



**STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS**

November 17, 2023

Laura Lansford, Rule-making Coordinator
N.C. Department of Revenue
Sent via email only to: Lauralansford@ncdor.gov

Re: Objection to 17 NCAC 07B .4206, .4415, and .5002.

Dear Ms. Lansford:

This letter will serve as the written notice of objection pursuant to G.S. 150B-21.12(a).

At its meeting on November 16, 2023, the Rules Review Commission continued its objection to the above captioned rules finding that the rules did not satisfy G.S. 150B-21.9(a). Specifically, the Commission adopted the written opinion of staff attached hereto.

Please respond to these objections pursuant to G.S. 150B-21.12(a)(1) or (2), and (b).

If you have any questions regarding the Commission's actions, please let me know.

Sincerely,

/s/ William W. Peaslee
William W. Peaslee
Commission Counsel

Attachment

Donald Robert van der Vaart, Director
Chief Administrative Law Judge

John C. Evans
Senior Administrative Law Judge

An Equal Employment Opportunity Employer
1711 New Hope Church Road, Raleigh, NC 27609
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**STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS**

November 20, 2023

Laura Lansford, Rule-making Coordinator
N.C. Department of Revenue
Sent via email only to: Lauralansford@ncdor.gov

Re: Objection to 17 NCAC 07B .4203, .4210, .4404, .4503, .4609, .4614, and .4701.

Dear Ms. Lansford:

This letter will serve as the written notice of objection pursuant to G.S. 150B-21.12(a).

At its meeting on November 16, 2023, the Rules Review Commission objected to the above captioned rules finding that the rules did not satisfy G.S. 150B-21.9(a). Specifically, the Commission adopted the written opinion of staff attached hereto.

Please respond to these objections pursuant to G.S. 150B-21.12(a)(1) or (2), and (b).

If you have any questions regarding the Commission's actions, please let me know.

Sincerely,

/s/ William W. Peaslee
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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 .4203

RECOMMENDATION DATE: November 11, 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:

I.

AS WRITTEN, IT IS UNCLEAR WHETHER THE SECRETARY INTENDS THE LANGUAGE OF THE RULE TO BE A RESTATEMENT OF EXISTING LAW, AN ATTEMPT TO IMPOSE REGULATION, OR AN INTERPRETATION OF EXISTING LAW. ACCORDINGLY, STAFF RECOMMENDS OBJECTION TO THE RULE PURSUANT TO G.S. 150B-21.9(A)(2) FOR LACK OF CLARITY.

LINES 5-7 APPEAR TO BE AN INTERPRETATION OF G.S. 105-164.4 WHICH IMPOSES A TAX GENERALLY UPON ALL SALES. ARGUABLY THIS IS UNNECESSARY UNLESS IT IS PREFATORY TO ESTABLISHING AN EXEMPTION WHICH THE BALANCE OF THE RULE APPEARS TO DO.

LINES 8-10 APPEAR TO GRANT AN EXEMPTION; HOWEVER, THE AUTHORITY TO DO SO IS UNCLEAR. IT IS UNCLEAR WHICH STATUTE, IF ANY, GRANTS SUCH AN EXEMPTION. NOR DOES THE RULE IDENTIFY ANY LANGUAGE BEING INTERPRETED.

ASSUMING ARGUENDO THAT THE COMMISSION FINDS THE LANGUAGE TO BE CLEAR AND UNAMBIGUOUS REGARDING THE SECRETARY'S INTENT, STAFF RECOMMENDS OBJECTION ON THE FOLLOWING BASES:

II.

LINES 8-10 OF THE RULE STATE THAT CERTAIN SALES ARE NOT SUBJECT TO TAX.

IF THE RRC FINDS THAT THE LANGUAGE WAS AN ATTEMPT TO REGULATE IN THE ABSENCE OF STATUTORY AUTHORITY, THE SECRETARY DOES NOT HAVE THE AUTHORITY TO EXEMPT ANYONE

*WILLIAM W. PEASLEE
COMMISSION COUNSEL*

FROM A TAX IN THE ABSENCE OF STATUTORY AUTHORITY, AND NO STATUTORY AUTHORITY IS EVIDENT AS WRITTEN. ACCORDINGLY, STAFF RECOMMENDS OBJECTION PURSUANT TO G.S. 150B-21.9(A)(1).

III.

PURSUANT TO G.S. 150B-2(8A), A "RULE" IS DEFINED INTER ALIA AS "STATEMENTS OF GENERAL APPLICABILITY THAT IMPLEMENTS OR INTERPRETS AN ENACTMENT OF THE GENERAL ASSEMBLY OR CONGRESS OR A REGULATION ADOPTED BY A FEDERAL AGENCY OR THAT DESCRIBES THE PROCEDURE OR PRACTICE REQUIREMENTS OF AN AGENCY."

BASED UPON THE AGENCY'S RESPONSE TO AN EMAIL ABOUT THE STATUTORY AUTHORITY FOR THIS RULE, STAFF BELIEVES THE SECRETARY IS INTENDING TO MAKE AN INTERPRETATION PURSUANT TO G.S. 105-164.13(17) ; HOWEVER, AS PREVIOUSLY STATED, BASED UPON THE LANGUAGE OF THE RULE, IT IS UNCLEAR WHETHER AND TO WHAT EXTENT THE SECRETARY IS MAKING AN INTERPRETATION, AND IF SO OF WHAT, OR WHETHER THE INTERPRETATION MEETS THE STANDARDS OF G.S. 150B-21.9.

ADDITIONALLY, G.S. 105-164.13 IS NOT CITED IN THE HISTORY NOTE.

PURSUANT TO G.S. 150B-21.9 THE COMMISSION "MUST DETERMINE WHETHER A RULE MEETS" ALL OF THE CRITERIA IN SECTION (A). IT APPEARS TO STAFF THAT THE COMMISSION IS UNABLE TO MAKE THAT DETERMINATION BASED UPON THE LANGUAGE OF THE RULE. ACCORDINGLY, STAFF RECOMMENDS OBJECTION TO THE RULE PURSUANT TO G.S. 150B-21.9(A)(1)-(3).

WILLIAM W. PEASLEE
COMMISSION COUNSEL

§ 150B-21.9. Standards and timetable for review by Commission.

