

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2001

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SENATE BILL 1409

Short Title: Make Tax Refund Rules Uniform.

(Public)

Sponsors: Senator Kerr.

Referred to: Finance.

June 13, 2002

A BILL TO BE ENTITLED

AN ACT TO MAKE TAX REFUND PROCEDURES EASIER BY PROVIDING THAT REFUND CLAIMS BASED ON CONSTITUTIONAL ISSUES FOLLOW THE SAME PROCEDURE AS OTHER REFUND CLAIMS, AND BY ALLOWING TAXPAYERS TO FILE PROTECTIVE REFUND CLAIMS.

The General Assembly of North Carolina enacts:

**SECTION 1.** G.S. 105-267 reads as rewritten:

"**§ 105-267. Taxes to be paid; suits for recovery of taxes. paid.**

No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Subchapter. G.S. 105-266.1 and G.S. 105-241.2 provide two alternative procedures for contesting a tax. Whenever a person has a valid defense to the enforcement of the collection of a tax, the person shall pay the tax to the proper officer, and that payment shall be without prejudice to any defense of rights the person may have regarding the tax. At any time within the applicable protest period, the taxpayer may demand a refund of the tax paid in writing from the Secretary and if the tax is not refunded within 90 days thereafter, may sue the Secretary in the courts of the State for the amount demanded. The protest period for a tax levied in Article 2A, 2C, or 2D of this Chapter is 30 days after payment. The protest period for all other taxes is three years after payment.

~~The suit may be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides at any time within three years after the expiration of the 90-day period allowed for making the refund. If upon the trial it is determined that all or part of the tax was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the judgment shall be collected as in other cases. The amount of taxes for which judgment is rendered in such an action shall be refunded by the State. G.S. 105-241.2 provides an alternate procedure for a taxpayer to contest a tax and is not in conflict with or superseded by this section."~~

**SECTION 2.** G.S. 105-266.1 reads as rewritten:

1 **"§ 105-266.1. Refunds of overpayment of taxes.**

2 (a) Claim. – If a taxpayer claims that a tax or an additional tax paid by the  
3 taxpayer was ~~excessive~~excessive, unconstitutional, or incorrect, the taxpayer may apply  
4 to the Secretary for refund of the tax or additional tax at any time within the period set  
5 by the statute of limitations in G.S. 105-266.

6 (a1) Initial Determination. – If the Secretary determines from a review of the  
7 application that the entire amount claimed is due, the Secretary must refund this amount  
8 to the taxpayer in accordance with G.S. 105-266. If the Secretary determines from a  
9 review of the application that the only question it raises is whether a tax is  
10 unconstitutional, the Secretary must deny the claim without a hearing on the ground that  
11 the Secretary cannot rule on constitutional questions. If the Secretary determines from a  
12 review of the application that the entire amount claimed may not be due and that the  
13 application raises questions other than whether a tax is unconstitutional, the Secretary  
14 must grant a hearing as provided in subsection (a2) of this section.

15 (a2) Hearing. – The Secretary shall grant a hearing on each timely request for a  
16 ~~refund~~refund that is not resolved under subsection (a1) of this section. Within 60 days  
17 after ~~a timely request for a refund has been filed~~the initial determination under  
18 subsection (a1) of this section and at least 10 days before the date set for the hearing, the  
19 Secretary shall notify the taxpayer in writing of the time and place at which the hearing  
20 will be conducted. The date set for the hearing shall be within 90 days after the ~~timely~~  
21 ~~request for a hearing was filed~~initial determination or at a later date mutually agreed  
22 upon by the taxpayer and the Secretary. The date set for the hearing may be postponed  
23 once, at the request of the taxpayer or the Secretary, for a period of up to 90 days or for  
24 a longer period mutually agreed upon by the taxpayer and the Secretary.

25 Within 90 days after conducting a hearing under this subsection, the Secretary shall  
26 make a decision on the requested refund, notify the taxpayer of the decision, and adjust  
27 the computation of the tax in accordance with the decision. The Secretary shall refund  
28 to the taxpayer in accordance with G.S. 105-266 the amount of any tax the Secretary  
29 finds was paid incorrectly or paid in excess of the tax due.

30 (b) Procedure. – The rules of evidence do not apply in a hearing before the  
31 Secretary of Revenue under this section. G.S. 105-241.2, 105-241.3, and 105-241.4  
32 apply to a tax or additional tax assessed under this section.

33 (c) Civil Action. – Within 90 days after notification of the Secretary's decision  
34 with respect to a demand for refund of any tax or additional tax under this section, an  
35 aggrieved taxpayer may, instead of petitioning for administrative review by the Tax  
36 Review Board under G.S. 105-241.2, bring a civil action against the Secretary for  
37 recovery of the alleged overpayment. If the alleged overpayment is more than two  
38 hundred dollars (\$200.00), the taxpayer may bring the action either in the Superior  
39 Court of Wake County or in the superior court of the county in which the taxpayer  
40 resides; if the alleged overpayment is two hundred dollars (\$200.00) or less, the  
41 taxpayer may bring the action in any State court of competent jurisdiction in Wake  
42 County. If upon trial it is determined that any tax paid was unconstitutional or that there  
43 has been an overpayment of tax or additional tax, judgment shall be rendered therefor,  
44 with interest, and the State shall refund the amount due.

