

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: North Carolina Department of Revenue

RULE CITATION: 17 NCAC 07B .0115

RECOMMENDATION DATE: November 14, 2023

RECOMMENDED ACTION:

X Approve, but note staff's comment

Object, based on:

Lack of statutory authority

Unclear or ambiguous

Unnecessary

Failure to comply with the APA

Extend the period of review

COMMENT:

The Commission objected to this rule at its September 2023 meeting for lack of necessity and lack of clarity. The agency has revised the rule and staff believes that these revisions have resolved all objections. Therefore, staff recommends approving the final revised version of the rule.

I. *Necessity*

The original version of this rule explained that sales of scientific or research equipment were subject to tax (per 105-164.4), unless exempt by statute. In effect this, stated that "scientific or research equipment" was "tangible personal property" and thus taxable. This was objectionable as unnecessary because it was plain on the face of the statute, as any owned object would be "tangible personal property."

The final revised version of the rule rewrites the rule to identify that equipment, attachments, and parts purchased to perform research services are purchased for use and not for resale. This is an interpretation of a retail sales and use tax exemption that exempts purchases for resale, G.S. 105-164.13(5). Staff believes that the "purchases for resale exemption" language in the statute as applied to the transactions described in the rule is potentially ambiguous, and that ambiguity is not resolved by another rule or statute. Therefore, this rule is "reasonably necessary" to interpret an act of the General Assembly.

Seth Ascher
Commission Counsel

II. Clarity

Staff believes that the final revised version of this rule has also resolved the prior clarity objections. The agency has rewritten the rule to reference a specific statutory term that is potentially ambiguous. The agency has also removed ambiguous language about “applicable taxes” and “unless exempt by statute”.

1 17 NCAC 07B .0115 is readopted with substantive changes pursuant to G.S. 150B-21.3A(c)(2)g without notice
2 pursuant to G.S. 150B-1(D)(4) as follows:

3
4 **17 NCAC 07B .0115 RESEARCH SERVICES**

5 For purposes of G.S. 105-164.13, ~~sales~~ purchases of scientific or research equipment, or an attachment or
6 repair part for scientific or research equipment, to independent contract research organizations for use in performing
7 research services for clients are purchased for use, not resale, ~~subject to the~~ applicable statutory state ~~general State,~~
8 and ~~applicable~~ local ~~and transit rates of~~ sales or use tax, ~~tax, unless exempt by statute.~~ If a contract research
9 organization qualifies under G.S. 105-187.51B(a)(2), then research equipment that meets the requirements of that
10 subsection are exempt from sales and use tax.

11
12 *History Note: Authority G.S. ~~105-164.4; 105-164.6; 105-164.13; 105-262; 105-164.13; 105-264; [Chapter 105,~~*
13 *~~Articles 39, 40, 42, 43, and 46;] Article 39; Article 40; Article 42; Article 43; Article 44; Article~~*
14 *~~46;~~*
15 *Eff. February 1, 1976;*
16 *Amended Eff. October 1, 2009; April 1, 2006; October 1, 1993; October 1, ~~1991-1991;~~*
17 *Readopted Eff. January 1, 2024.*

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AGENCY: North Carolina Department of Revenue

RULE CITATION: 17 NCAC 07B .3101

RECOMMENDATION DATE: November 14, 2023

RECOMMENDED ACTION:

- Approve, but note staff's comment
- Object, based on:
 - Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA
 - Extend the period of review

COMMENT:

The Commission objected to this rule at its September 2023 meeting for lack of necessity and lack of clarity. The agency has revised the rule and staff believes that these revisions have resolved the clarity objection, but have not resolved the necessity objection. Therefore, staff recommends continuing objection on the grounds of necessity.

I. Clarity

Staff believes that the final revised version of this rule has also resolved the prior clarity objections. The agency has rewritten the rule to reference a specific statutory term that is potentially ambiguous. The agency has also removed ambiguous language about "applicable taxes" and "unless exempt by statute".