(a) Standards. - **The Commission must determine whether a rule meets all of the following criteria:**

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

§ 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

- (1) Administrative law judge. - A person appointed under G.S. 7A-752, 7A-753, or 7A-757.
- (1a) Adopt. - To take final action to create, amend, or repeal a rule.
- (1b) Agency. - An agency or an officer in the executive branch of the government of this State. The term includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A local unit of government is not an agency.
- (1c) Codifier of Rules. - The person appointed by the Chief Administrative Law Judge of the Office of Administrative Hearings pursuant to G.S. 7A-760(b).
- (1d) Commission. - The Rules Review Commission.
- (2) Contested case. - An administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty. The term does not include rulemaking, declaratory rulings, or the award or denial of a scholarship, a grant, or a loan.
 - (2a) Repealed by Session Laws 1991, c. 418, s. 3.
 - (2b) Hearing officer. - A person or group of persons designated by an agency that is subject to Article 3A of this Chapter to preside in a contested case hearing conducted under that Article.
- (3) License. - Any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in any activity, except licenses issued under Chapter 20 and Subchapter I of Chapter 105 of the General Statutes, occupational licenses, and certifications of electronic poll books, ballot duplication systems, or voting systems under G.S. 163-165.7.
- (4) Licensing. - Any administrative action issuing, failing to issue, suspending, or revoking a license or occupational license. The term does not include controversies over whether an examination was fair or whether the applicant passed the examination.
 - (4a) Occupational license. - Any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in a profession, occupation, or field of endeavor that is issued by an occupational licensing agency.
 - (4b) Occupational licensing agency. - Any board, commission, committee, or other agency of the State that is established for the primary purpose of regulating the entry of persons into, or the conduct of persons within a particular profession, occupation, or field of endeavor, and that is authorized to issue and revoke licenses. The term does not include State

agencies or departments that may as only a part of their regular function issue permits or licenses.

- (5) Party. - Any person or agency named or admitted as a party or properly seeking as of right to be admitted as a party and includes the agency as appropriate.
- (5a) Person. - Any natural person, partnership, corporation, body politic, and any unincorporated association, organization, or society that may sue or be sued under a common name.
- (6) Person aggrieved. - Any person or group of persons of common interest directly or indirectly affected substantially in his, her, or its person, property, or employment by an administrative decision.
- (7) Recodified as subdivision (5a) of this section by Session Laws 2021-88, s. 16(a), effective July 22, 2021.
- (7a) Policy. - Any nonbinding interpretive statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.
- (8) Residence. - Domicile or principal place of business.
- (8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
 - a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
 - b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.
 - c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
 - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
 - e. Statements of agency policy made in the context of another proceeding, including:

1. Declaratory rulings under G.S. 150B-4.
 2. Orders establishing or fixing rates or tariffs.
- f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
 - g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
 - h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.
 - i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
 - j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
 - k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
 - l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.
- (8b) Repealed by Session Laws 2011-398, s. 61.2, effective July 25, 2011.
- (8c) Substantial evidence. - Relevant evidence a reasonable mind might accept as adequate to support a conclusion.
- (9) Repealed by Session Laws 1991, c. 418, s. 3. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, ss. 61, 62; 1977, c. 915, s. 5; 1983, c. 641, s. 1; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(2)-1(5); 1987, c. 878, ss. 1, 2, 21; 1987 (Reg. Sess., 1988), c. 1111, s. 17; 1991, c. 418, s. 3; c. 477, ss. 3.1, 3.2, 9; 1995, c. 390, s. 29; 1996, 2nd Ex. Sess., c. 18, s. 7.10(g); 1997-456, s. 27; 2003-229, s. 12; 2007-491, s. 44(1)b; 2011-13, s. 2; 2011-398, ss. 15, 61.2; 2013-188, s. 7; 2013-382, s. 9.1(c); 2013-413, s. 1; 2015-2, s. 2.2(c); 2015-241, ss. 7A.3, 30.16(a); 2017-6, s. 3; 2018-13, s. 3.8(b); 2018-146, ss. 3.1(a), (b), 4.5(b); 2021-88, s. 16(a), (b).)

§ 105-264. Effect of Secretary's interpretation of revenue laws.

(a) **Interpretation.** - It is the duty of the Secretary to interpret all laws administered by the Secretary. The Secretary's interpretation of these laws shall be consistent with the applicable rules. An interpretation by the Secretary is prima facie correct. When the Secretary interprets a law by adopting a rule or publishing a bulletin or directive on the law, the interpretation is a protection to the officers and taxpayers affected by the interpretation, and taxpayers are entitled to rely upon the interpretation. If the Secretary changes an interpretation, a taxpayer who relied on it before it was changed is not liable for any penalty or additional assessment on any tax that accrued before the interpretation was changed and was not paid by reason of reliance upon the interpretation.

(b) **Advice.** - If a taxpayer requests specific advice from the Department and receives erroneous advice in response, the taxpayer is not liable for any penalty or additional assessment attributable to the erroneous advice furnished by the Department to the extent that the following conditions are all satisfied:

- (1) The advice was reasonably relied upon by the taxpayer.
- (2) The penalty or additional assessment did not result from the taxpayer's failure to provide adequate or accurate information.
- (3) The Department provided the advice in writing or the Department's records establish that the Department provided erroneous verbal advice.

(c) **Revised Interpretations.** - This section does not prevent the Secretary from changing an interpretation, and it does not prevent a change in an interpretation from applying on and after the effective date of the change. An interpretation that revises a prior interpretation by expanding the scope of a tax or otherwise increasing the amount of tax due may not become effective sooner than the following:

- (1) For a tax that is payable on a monthly or quarterly basis, the first day of a month that is at least 90 days after the date the revised interpretation is issued.
- (2) For a tax that is payable on an annual basis, the first day of a tax year that begins after the date the revised interpretation is issued.

(d) **Fee.** - The Secretary may charge a fee for providing a written determination at the request of a taxpayer. The fee is a receipt of the Department and must be applied to the costs of providing the written determination. The proceeds of the fee must be credited to a special account within the Department and do not revert but remain in the special account until spent by the Department for the costs of providing the written determination. The Secretary may adopt a tiered fee structure based on the taxpayer's income or gross receipts, the relative complexity of the advice requested, or the tax schedule for which advice is requested. The fee shall not be less than one hundred dollars (\$100.00) or more than five thousand dollars (\$5,000). The fee may be waived by the Secretary. The term "written determination" has the same meaning as defined in G.S. 105-264.2. (1939, c. 158, s. 933; 1955, c. 1350, s. 4; 1957, c. 1340, s. 14; 1973, c. 476, s. 193;

1991, c. 45, s. 29; 1993, c. 532, s. 9; 1998-98, s. 21; 2008-107, s. 28.16(e); 2010-31, s. 31.7A(a); 2011-390, s. 6; 2016-103, s. 6.)

WILLIAM W. PEASLEE
COMMISSION COUNSEL

From: [Andrew O. Furuseth](#)

To: [Ascher, Seth M](#); [Peaslee, William W](#); [Lansford, Laura L](#)

Cc: [Burgos, Alexander N](#); [Jacobs, Tenisha S](#)

Subject: RE: [External] RE: DOR Rules

Date: Wednesday, September 6, 2023 4:47:01 PM

CAUTION: External email. Do not click links or open attachments unless verified. Report suspicious emails with the Report Message button located on your Outlook menu bar on the Home tab.