1 (d) Appeal. – Either party may appeal to the appellate division from the judgment  
2 of the superior court under the rules and regulations prescribed by law for appeals,  
3 except that ~~the Secretary, if he should appeal, shall not be if the Secretary appeals, the~~  
4 Secretary is not required to give any undertaking or make any deposit to secure the cost  
5 of such the appeal.

6 (e) Alternative Procedure. – Nothing in this section shall be construed to conflict  
7 with or supersede the provisions of ~~G.S. 105-241.2, and, with respect to tax paid to the~~  
8 ~~Secretary of Revenue, the rights granted by this section are in addition to the rights~~  
9 ~~provided by G.S. 105-267.~~G.S. 105-241.2."

10 **SECTION 3.** G.S. 105-266 reads as rewritten:

11 "**§ 105-266. Overpayment of taxes to be refunded with interest.**

12 (a) Refund. – If the Secretary discovers that a taxpayer has overpaid the correct  
13 amount of a tax, that overpayment shall be refunded to the taxpayer as soon as possible  
14 together with any applicable interest. The Secretary shall not refund an overpayment  
15 before the taxpayer has filed the final return for the tax period. The Secretary may not  
16 refund any of the following:

- 17 (1) An overpayment set off under Chapter 105A, the Setoff Debt  
18 Collection Act, or under another setoff debt collection program  
19 authorized by law.
- 20 (2) An income tax overpayment the taxpayer has elected to apply to  
21 another purpose as provided in this Article.
- 22 (3) An individual income tax overpayment of less than one dollar (\$1.00)  
23 or another tax overpayment of less than three dollars (\$3.00), unless  
24 the taxpayer makes a written demand for the refund.

25 (b) Interest. – An overpayment of tax bears interest at the rate established in G.S.  
26 105-241.1(i) from the date that interest begins to accrue until a refund is paid. A refund  
27 sent to a taxpayer is considered paid on a date determined by the Secretary that is no  
28 sooner than five days after a refund check is mailed.

29 A refund set off against a debt pursuant to Chapter 105A of the General Statutes is  
30 considered paid five days after the Department mails the taxpayer a notice of the setoff,  
31 unless G.S. 105A-5 or G.S. 105A-8 requires the agency that requested the setoff to  
32 return the refund to the taxpayer. In this circumstance, the refund that was set off is not  
33 considered paid until five days after the agency that requested the refund mails the  
34 taxpayer a check for the refund.

35 Interest on an overpayment of a tax, other than a tax levied under Article 4 or Article  
36 8B of this Chapter, accrues from a date 90 days after the date the tax was originally paid  
37 by the taxpayer until the refund is paid. Interest on an overpayment of a tax levied under  
38 Article 4 or Article 8B of this Chapter accrues from a date 45 days after the latest of the  
39 following dates until the refund is paid:

- 40 (1) The date the final return was filed.
- 41 (2) The date the final return was due to be filed.
- 42 (3) The date of the overpayment.

43 The date of an overpayment of a tax levied under Article 4 or Article 8B of this Chapter  
44 is determined in accordance with section 6611(d), (f), (g), and (h) of the Code.

1 (c) Statute of Limitations. – The period in which a refund must be demanded or  
2 discovered under this section is determined as follows:

3 (1) General Rule. – No overpayment shall be refunded, whether upon  
4 discovery or receipt of written demand, if the discovery is not made or  
5 the demand is not received within three years after the date set by the  
6 statute for the filing of the return or within six months after the  
7 payment of the tax alleged to be an overpayment, whichever is later.  
8 An agreement by a taxpayer to extend the time in which the  
9 Department can assess the taxpayer for an underpayment automatically  
10 extends the time in which the taxpayer can request a refund.

11 (2) Worthless Debts or Securities. – Section 6511(d)(1) of the Code  
12 applies to an overpayment of the tax levied in Part 2 or 3 of Article 4  
13 of this Chapter to the extent the overpayment is attributable to either of  
14 the following:

15 a. The deductibility by the taxpayer under section 166 of the Code  
16 of a debt that becomes worthless, or under section 165(g) of the  
17 Code of a loss from a security that becomes worthless.

18 b. The effect of the deductibility of a debt or loss described in  
19 subpart a. of this subdivision on the application of a carryover  
20 to the taxpayer.

21 (3) Capital Loss and Net Operating Loss Carrybacks. – Section 6511(d)(2)  
22 of the Code applies to an overpayment of the tax levied in Part 2 or 3  
23 of Article 4 of this Chapter to the extent the overpayment is  
24 attributable to a capital loss carryback under section 1212(c) of the  
25 Code or to a net operating loss carryback under section 172 of the  
26 Code.