II. Necessity

Staff believes that the agency has not resolved the necessity objections to paragraphs (b) and (c) in their revised version of the rules.

In sum, the agency has added statutory references to paragraphs (b) and (c). However, the statutes referenced in those paragraphs are not ambiguous in application to the circumstances described. As stated in the September 19, 2023 staff opinion recommending objection: "To the

Seth Ascher
Commission Counsel

extent that paragraphs (b) and (c) of this rule are interpreting statutory language, paragraph (b) is stating that going to the movie theater is an entertainment activity and paragraph (c) is stating that sales through movie theater concession stands are retail sales. These “interpretations” appear to be plain on the face of the statute. As a result, paragraphs (b) and (c) of this rule are unnecessary.”

Therefore, staff believes that the agency has not resolved the necessity objection to paragraphs (b) and (c), as fully described in the September 19, 2023 staff opinion.

1 17 NCAC 07B .3101 is readopted with substantive changes pursuant to G.S. 150B-21.3A(c)(2)g without notice
2 pursuant to G.S. 150B-1(D)(4) as follows:

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4 **SECTION .3100 - RADIO AND TELEVISION STATIONS: ~~MOTION PICTURE~~MOVIE THEATRES**

5
6 **17 NCAC 07B .3101 ~~RADIO AND TELEVISION: ETC.~~RADIO, TELEVISION, MOVIE THEATRES**
7 **RECEIPTS**

8 (a) Pursuant to G.S. 105-164.4, sales and use tax does not apply to ~~Receipts~~ receipts of radio and television companies
9 ~~for derived from~~ the broadcasting or telecasting of programs ~~[are not subject to sales or use] tax.~~ tax, unless the
10 receipts are derived from certain digital property, video programming, or satellite digital audio radio service. For
11 example, receipts of radio or television companies from advertisers to broadcast advertisements are not subject to
12 sales and use tax.

13 (b) ~~Receipts~~ Pursuant to G.S. 105-164.4 and G.S. 105-164.4G, [The]the gross receipts of ~~motion picture~~movie theatres
14 derived from admission charges are ~~not~~ subject to ~~[the general State, and applicable local and transit rates of]~~ sales ~~or~~
15 ~~and~~ use tax.

16 (c) ~~Motion picture theatres making taxable sales of tangible~~ Pursuant to G.S. 105-164.4, sales of [Tangible]tangible
17 ~~personal property~~ property, including food, prepared food, and beverages, [sold] by movie theatres through concession
18 stands or otherwise ~~must register with the department and must collect and remit the applicable statutory state~~are
19 subject to [the general State,] and [applicable]local [and transit rates of] sales ~~or~~ ~~and~~ use tax ~~on such sales.~~tax.

20
21 *History Note: Authority G.S. 105-164.3; 105-164.4; 105-164.4G; 105-262; 105-264; [Chapter 105, Articles 39,
22 40, 42, 43, and 46;]Article 39; Article 40; Article 42; Article 43; Article 44; Article 46;
23 Eff. February 1, 1976;
24 Amended Eff. May 1, 2009; October 1, 1993; October 1, 1991-1991;
25 Readopted Eff. January 1, 2024.*

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AGENCY: North Carolina Department of Revenue

RULE CITATION: 17 NCAC 07B .3107

RECOMMENDATION DATE: November 14, 2023

RECOMMENDED ACTION:

X Approve, but note staff's comment

Object, based on:

Lack of statutory authority

Unclear or ambiguous

Unnecessary

Failure to comply with the APA

Extend the period of review

COMMENT:

The Commission objected to this rule at its September 2023 meeting for lack of necessity and lack of clarity. The agency has revised the rule and staff believes that these revisions have resolved all objections. Therefore, staff recommends approving the final revised version of the rule.