Mr. Peaslee and Mr. Ascher,

We look forward to meeting with you tomorrow morning. We have included specific statute support and a brief explanation for each rule mentioned in your emails below. In addition, we want to provide a brief general explanation for the industry specific rules. While each of these industry specific rules have existed for a long time, it is my understanding that they were adopted to provide the interpretation for how sales and use tax applies to industries that have had questions or disputes about the application of sales and use tax to the industry. The objective is to provide the Secretary's interpretation of the law to the specific industry so they can comply with the law.

These types of interpretations are important because retailers become liable for sales and use tax that is incorrectly calculated. For example, if a business thinks an item they are selling is not subject to tax and does not collect tax from its customer, the business becomes liable for the tax. In the inverse situation, a retailer that collects tax on an item that is not subject to tax, can become liable to civil actions by its customers including class actions. See G.S. 105-164.11(c).

We also want to address the question about the articles referenced in the rules. We have 75 rules that where the Secretary has cited "Chapter 105, Articles 39, 40, 42, 43, and 46." The existing rules cite these articles for the authority to impose the local and transit rates of sales and use tax. The following citations provide the specific authority for those tax levies and the administration of those taxes: 105-467; 105-468; 105-469; 105-483; 105-498; 105-507.2; 105-509.1; 105-510.1; 105-511.3; 105-537; 105-538.

17 NCAC 07B .4415 - SKATING RINK AND BOWLING ALLEY RENTAL FEES
Statutes – G.S. 105-105-164.4(a)(1) and 164.4G(e)(1)

The rule interprets the exemption allowed per 105-164.4G(e)(1) which excepts from tax "[a]n amount paid solely for the right to participate, other than to be a spectator, in sporting activities. Examples of these types of charges include bowling fees..." In addition, the rule interprets the imposition of tax on tangible personal property for the rental of shoes etc.

.4201 US Government Exemption
Statute - G.S. 105-164.13(17)

Explanation – The rule interprets the exemption for sales which the states are without power to tax. The United States Constitution does not expressly provide that the federal government is immune from state taxation, however, numerous Supreme Court cases have held that the United State is generally exempt from direct state taxation.

.4202 US Government Exemption
Statute - G.S. 105-164.13(17)

Explanation – The rule interprets the exemption for sales which the states are without power to tax. The United States Constitution does not expressly provide that the federal government is immune from state taxation, however, numerous Supreme Court cases have held that the United State is generally exempt from direct state taxation.

WILLIAM W. PEASLEE
COMMISSION COUNSEL

.4203 US Government Contractor's Exemption
Statute - G.S. 105-164.13(17)

Explanation – The rule interprets the exemption for sales which the states are without power to tax. In the Supreme Court opinion of *United States v. County of Allegheny*, 322 U.S. 174 (1944), the court found that in instances where contractor purchases of property to which title passes to United States are exempt from state taxation. This was also applied in *General Dynamics v. NCDOR*, 09 REV 05695.

.4614 Recreational vehicles exemption

Statutes - G.S. 105-164.4(a)(1), 105-164.13(32), 105-164.3(149).

Explanation – This rule provides the interpretation for certain recreational vehicles being classified as motor vehicles which qualify for exemption from sales and use tax or taxable tangible personal property. Motor vehicles are defined in G.S. 105-164.3(149) and subject to the highway use tax or alternate highway use tax, not the sales and use tax.

.4700 Commercial printers and publishers' exemptions Statutes

- G.S. 105-164(a)(1), 105-164.13(5e) & (39)

Explanation - This rule covers all different types of transactions that a commercial printer or publisher may encounter and provides taxability information on items purchased and whether those items purchased are used or resold to a customer. The rule also covers commercial printers and publishers being classified as a manufacturing industry or plant and covers the taxability with respect to many items that fall under that exemption.

.4707 Printing Chemicals exemption

Statute- 105-164.13(8)

Explanation - Exemption allowed for chemicals that become ingredient and component part of printed materials and 105-164.13(5e) which is the mill machinery and mill machinery parts and accessories exemption for chemicals to clean printing machinery.

.4708 Postage Charges by printers exemption

Statute - 105-164.13(17) and 18 USC 8

Explanation - The rule interprets the exemption for sales which the states are without power to tax. 18 USC 8 states that stamps are an obligation of the US government and the states generally cannot tax the face value of an obligation of the US government.

.5002 Eyeglass frames and repair parts exemption Statutes

- 105-164.13(12)(a) and 164.4D(a)(1)c

Explanation - The rule interprets the exemption for prosthetic devices and bundled transactions on medical devices.

.5001 Eyeglass and contact lens exemption

Statutes - 105-164.13(12) and 105-164.3(192)

Explanation - The rule interprets the exemption for prosthetic devices and the definition of prosthetic devices.

.5004 Optical supply exemption.

Statutes - G.S. 105-164.4(a)(1) and 105-164.13(12)a

Explanation - The rule interprets the exemption for prosthetic devices and the tax imposed on tangible personal property.

.0112(c) Exemption for Business engaged in occasional and isolated sales
Statutes - 105-164.3(25) and 105-164.4(4b)

Explanation – The rule interprets the imposition of tax and the following exclusion in 105-164.3, “[t]he term does not include an occasional and isolated sale or transaction by a person who does not claim to be engaged in business.” In addition, G.S. 105-164.4(4b) differentiates between a person who sells TPP at a specialty market, who is considered a retailer, from a person who sells their own household items.

.0901 (a), (b) Advertising services
Statutes – 105-164.3(237), 105-164.4(a)(1) and 105-164.13.

Explanation – Generally, this rule interprets the imposition of tax on tangible personal property and the lack of imposition on professional services as it relates to advertising agencies. The rule interprets when a sale of tangible personal property takes place versus when a sale is of professional services and the tax consequences of those determinations. The rule also interprets the definition of sales prices for various charges by an advertising agency and the purchase for resale exemption.

.0902 Advertising artists
Statutes – 105-164.3(237), 105-164.4(a)(1) and 105-164.13.

Explanation – Generally, this rule interprets the imposition of tax on tangible personal property and the lack of imposition on professional services as it relates to advertising artists. The rule interprets when a sale of tangible personal property takes place versus when a sale is of professional services and the tax consequences of those determinations. The rule also interprets the definition of sales prices for various charges and the purchase for resale exemption.

.0904 Public relations firms
Statutes – 105-164.3(237), 105-164.4(a)(1) and 105-164.13.

Explanation – Generally, this rule interprets the imposition of tax on tangible personal property and the lack of imposition on professional services as it relates to public relations firms. The rule interprets when a sale is of tangible personal property versus when a sale is of professional services and the tax consequences of those determinations. The rule also interprets the definition of sales prices for various charges by a public relations firm and the purchase for resale exemption.

.0115 Research Services Statute –
105-164.4(a)(1)

Explanation - The rule interprets the imposition of tax on research equipment used by research firms.

.1202 Supplies and Equipment for an Accommodation
Statutes - GS 105-164.4(a)(1), GS 105-164.6, 105-164.13.

Explanation – The rule interprets the imposition of tax on items purchased by an accommodation provider and used in the accommodation. This has been an area of confusion in the past and the legislature gave relief from assessments in G.S. 105-244.4 for a period of time.