27 (4) Federal Determination. – When a taxpayer files with the Secretary a  
28 return that reflects a federal determination and the return is filed within  
29 the required time, the period in which a refund must be demanded or  
30 discovered is one year after the return reflecting the federal  
31 determination is filed or three years after the original return was filed  
32 or due to be filed, whichever is later.

33 (c1) Protective Refund Claim. – If a taxpayer's right to a refund is contingent on  
34 future events and may not be determinable until after the period set by the statute of  
35 limitations, the taxpayer may file a protective refund claim within that period. The  
36 protective refund claim must identify and describe the contingencies affecting the claim,  
37 must state the date by which the contingencies are expected to be resolved, must be  
38 sufficiently precise to alert the Secretary to the issues and the nature of the potential  
39 refund, and must identify specifically the tax years for which a potential refund is  
40 claimed. If the Secretary determines that a protective refund claim does not satisfy these  
41 conditions, the Secretary must notify the taxpayer and give the taxpayer an opportunity  
42 to amend the claim within 60 days after the notice.

43 The issues raised in the taxpayer's protective refund claim remain open from the date  
44 it is filed. When the right to a refund is no longer contingent on future events, the

1 taxpayer may request a hearing on the claim. Unless the taxpayer has requested a  
2 hearing on the protective refund claim, the Secretary may schedule a hearing at any time  
3 after the date stated in the claim as the date by which the contingencies are expected to  
4 be resolved. Once a hearing is requested or scheduled, the provisions of G.S. 105-266.1  
5 apply to the protective refund claim as if it were a claim timely filed under G.S.  
6 105-266.1(a).

7 (d) Effect of Refund. – A refund made under this section does not absolve the  
8 taxpayer of a tax liability that may in fact exist; the Secretary may make an assessment  
9 for any deficiency as provided in this Article.

10 (e) Scope. – ~~This section does not apply to interest required under G.S. 105-267.~~  
11 This section applies to a refund payable to a husband and wife who filed a joint return."

12 **SECTION 4.** G.S. 105-113.113(a) reads as rewritten:

13 "(a) Special Account. – The Secretary shall credit the proceeds of the tax levied  
14 by this Article to a special nonreverting account, to be called the State Unauthorized  
15 Substances Tax Account, until the tax proceeds are unencumbered. The Secretary shall  
16 remit the unencumbered tax proceeds as provided in this section on a quarterly or more  
17 frequent basis. Tax proceeds are unencumbered when either of the following occurs:

18 (1) The tax has been fully paid and the taxpayer has no current right under  
19 ~~G.S. 105-267~~ Article 9 of this Chapter to seek a refund.

20 (2) The taxpayer has been notified of the final assessment of the tax under  
21 G.S. 105-241.1 and has neither fully paid nor timely contested the tax  
22 under ~~G.S. 105-241.1 through G.S. 105-241.4 or G.S. 105-267.~~ Article  
23 9 of this Chapter."

24 **SECTION 5.** G.S. 105-239.1(c) reads as rewritten:

25 "(c) The provisions of G.S. 105-241.1, 105-241.2, 105-241.3, 105-241.4,  
26 ~~105-266.1 and 105-267~~ and 105-266.1 with respect to assessment procedure, demand for  
27 refund, review, and appeal ~~shall~~ apply to the liability of any transferee assessed under  
28 this section or of any property subject to the liability imposed by this section and to the  
29 assertion of a lien upon property in the hands of the transferee."

30 **SECTION 6.** G.S. 105-241.4 reads as rewritten:

31 "**§ 105-241.4. Action to recover tax paid.**

32 Within 30 days after notification of the Secretary's decision with respect to liability  
33 under this Subchapter or Subchapter V, any taxpayer aggrieved ~~thereby,~~ by the decision,  
34 in lieu of petitioning for administrative review thereof by the Tax Review Board under  
35 G.S. 105-241.2, may pay the tax and bring a civil action for its recovery as provided in  
36 G.S. ~~105-267.~~ 105-266.1.

37 Any taxpayer who has obtained an administrative review by the Tax Review Board  
38 as provided by G.S. 105-241.2 and who is aggrieved by the decision of the Board may,  
39 in lieu of appealing pursuant to the provisions of G.S. 105-241.3, within 30 days after  
40 notification of the Board's decision with respect to liability pay the tax and bring a civil  
41 action for its recovery as provided in G.S. ~~105-267.~~ 105-266.1.

42 Either party may appeal to the appellate division from the judgment of the superior  
43 court under the rules and regulations prescribed by law for appeals, except that if the

1 Secretary appeals, the Secretary is not required to give any undertaking or make any  
2 deposit to secure the cost of the appeal.

3 Any taxes, interest or penalties paid and found by the court to be in excess of those  
4 which can be properly assessed shall be ordered refunded to the taxpayer with interest  
5 from time of payment."

6 **SECTION 7.** This act becomes effective January 1, 2003, and applies to  
7 taxes paid on or after that date.