I. *Necessity*

The original version of paragraph (a) of this rule explained that sales of tangible personal property to production companies were subject to tax. In effect, this was an "interpretation" that sales of tangible personal property to production companies are retail sales. This paragraph was objectionable as unnecessary because it was plain on the face of the statute.

The rewritten rule specifies that certain purchases by production companies are not purchases for resale or purchases of mill machinery. This is an interpretation of a retail sales and use tax exemption that exempts purchases for resale, G.S. 105-164.13(5), and certain purchases of mill machinery, G.S. 105-164.13(5). Staff believes that the "purchases for resale exemption" and the "mill machinery" language in the statute as applied to the transactions described in the rule is potentially ambiguous, and that ambiguity is not resolved by another rule or statute. Therefore, staff believes that this rule is "reasonably necessary" to interpret an act of the General Assembly.

Seth Ascher
Commission Counsel

II. Clarity

Staff believes that the final revised version of this rule has also resolved the prior clarity objections. The agency has rewritten the rule to reference specific statutory terms that are potentially ambiguous. The agency has also removed ambiguous language about “applicable taxes” and “unless exempt by statute”.

1 17 NCAC 07B .3107 is readopted with substantive changes pursuant to G.S. 150B-21.3A(c)(2)g without notice
2 pursuant to G.S. 150B-1(D)(4) as follows:

3
4 **17 NCAC 07B .3107 ~~MOTION PICTURE PRODUCTION FIRMS~~ PRODUCTION COMPANIES**

5 (a) For purposes of G.S. 105-164.13, purchases by ~~[Sales to]~~ motion picture production firms ~~a production company,~~
6 as defined in G.S. 105-164.3, of items including cameras, film ~~machinery, equipment, film,~~ and props or building
7 materials used in the construction of sets which are used in the actual filming of movies for sale, lease or rental are
8 exempt from ~~are~~ purchased for use, not resale, except as provided in subsection (b) of this Rule. These items are also
9 not mill machinery, or mill machinery parts or accessories. ~~[subject to the general State, and applicable local and~~
10 transit rates of] ~~sales and use tax.~~ The sale ~~Sales of chemicals~~ ~~[chemicals, film,]~~ and equipment used to develop and
11 edit film ~~which is used to~~ ~~[that]~~ produce release prints ~~is exempt from~~ ~~[are subject to the general State, and applicable~~
12 local and transit rates of] ~~sales and use tax.~~ ~~[tax unless exempt by paragraph (b) of this Rule or other exemption.]~~

13 (b) ~~Sales of machinery and equipment and other property to motion picture production firms for use in receiving~~
14 ~~tangible personal property and other activities such as raw materials storage, finished goods storage, distribution or~~
15 ~~administration is subject to the applicable statutory state and local sales or use tax.~~

16 (c) ~~(b)~~ The purchase ~~Pursuant to G.S. 105-164.13,~~ ~~[Sales]~~ purchases ~~of film by a movie~~ ~~[to]~~ by ~~a production company~~
17 which ~~that~~ becomes an ingredient or a component part of release prints that are actually produced and sold, leased
18 leased, ~~or rented to its customers are exempt from sales and use tax. Also,~~ ~~[Sales]~~ Purchases ~~of chemicals which are~~
19 used to develop release prints that are for sale, lease ~~lease,~~ or rental that become an ingredient or a component part of
20 the release prints are exempt from sales and use tax.

21
22 *History Note: Authority G.S. 105-164.3; ~~105-164.4; 105-164.6;~~ 105-164.13; 105-262; 105-264; ~~105-164.13;~~*
23 *Article 39; Article 40; Article 42; Article 43; Article 44; Article 46; ~~[Chapter 105, Articles 39, 40,~~*
24 *~~42, 43, and 46;]~~*

25 *Eff. June 1, 1992;*

26 *Amended Eff. October 1, 2009; October 1, ~~1993, 1993;~~*

27 *Readopted Eff. January 1, 2024.*