.1302 In-state deliveries
Statutes - G.S. 105-164.4(a)(1) and G.S. 105-164.13(33a)

Explanation - This rule interprets the imposition of tax on items sold at retail to the purchaser or purchaser’s agent even when they may be taken about of State. Even though these items could be transported out of this State, because they are delivered

in this State to the purchaser or purchaser's agent in this State, they are subject to North Carolina use tax.

.1303 Gifts to donees

Statutes - G.S. 105-164.4(a)(1) and 105-164.4B.

Explanation - This rule interprets the imposition of tax on items that are sold to a purchaser to be given to a donee or given directly to the donee.

.1404 Medical supplies, instruments, and equipment

Statutes - G.S. 105-164.3(229), 105-164.3(227), 105-164.3(43), 105-164.4(a)(1), 105-164.6.

Explanation - This rule interprets the treatment of sales to and purchases by hospitals and other institutions. For an example of disputes related to medical supplies, see *Feeling Great, Inc. and Sleep Medical Center, Inc. v. N.C. Department of Revenue*, 14 CVS 11139, Wake County Superior Court Division.

.1601 Sales to or purchases by nonprofit entities

Statutes - G.S. 105-164.4 and 105-164.14

Explanation - This rule interprets how the sales and use tax applies to purchases by and for non-profits. North Carolina is one of very few States that does not provide an exemption for these sales.

.1605 Sales by nonprofit entities

Statutes - G.S. 105-164.4 and 105-164.3(229)

Explanation - The rule interprets the imposition of tax on nonprofits that act as retailers. The rule makes clear that nonprofits making retail sales are retailers.

.1705 Housing authorities

Statutes - G.S. 105-164.4 and 105-164.14(c)

Explanation - This rule interprets the imposition of tax on housing authorities and the non-profits eligible for refund. The housing authorities listed in the statute do not meet the requirements of 105-164.14(c) and thus are not eligible for a refund.

.1801 Sales to hospitals

Statutes - G.S. 105-164.4 and 105-164.13(12) and -(13).

Explanation - The rule interprets various impositions and exemptions and how they apply to hospitals. The rule interprets which items are purchased for use, which items are purchased for resale, and which items are subject to exemption.

.1905 Tire retreaders

Statutes - G.S. 105-164.4(a)(1)a., G.S. 105-164.4(a)(1)c.

Explanation - The rule interprets the imposition of tax on tangible personal property and repair, maintenance and installation services as they relate to tire retreaders. In addition, the rule interprets which items purchased by tire retreaders are subject to the exemption provided in G.S. 105-164.13(61b)

.2001 Sales to employees Statutes -

G.S. 105-164.4

Explanation - The rule interprets the imposition of tax on sales by employers to employees. This rule explains an employer engaged in business in this State that makes retail sales of items to their employees is a retailer. Therefore, the employer must collect and remit the sales and use tax due on its retail sales to employees.

.2002 Gifts to employees Statutes
– GS 105-164.4

Explanation - The rule interprets the imposition of tax on gifts to employees. This rule explains an employer that purchases items provided to an employee or other person as a gift or as compensation is the consumer of the items.

Thank You,

Andrew O. Furuseth
Director, Sales and Use Tax Division
N.C. Department of Revenue
PO Box 871
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WILLIAM W. PEASLEE
COMMISSION COUNSEL

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 .4206

RECOMMENDATION DATE: October 31, 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:

AS REVISED, THE RULE CONTINUES TO BE UNCLEAR WHETHER THE SECRETARY INTENDS THE LANGUAGE OF THE RULE TO BE A RESTATEMENT OF EXISTING LAW, AN ATTEMPT TO IMPOSE REGULATION, OR AN INTERPRETATION OF EXISTING LAW. WHILE THE LANGUAGE OF THE RULE NOW STATES THAT IT IS PURSUANT TO G.S. 105-164.13, THE STATUTE PROVIDES SEVENTY-THREE EXEMPTIONS TO THE STATE SALES AND USE TAX NONE OF WHICH INCLUDE THE WORDS "BANK", "CREDIT UNION", OR "SAVINGS AND LOAN ASSOCIATION." FURTHER, WHILE G.S. 105-164.13 IS AN EXEMPTION STATUTE, THE REVISED RULE DOES NOT PROVIDE FOR ANY EXEMPTIONS.

STAFF RECOMMENDS THAT THE COMMISSION FIND THAT THE SECRETARY HAS NOT SATISFIED OBJECTIONS I-IV OF THE SEPTEMBER COMMISSION OBJECTIONS.

STAFF FURTHER RECOMMENDS THAT THE COMMISSION FIND THAT THE SECRETARY HAS SATISFIED OBJECTION V OF THE SEPTEMBER COMMISSION OBJECTIONS.

*WILLIAM W. PEASLEE
COMMISSION COUNSEL*

§ 150B-21.9. Standards and timetable for review by Commission.

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

§ 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

- (1) Administrative law judge. - A person appointed under G.S. 7A-752, 7A-753, or 7A-757.
- (1a) Adopt. - To take final action to create, amend, or repeal a rule.
- (1b) Agency. - An agency or an officer in the executive branch of the government of this State. The term includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A local unit of government is not an agency.
- (1c) Codifier of Rules. - The person appointed by the Chief Administrative Law Judge of the Office of Administrative Hearings pursuant to G.S. 7A-760(b).
- (1d) Commission. - The Rules Review Commission.
- (2) Contested case. - An administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty. The term does not include rulemaking, declaratory rulings, or the award or denial of a scholarship, a grant, or a loan.
- (2a) Repealed by Session Laws 1991, c. 418, s. 3.
- (2b) Hearing officer. - A person or group of persons designated by an agency that is subject to Article 3A of this Chapter to preside in a contested case hearing conducted under that Article.
- (3) License. - Any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in any activity, except licenses issued under Chapter 20 and Subchapter I of Chapter 105 of the General Statutes, occupational licenses, and certifications of electronic poll books, ballot duplication systems, or voting systems under G.S. 163-165.7.
- (4) Licensing. - Any administrative action issuing, failing to issue, suspending, or revoking a license or occupational license. The term does not include controversies over whether an examination was fair or whether the applicant passed the examination.
- (4a) Occupational license. - Any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in a profession, occupation, or field of endeavor that is issued by an occupational licensing agency.
- (4b) Occupational licensing agency. - Any board, commission, committee, or other agency of the State that is established for the primary purpose of regulating the entry of persons into, or the conduct of persons within a particular profession, occupation, or field of endeavor, and that is authorized to issue and revoke licenses. The term does not include State

agencies or departments that may as only a part of their regular function issue permits or licenses.

