other electronic replenishments...Boost...collect[ed] tax on taxable items and display[ed] the calculated tax to customers in their My Account page.” *Id.* (emphasis added).

24. However, Petitioner could not overcome the fact that Boost did not begin to do so until September 8, 2017. Moreover, in Petitioner's own exhibits, Sprint/T-Mobile/Boost are clear that until that date, the onus of collecting and remitting taxes—even on RTRs and prepaid calling services—was on their dealer partners, which included Petitioner.

25. When asked whether Sprint, T-Mobile, or Boost had, in fact paid any of the taxes assessed to Petitioner during the period at issue, Respondent simply responded that it could not discuss another taxpayer's obligations or payments with the Tribunal (presumably because they were not party to the litigation).

26. Respondent does not argue that Sprint/Boost Mobile did not collect and/or remit the owed taxes to Respondent.

27. Moreover, even though Sprint/Boost advised it is responsible for having collected and remitted sales tax on all prepaid wireless phone services sold on or after September 8, 2017 **and, that it had reported all taxes collected to Respondent, by one of two legal entities (Sprint Spectrum, LP or SprintCom, Inc.)**, Respondent never sought to determine the amount of taxes Sprint had collected from the services sold by Petitioner during the period at issue. Neither did Respondent ever seek to determine the amount Sprint paid in taxes based on the prepaid wireless phone services sold by Petitioner during the period at issue.

28. Due to this failure, it is more likely than not that Respondent has already been paid the taxes due on the prepaid wireless phone services sold by Petitioner from September 8, 2017 through December 31, 2018—almost half of the period at issue.

BASED ON the foregoing findings of fact, the Undersigned makes the following

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. The parties received proper notice of the hearing in this matter.

2. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law. A court need not make findings as to every fact, which arises from the evidence, and need only find those facts that are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, *aff'd*, 335 N.C. 234, 436 S.E.2d 588 (1993).

3. The NC Administrative Procedure Act (“the Act”) provides, in pertinent part, that:

A contested case shall be commenced by paying a fee in an amount established in G.S. 150B-23.2 and by filing a petition with the Office of Administrative Hearings and, except as provided in Article 3A of this Chapter, shall be conducted by that Office. ...A petition[...] if filed by a party other than an agency, shall state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner’s rights and that the agency did any of the following:

- (1) Exceeded its authority or jurisdiction.
- (2) Acted erroneously.
- (3) Failed to use proper procedure.
- (4) Acted arbitrarily or capriciously.
- (5) Failed to act as required by law or rule.

N.C.G.S. § 150B-23.

4. Under N.C.G.S. § 105-164.3: a retailer is defined, in pertinent part, as:

Any of the following persons:

- a. A person engaged in business of making sales at retail, offering to make sales at retail, or soliciting sales at retail of items sourced to this State. When the Secretary finds it necessary for the efficient administration of this Article to regard any sales representatives, solicitors, representatives, consignees, peddlers, or truckers as agents of the dealers, distributors, consignors, supervisors, employers, or persons under whom they operate or from whom they obtain the items sold by them regardless of whether they are making sales on their own behalf or on behalf of these dealers, distributors, consignors, supervisors, employers, or persons, the Secretary may so regard them and may regard the dealers, distributors, consignors, supervisors, employers, or persons as “retailers” for the purpose of this Article.
- b. A person, other than a real property contractor, engaged in business of delivering, erecting, installing, or applying tangible personal property or certain digital property for use in this State.

- c. A person engaged in business of making a remote sale, if one of the conditions listed in G.S. 105-164.8(b) is met.
- d. A person required to collect the State tax levied under this Article or the local taxes levied under Subchapter VIII of this Chapter and under Chapter 1096 of the 1967 Session Laws.
- e. A marketplace facilitator that is subject to the requirements of G.S. 105-164.4J or a facilitator that is required to collect and remit the tax under this Article.

N.C.G.S. § 105-164.3(229).

5. Pursuant to N.C.G.S. § 105-164.3(a) and § 105-164.4(a)(4d), Petitioner, as Boost Mobile's dealer-partner, is a retailer for the purpose of any prepaid telephone calling services sold in conjunction with prepaid wireless phone services by them.

6. Petitioner alleges Respondent ordered it to pay a civil penalty (along with taxes and interest) on taxes it does not owe and, in doing so, acted arbitrarily or capriciously. Petitioner also alleges that Respondent is attempting to collect the tax twice—having already collected the taxes from Boost Mobile and now is attempting to collect the same tax from Petitioner—depriving Petitioner of its property (the benefit of the taxes paid by Boost). Such action, if proven, would show Respondent exceeded its authority, acted erroneously, failed to use proper procedure and acted arbitrarily and capriciously.

7. N.C.G.S. § 105-241.9(a) provides that “[Respondent-] Secretary may propose an assessment against a taxpayer for tax due from the taxpayer. [Respondent] must base a proposed assessment on the best information available. A proposed assessment of the Secretary is presumed to be correct.” *Id.* (emphasis added). A taxpayer who challenges a proposed assessment bears the burden of overcoming the presumption that the assessment is correct.