- (5) Party. - Any person or agency named or admitted as a party or properly seeking as of right to be admitted as a party and includes the agency as appropriate.
- (5a) Person. - Any natural person, partnership, corporation, body politic, and any unincorporated association, organization, or society that may sue or be sued under a common name.
- (6) Person aggrieved. - Any person or group of persons of common interest directly or indirectly affected substantially in his, her, or its person, property, or employment by an administrative decision.
- (7) Recodified as subdivision (5a) of this section by Session Laws 2021-88, s. 16(a), effective July 22, 2021.
- (7a) Policy. - Any nonbinding interpretive statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.
- (8) Residence. - Domicile or principal place of business.
- (8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
 - a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
 - b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.
 - c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
 - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
 - e. Statements of agency policy made in the context of another proceeding, including:

1. Declaratory rulings under G.S. 150B-4.
 2. Orders establishing or fixing rates or tariffs.
- f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
 - g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
 - h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.
 - i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
 - j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
 - k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
 - l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.
- (8b) Repealed by Session Laws 2011-398, s. 61.2, effective July 25, 2011.
- (8c) Substantial evidence. - Relevant evidence a reasonable mind might accept as adequate to support a conclusion.
- (9) Repealed by Session Laws 1991, c. 418, s. 3. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, ss. 61, 62; 1977, c. 915, s. 5; 1983, c. 641, s. 1; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(2)-1(5); 1987, c. 878, ss. 1, 2, 21; 1987 (Reg. Sess., 1988), c. 1111, s. 17; 1991, c. 418, s. 3; c. 477, ss. 3.1, 3.2, 9; 1995, c. 390, s. 29; 1996, 2nd Ex. Sess., c. 18, s. 7.10(g); 1997-456, s. 27; 2003-229, s. 12; 2007-491, s. 44(1)b; 2011-13, s. 2; 2011-398, ss. 15, 61.2; 2013-188, s. 7; 2013-382, s. 9.1(c); 2013-413, s. 1; 2015-2, s. 2.2(c); 2015-241, ss. 7A.3, 30.16(a); 2017-6, s. 3; 2018-13, s. 3.8(b); 2018-146, ss. 3.1(a), (b), 4.5(b); 2021-88, s. 16(a), (b).)

§ 105-264. Effect of Secretary's interpretation of revenue laws.

(a) **Interpretation.** - It is the duty of the Secretary to interpret all laws administered by the Secretary. The Secretary's interpretation of these laws shall be consistent with the applicable rules. An interpretation by the Secretary is prima facie correct. When the Secretary interprets a law by adopting a rule or publishing a bulletin or directive on the law, the interpretation is a protection to the officers and taxpayers affected by the interpretation, and taxpayers are entitled to rely upon the interpretation. If the Secretary changes an interpretation, a taxpayer who relied on it before it was changed is not liable for any penalty or additional assessment on any tax that accrued before the interpretation was changed and was not paid by reason of reliance upon the interpretation.

(b) **Advice.** - If a taxpayer requests specific advice from the Department and receives erroneous advice in response, the taxpayer is not liable for any penalty or additional assessment attributable to the erroneous advice furnished by the Department to the extent that the following conditions are all satisfied:

- (1) The advice was reasonably relied upon by the taxpayer.
- (2) The penalty or additional assessment did not result from the taxpayer's failure to provide adequate or accurate information.
- (3) The Department provided the advice in writing or the Department's records establish that the Department provided erroneous verbal advice.

(c) **Revised Interpretations.** - This section does not prevent the Secretary from changing an interpretation, and it does not prevent a change in an interpretation from applying on and after the effective date of the change. An interpretation that revises a prior interpretation by expanding the scope of a tax or otherwise increasing the amount of tax due may not become effective sooner than the following:

- (1) For a tax that is payable on a monthly or quarterly basis, the first day of a month that is at least 90 days after the date the revised interpretation is issued.
- (2) For a tax that is payable on an annual basis, the first day of a tax year that begins after the date the revised interpretation is issued.

(d) **Fee.** - The Secretary may charge a fee for providing a written determination at the request of a taxpayer. The fee is a receipt of the Department and must be applied to the costs of providing the written determination. The proceeds of the fee must be credited to a special account within the Department and do not revert but remain in the special account until spent by the Department for the costs of providing the written determination. The Secretary may adopt a tiered fee structure based on the taxpayer's income or gross receipts, the relative complexity of the advice requested, or the tax schedule for which advice is requested. The fee shall not be less than one hundred dollars (\$100.00) or more than five thousand dollars (\$5,000). The fee may be waived by the Secretary. The term "written determination" has the same meaning as defined in G.S. 105-264.2. (1939, c. 158, s. 933; 1955, c. 1350, s. 4; 1957, c. 1340, s. 14; 1973, c. 476, s. 193;

1991, c. 45, s. 29; 1993, c. 532, s. 9; 1998-98, s. 21; 2008-107, s. 28.16(e); 2010-31, s. 31.7A(a); 2011-390, s. 6; 2016-103, s. 6.)

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COMMISSION COUNSEL

From: [Andrew O. Furuseth](#)

To: [Ascher, Seth M](#); [Peaslee, William W](#); [Lansford, Laura L](#)

Cc: [Burgos, Alexander N](#); [Jacobs, Tenisha S](#)

Subject: RE: [External] RE: DOR Rules

Date: Wednesday, September 6, 2023 4:47:01 PM

CAUTION: External email. Do not click links or open attachments unless verified. Report suspicious emails with the Report Message button located on your Outlook menu bar on the Home tab.

Mr. Peaslee and Mr. Ascher,

We look forward to meeting with you tomorrow morning. We have included specific statute support and a brief explanation for each rule mentioned in your emails below. In addition, we want to provide a brief general explanation for the industry specific rules. While each of these industry specific rules have existed for a long time, it is my understanding that they were adopted to provide the interpretation for how sales and use tax applies to industries that have had questions or disputes about the application of sales and use tax to the industry. The objective is to provide the Secretary's interpretation of the law to the specific industry so they can comply with the law.

These types of interpretations are important because retailers become liable for sales and use tax that is incorrectly calculated. For example, if a business thinks an item they are selling is not subject to tax and does not collect tax from its customer, the business becomes liable for the tax. In the inverse situation, a retailer that collects tax on an item that is not subject to tax, can become liable to civil actions by its customers including class actions. See G.S. 105-164.11(c).

We also want to address the question about the articles referenced in the rules. We have 75 rules that where the Secretary has cited "Chapter 105, Articles 39, 40, 42, 43, and 46." The existing rules cite these articles for the authority to impose the local and transit rates of sales and use tax. The following citations provide the specific authority for those tax levies and the administration of those taxes: 105-467; 105-468; 105-469; 105-483; 105-498; 105-507.2; 105-509.1; 105-510.1; 105-511.3; 105-537; 105-538.

17 NCAC 07B .4415 - SKATING RINK AND BOWLING ALLEY RENTAL FEES
Statutes – G.S. 105-105-164.4(a)(1) and 164.4G(e)(1)

The rule interprets the exemption allowed per 105-164.4G(e)(1) which excepts from tax "[a]n amount paid solely for the right to participate, other than to be a spectator, in sporting activities. Examples of these types of charges include bowling fees...." In addition, the rule interprets the imposition of tax on tangible personal property for the rental of shoes etc.

.4201 US Government Exemption
Statute - G.S. 105-164.13(17)

Explanation – The rule interprets the exemption for sales which the states are without power to tax. The United States Constitution does not expressly provide that the federal government is immune from state taxation, however, numerous Supreme Court cases have held that the United State is generally exempt from direct state taxation.

.4202 US Government Exemption
Statute - G.S. 105-164.13(17)

Explanation – The rule interprets the exemption for sales which the states are without power to tax. The United States Constitution does not expressly provide that the federal government is immune from state taxation, however, numerous Supreme Court cases have held that the United State is generally exempt from direct state taxation.

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.4203 US Government Contractor's Exemption
Statute - G.S. 105-164.13(17)

Explanation – The rule interprets the exemption for sales which the states are without power to tax. In the Supreme Court opinion of *United States v. County of Allegheny*, 322 U.S. 174 (1944), the court found that in instances where contractor purchases of property to which title passes to United States are exempt from state taxation. This was also applied in *General Dynamics v. NCDOR*, 09 REV 05695.

.4614 Recreational vehicles exemption

Statutes - G.S. 105-164.4(a)(1), 105-164.13(32), 105-164.3(149).

Explanation – This rule provides the interpretation for certain recreational vehicles being classified as motor vehicles which qualify for exemption from sales and use tax or taxable tangible personal property. Motor vehicles are defined in G.S. 105-164.3(149) and subject to the highway use tax or alternate highway use tax, not the sales and use tax.

.4700 Commercial printers and publishers' exemptions Statutes

- G.S. 105-164(a)(1), 105-164.13(5e) & (39)

Explanation - This rule covers all different types of transactions that a commercial printer or publisher may encounter and provides taxability information on items purchased and whether those items purchased are used or resold to a customer. The rule also covers commercial printers and publishers being classified as a manufacturing industry or plant and covers the taxability with respect to many items that fall under that exemption.

.4707 Printing Chemicals exemption

Statute- 105-164.13(8)

Explanation - Exemption allowed for chemicals that become ingredient and component part of printed materials and 105-164.13(5e) which is the mill machinery and mill machinery parts and accessories exemption for chemicals to clean printing machinery.

.4708 Postage Charges by printers exemption

Statute - 105-164.13(17) and 18 USC 8

Explanation - The rule interprets the exemption for sales which the states are without power to tax. 18 USC 8 states that stamps are an obligation of the US government and the states generally cannot tax the face value of an obligation of the US government.

.5002 Eyeglass frames and repair parts exemption Statutes

- 105-164.13(12)(a) and 164.4D(a)(1)c

Explanation - The rule interprets the exemption for prosthetic devices and bundled transactions on medical devices.

.5001 Eyeglass and contact lens exemption

Statutes - 105-164.13(12) and 105-164.3(192)

Explanation - The rule interprets the exemption for prosthetic devices and the definition of prosthetic devices.

.5004 Optical supply exemption.

Statutes - G.S. 105-164.4(a)(1) and 105-164.13(12)a

Explanation - The rule interprets the exemption for prosthetic devices and the tax imposed on tangible personal property.

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.0112(c) Exemption for Business engaged in occasional and isolated sales
Statutes - 105-164.3(25) and 105-164.4(4b)

Explanation – The rule interprets the imposition of tax and the following exclusion in 105-164.3, “[t]he term does not include an occasional and isolated sale or transaction by a person who does not claim to be engaged in business.” In addition, G.S. 105-164.4(4b) differentiates between a person who sells TPP at a specialty market, who is considered a retailer, from a person who sells their own household items.

.0901 (a), (b) Advertising services
Statutes – 105-164.3(237), 105-164.4(a)(1) and 105-164.13.

Explanation – Generally, this rule interprets the imposition of tax on tangible personal property and the lack of imposition on professional services as it relates to advertising agencies. The rule interprets when a sale of tangible personal property takes place versus when a sale is of professional services and the tax consequences of those determinations. The rule also interprets the definition of sales prices for various charges by an advertising agency and the purchase for resale exemption.

.0902 Advertising artists
Statutes – 105-164.3(237), 105-164.4(a)(1) and 105-164.13.

Explanation – Generally, this rule interprets the imposition of tax on tangible personal property and the lack of imposition on professional services as it relates to advertising artists. The rule interprets when a sale of tangible personal property takes place versus when a sale is of professional services and the tax consequences of those determinations. The rule also interprets the definition of sales prices for various charges and the purchase for resale exemption.

.0904 Public relations firms
Statutes – 105-164.3(237), 105-164.4(a)(1) and 105-164.13.

Explanation – Generally, this rule interprets the imposition of tax on tangible personal property and the lack of imposition on professional services as it relates to public relations firms. The rule interprets when a sale is of tangible personal property versus when a sale is of professional services and the tax consequences of those determinations. The rule also interprets the definition of sales prices for various charges by a public relations firm and the purchase for resale exemption.

.0115 Research Services Statute –
105-164.4(a)(1)

Explanation - The rule interprets the imposition of tax on research equipment used by research firms.

.1202 Supplies and Equipment for an Accommodation
Statutes - GS 105-164.4(a)(1), GS 105-164.6, 105-164.13.

Explanation – The rule interprets the imposition of tax on items purchased by an accommodation provider and used in the accommodation. This has been an area of confusion in the past and the legislature gave relief from assessments in G.S. 105-244.4 for a period of time.

.1302 In-state deliveries
Statutes - G.S. 105-164.4(a)(1) and G.S. 105-164.13(33a)

Explanation - This rule interprets the imposition of tax on items sold at retail to the purchaser or purchaser’s agent even when they may be taken about of State. Even though these items could be transported out of this State, because they are delivered

in this State to the purchaser or purchaser's agent in this State, they are subject to North Carolina use tax.

.1303 Gifts to donees

Statutes - G.S. 105-164.4(a)(1) and 105-164.4B.

Explanation - This rule interprets the imposition of tax on items that are sold to a purchaser to be given to a donee or given directly to the donee.

.1404 Medical supplies, instruments, and equipment

Statutes - G.S. 105-164.3(229), 105-164.3(227), 105-164.3(43), 105-164.4(a)(1), 105-164.6.

Explanation - This rule interprets the treatment of sales to and purchases by hospitals and other institutions. For an example of disputes related to medical supplies, see *Feeling Great, Inc. and Sleep Medical Center, Inc. v. N.C. Department of Revenue*, 14 CVS 11139, Wake County Superior Court Division.

.1601 Sales to or purchases by nonprofit entities

Statutes - G.S. 105-164.4 and 105-164.14

Explanation – This rule interprets how the sales and use tax applies to purchases by and for non-profits. North Carolina is one of very few States that does not provide an exemption for these sales.