8. Adhering to N.C.G.S. 105-241.9(a), Petitioner challenged the proposed assessment on the basis that Boost Mobile already paid it. As evidence, Petitioner produced documents from Sprint/Boost Mobile, including an Affidavit, averring that Boost Mobile collected the sales tax for the period of September 8, 2017 through December 31, 2018 (some of the same sales tax upon which Respondent's assessment is based) and reported/remitted it to Respondent under one of two (2) business names: Sprint Spectrum, LP and/or SprintCom, Inc. Petitioner's Exh 9, p.3. With its admitted evidence, Petitioner has overcome the presumption that Respondent's assessment is correct, and the burden of proof switched to Respondent to prove, by a preponderance of the evidence, that the tax assessed is actually still owed.

9. It does not matter *who* paid the owed taxes. If the tax was paid by *anyone*, it is no longer tax due from the taxpayer, as required by N.C.G.S. § 105-241.9(a) for Respondent's assessment to be lawful and proper.

10. By refusing to answer the Tribunal's questions as to whether Boost Mobile had paid the owed taxes from September 8, 2017 forward and, if so, how much had been paid, Respondent refused and failed to show that the taxes have *not* been paid but remain owing. Thus, although a proposed assessment by Respondent "is presumed to be correct[.]" where, as here, the taxpayer asserts that the tax has already been paid and therefore, is **not due** from taxpayer, and Respondent failed to prove by a preponderance of the evidence that the tax is still owing, the presumption has been overcome that the proposed assessment is correct. Respondent's assessment for taxes due from September 8, 2017 through December 31, 2018 must be reversed. *Id.*

11. Just as it is undisputed that neither Petitioner nor Boost Mobile collected or paid taxes therefore from January 1, 2016 through September 7, 2017, there is also no dispute that Boost Mobile fully expected Petitioner to collect and pay to Respondent the appropriate taxes which came due prior to September 8, 2017.

12. Sales tax is properly assessed against retail merchandise, including RTRs **sold in conjunction with prepaid wireless calling service,** including prepaid telephone services. N.C.G.S. § 105-164.4(a)(4d). Thus, Petitioner is liable for the sales tax owed on such services sold by it between January 1, 2016 and September 7, 2017.

13. Relying on N.C.G.S. § 105-236, Respondent's assessment of interest and penalties against Petitioner is based on Respondent's assertion that Petitioner unlawfully failed to pay sales tax which it was obligated to pay but, Respondent "**must [have] base[d its] proposed assessment on the best information available.**" N.C.G.S. § 105-241.9(a).

14. In the present case, Respondent did not base its assessment on the best information available because Respondent refused to follow up to determine how much of the owed taxes Boost had remitted to it for the prepaid wireless phone services and RTRs Petitioner sold during the period at issue.

15. Additionally, Respondent admitted that it assessed taxes against Petitioner's *gross* sales (as allowed by N.C.G.S. § 105-164.4(b) when a taxpayer's records fail to show taxable and non-taxable items separately). However, as outlined in FOF #5 and #19 above, there is no dispute that Petitioner collected and paid all sales tax due on equipment sold. Respondent's acknowledgement of this conflicts with Respondent's assertion that it was appropriate to utilize Petitioner's gross receipts to make the assessment. Instead, Respondent had an obligation to deduct the gross sales receipts for equipment sold *prior to* assessing tax against Petitioner for services sold which comply with those to be taxed under N.C.G.S. § 105-164.4(a)(4d).

16. In order to calculate the penalty and interest due on the portion of taxes that were not paid by Sprint on Petitioner's behalf, Respondent must recalculate the taxes due for January 1, 2017 through September 7, 2017, taking into consideration the deductions to be made pursuant to COL #10 and #15 above. That calculation was not offered nor was it included in the record.

17. Respondent's assessment against Petitioner must be overturned: a) for Respondent to deduct the September 8, 2017 – December 31, 2018 taxes paid by Sprint/Boost Mobile (along with all penalty and interest assessed thereon); b) for Respondent to deduct Petitioner's gross

receipts accountable for Petitioner's equipment sales; c) for Respondent to properly determine what services are appropriately taxed pursuant to N.C.G.S. § 105-164.4(a)(4d) to determine the gross receipts remaining upon which tax may be assessed, and; d) utilizing that new gross receipts figure, for Respondent to properly determine how much tax Petitioner actually owes for the period of January 1, 2016 through September 7, 2017.

BASED ON the foregoing findings of fact and conclusions of law,

FINAL DECISION

IT IS THEREFORE ORDERED, that:

1. Respondent's assessment for sales tax due from September 8, 2017 through December 31, 2018 is hereby **REVERSED**.

2. As to Respondent's assessment for tax due from January 1, 2016 through September 7, 2017, Respondent is Ordered to properly re-calculate and re-assess the tax owed by Petitioner for that period, prior to adding any penalty or interest. In doing so, Respondent shall:

- a) Deduct all sales tax which came due from September 8, 2017 through December 31, 2018;
- b) Deduct from Petitioner's gross receipts the gross receipts for equipment sales for which Petitioner has already paid taxes;
- c) Properly determine what services are appropriately taxed under N.C.G.S. § 105-164.4(a)(4d) to determine the amount of gross receipts remaining upon which tax may be assessed; and,
- d) Utilize the new gross receipts amount to properly determine and assess the amount of tax Petitioner actually owes for the period of January 1, 2016 through September 7, 2017.

NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties as indicated by the Certificate of Service attached to this**

Final Decision. N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated to ensure the timely filing of the record.

SO ORDERED. This the 13th day of May, 2022.



Hon. Karlene S. Turrentine
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service.

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This the 13th day of May, 2022.



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