.1605 Sales by nonprofit entities

Statutes – G.S. 105-164.4 and 105-164.3(229)

Explanation – The rule interprets the imposition of tax on nonprofits that act as retailers. The rule makes clear that nonprofits making retail sales are retailers.

.1705 Housing authorities

Statutes – G.S. 105-164.4 and 105-164.14(c)

Explanation – This rule interprets the imposition of tax on housing and authorities and the non-profits eligible for refund. The housing authorities listed in the statute do not meet the requirements of 105-164.14(c) and thus are not eligible for a refund.

.1801 Sales to hospitals

Statutes – G.S. 105-164.4 and 105-164.13(12) and –(13).

Explanation – The rule interprets various impositions and exemptions and how they apply to hospitals. The rule interprets which items are purchased for use, which items are purchased for resale, and which items are subject to exemption.

.1905 Tire retreaders

Statutes – G.S. 105-164.4(a)(1)a., G.S. 105-164.4(a)(1)c.

Explanation – The rule interprets the imposition of tax on tangible personal property and repair, maintenance and installation services as they relate to tire retreaders. In addition, the rule interprets which items purchased by tire retreaders are subject to the exemption provided in G.S. 105-164.13(61b)

.2001 Sales to employees Statutes -

G.S. 105-164.4

Explanation – The rule interprets the imposition of tax on sales by employers to employees. This rule explains an employer engaged in business in this State that makes retail sales of items to their employees is a retailer. Therefore, the employer must collect and remit the sales and use tax due on its retail sales to employees.

.2002 Gifts to employees Statutes
– GS 105-164.4

Explanation - The rule interprets the imposition of tax on gifts to employees. This rule explains an employer that purchases items provided to an employee or other person as a gift or as compensation is the consumer of the items.

Thank You,

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WILLIAM W. PEASLEE
COMMISSION COUNSEL

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 .4210

RECOMMENDATION DATE: November 11, 2023

RECOMMENDED ACTION:

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

COMMENT:

I.

PURSUANT TO G.S. 164.13(25), "SALES BY MERCHANTS ON THE CHEROKEE INDIAN RESERVATION WHEN SUCH MERCHANTS ARE AUTHORIZED TO DO BUSINESS ON THE RESERVATION AND ARE PAYING THE TRIBAL GROSS RECEIPTS LEVY TO THE TRIBAL COUNCIL" ARE EXEMPT FROM SALES AND USE TAX. BY THE PLAIN LANGUAGE, THE MERCHANTS MUST BE ON THE RESERVATION.

IN SUBPARAGRAPH (A)(1) OF THE RULE, SALES OF ITEMS "BY MERCHANTS SOURCED TO THE [EASTERN BAND OF CHEROKEE INDIANS]" ARE EXEMPT FROM SALES TAX.

THE LANGUAGE EMPLOYED IS AMBIGUOUS. THIS SUBPARAGRAPH COULD BE READ THAT SALES OF ITEMS TO MERCHANTS ON THE RESERVATION ARE EXEMPT. OR IT COULD BE READ THAT SALES BY MERCHANTS LOCATED ON THE RESERVATION TO CUSTOMERS OFF THE RESERVATION ARE TAX EXEMPT. THE FORMER WOULD NOT BE IN ACCORDANCE WITH G.S. 164.13(25).

ACCORDINGLY, STAFF RECOMMENDS OBJECTION PURSUANT TO G.S. 150B-21.9(A)(2) FOR LACK OF CLARITY.

*WILLIAM W. PEASLEE
COMMISSION COUNSEL*

§ 150B-21.9. Standards and timetable for review by Commission.

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

§ 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

- (1) Administrative law judge. - A person appointed under G.S. 7A-752, 7A-753, or 7A-757.
- (1a) Adopt. - To take final action to create, amend, or repeal a rule.
- (1b) Agency. - An agency or an officer in the executive branch of the government of this State. The term includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A local unit of government is not an agency.
- (1c) Codifier of Rules. - The person appointed by the Chief Administrative Law Judge of the Office of Administrative Hearings pursuant to G.S. 7A-760(b).
- (1d) Commission. - The Rules Review Commission.
- (2) Contested case. - An administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty. The term does not include rulemaking, declaratory rulings, or the award or denial of a scholarship, a grant, or a loan.
 - (2a) Repealed by Session Laws 1991, c. 418, s. 3.
 - (2b) Hearing officer. - A person or group of persons designated by an agency that is subject to Article 3A of this Chapter to preside in a contested case hearing conducted under that Article.
- (3) License. - Any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in any activity, except licenses issued under Chapter 20 and Subchapter I of Chapter 105 of the General Statutes, occupational licenses, and certifications of electronic poll books, ballot duplication systems, or voting systems under G.S. 163-165.7.
- (4) Licensing. - Any administrative action issuing, failing to issue, suspending, or revoking a license or occupational license. The term does not include controversies over whether an examination was fair or whether the applicant passed the examination.
 - (4a) Occupational license. - Any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in a profession, occupation, or field of endeavor that is issued by an occupational licensing agency.
 - (4b) Occupational licensing agency. - Any board, commission, committee, or other agency of the State that is established for the primary purpose of regulating the entry of persons into, or the conduct of persons within a particular profession, occupation, or field of endeavor, and that is authorized to issue and revoke licenses. The term does not include State

agencies or departments that may as only a part of their regular function issue permits or licenses.

- (5) Party. - Any person or agency named or admitted as a party or properly seeking as of right to be admitted as a party and includes the agency as appropriate.
- (5a) Person. - Any natural person, partnership, corporation, body politic, and any unincorporated association, organization, or society that may sue or be sued under a common name.
- (6) Person aggrieved. - Any person or group of persons of common interest directly or indirectly affected substantially in his, her, or its person, property, or employment by an administrative decision.
- (7) Recodified as subdivision (5a) of this section by Session Laws 2021-88, s. 16(a), effective July 22, 2021.
- (7a) Policy. - Any nonbinding interpretive statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.
- (8) Residence. - Domicile or principal place of business.
- (8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
 - a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
 - b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.
 - c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
 - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
 - e. Statements of agency policy made in the context of another proceeding, including:

1. Declaratory rulings under G.S. 150B-4.
 2. Orders establishing or fixing rates or tariffs.
- f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
 - g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
 - h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.
 - i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
 - j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
 - k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
 - l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.
- (8b) Repealed by Session Laws 2011-398, s. 61.2, effective July 25, 2011.
- (8c) Substantial evidence. - Relevant evidence a reasonable mind might accept as adequate to support a conclusion.
- (9) Repealed by Session Laws 1991, c. 418, s. 3. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, ss. 61, 62; 1977, c. 915, s. 5; 1983, c. 641, s. 1; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(2)-1(5); 1987, c. 878, ss. 1, 2, 21; 1987 (Reg. Sess., 1988), c. 1111, s. 17; 1991, c. 418, s. 3; c. 477, ss. 3.1, 3.2, 9; 1995, c. 390, s. 29; 1996, 2nd Ex. Sess., c. 18, s. 7.10(g); 1997-456, s. 27; 2003-229, s. 12; 2007-491, s. 44(1)b; 2011-13, s. 2; 2011-398, ss. 15, 61.2; 2013-188, s. 7; 2013-382, s. 9.1(c); 2013-413, s. 1; 2015-2, s. 2.2(c); 2015-241, ss. 7A.3, 30.16(a); 2017-6, s. 3; 2018-13, s. 3.8(b); 2018-146, ss. 3.1(a), (b), 4.5(b); 2021-88, s. 16(a), (b).)

§ 105-264. Effect of Secretary's interpretation of revenue laws.

(a) **Interpretation.** - It is the duty of the Secretary to interpret all laws administered by the Secretary. The Secretary's interpretation of these laws shall be consistent with the applicable rules. An interpretation by the Secretary is prima facie correct. When the Secretary interprets a law by adopting a rule or publishing a bulletin or directive on the law, the interpretation is a protection to the officers and taxpayers affected by the interpretation, and taxpayers are entitled to rely upon the interpretation. If the Secretary changes an interpretation, a taxpayer who relied on it before it was changed is not liable for any penalty or additional assessment on any tax that accrued before the interpretation was changed and was not paid by reason of reliance upon the interpretation.

(b) **Advice.** - If a taxpayer requests specific advice from the Department and receives erroneous advice in response, the taxpayer is not liable for any penalty or additional assessment attributable to the erroneous advice furnished by the Department to the extent that the following conditions are all satisfied:

- (1) The advice was reasonably relied upon by the taxpayer.
- (2) The penalty or additional assessment did not result from the taxpayer's failure to provide adequate or accurate information.
- (3) The Department provided the advice in writing or the Department's records establish that the Department provided erroneous verbal advice.

(c) **Revised Interpretations.** - This section does not prevent the Secretary from changing an interpretation, and it does not prevent a change in an interpretation from applying on and after the effective date of the change. An interpretation that revises a prior interpretation by expanding the scope of a tax or otherwise increasing the amount of tax due may not become effective sooner than the following:

- (1) For a tax that is payable on a monthly or quarterly basis, the first day of a month that is at least 90 days after the date the revised interpretation is issued.
- (2) For a tax that is payable on an annual basis, the first day of a tax year that begins after the date the revised interpretation is issued.

(d) **Fee.** - The Secretary may charge a fee for providing a written determination at the request of a taxpayer. The fee is a receipt of the Department and must be applied to the costs of providing the written determination. The proceeds of the fee must be credited to a special account within the Department and do not revert but remain in the special account until spent by the Department for the costs of providing the written determination. The Secretary may adopt a tiered fee structure based on the taxpayer's income or gross receipts, the relative complexity of the advice requested, or the tax schedule for which advice is requested. The fee shall not be less than one hundred dollars (\$100.00) or more than five thousand dollars (\$5,000). The fee may be waived by the Secretary. The term "written determination" has the same meaning as defined in G.S. 105-264.2. (1939, c. 158, s. 933; 1955, c. 1350, s. 4; 1957, c. 1340, s. 14; 1973, c. 476, s. 193;

1991, c. 45, s. 29; 1993, c. 532, s. 9; 1998-98, s. 21; 2008-107, s. 28.16(e); 2010-31, s. 31.7A(a); 2011-390, s. 6; 2016-103, s. 6.)

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§ 105-164.4B. Sourcing principles.

(a) **General Principles.** - The following principles apply in determining where to source the sale of an item for the seller's purpose and do not alter the application of the tax imposed under G.S. 105-164.6. Except as otherwise provided in this section, a service is sourced where the purchaser can potentially first make use of the service. These principles apply regardless of the nature of the item, except as otherwise noted in this section:

- (1) When a purchaser receives an item at a business location of the seller, the sale is sourced to that business location.
- (2) When a purchaser or purchaser's donee receives an item at a location specified by the purchaser and the location is not a business location of the seller, the sale is sourced to the location where the purchaser or the purchaser's donee receives the item.
- (3) When subdivisions (1) and (2) of this subsection do not apply, the sale is sourced to the location indicated by an address for the purchaser that is available from the business records of the seller that are maintained in the ordinary course of the seller's business when use of this address does not constitute bad faith.
- (4) When subdivisions (1), (2), and (3) of this subsection do not apply, the sale is sourced to the location indicated by an address for the purchaser obtained during the consummation of the sale, including the address of a purchaser's payment instrument, if no other address is available, when use of this address does not constitute bad faith.
- (5) When subdivisions (1), (2), (3), and (4) of this subsection do not apply, including the circumstance in which the seller is without sufficient information to apply the rules, the location will be determined based on the following:
 - a. Address from which tangible personal property was shipped,
 - b. Address from which the digital good or the computer software delivered electronically was first available for transmission by the seller, or
 - c. Address from which the service was provided.

(b) **Periodic Rental Payments.** - When a lease or rental agreement requires recurring periodic payments, the payments are sourced as follows:

- (1) For leased or rented property, the first payment is sourced in accordance with the principles set out in subsection (a) of this section and each subsequent payment is sourced to the primary location of the leased or rented property for the period covered by the payment. This subdivision applies to all property except a motor vehicle, an aircraft, transportation equipment, and a utility company railway car.
- (2) For leased or rented property that is a motor vehicle or an aircraft but is not transportation equipment, all payments are sourced to the primary location of the leased or rented property for the period covered by the payment.

- (3) For leased or rented property that is transportation equipment, all payments are sourced in accordance with the principles set out in subsection (a) of this section.
 - (4) For a railway car that is leased or rented by a utility company and would be transportation equipment if it were used in interstate commerce, all payments are sourced in accordance with the principles set out in subsection (a) of this section.
- (c) **Transportation Equipment Defined.** - As used in the section, the term "transportation equipment" means any of the following used to carry persons or property in interstate commerce: a locomotive, a railway car, a commercial motor vehicle as defined in G.S. 20-4.01, or an aircraft. The term includes a container designed for use on the equipment and a component part of the equipment.
- (d) **Exceptions.** - This section does not apply to the following:
- (1) **Telecommunications services.** - Telecommunications services are sourced in accordance with G.S. 105-164.4C.
 - (2) **Direct mail.** - Direct mail is sourced in accordance with G.S. 105-164.4E.
 - (3) **Florist wire sale.** - A florist wire sale is sourced to the business location of the florist that takes an order for the sale. A "florist wire sale" is a sale in which a retail florist takes a customer's order and transmits the order to another retail florist to be filled and delivered.
- (e) **Accommodations.** - The rental of an accommodation, as defined in G.S. 105-164.4F, is sourced to the location of the accommodation.
- (f) **Certain Digital Property.** - A purchaser receives certain digital property when the purchaser takes possession of the property or makes first use of the property, whichever comes first.
- (g) **Prepaid Meal Plan.** - The gross receipts derived from a prepaid meal plan are sourced to the location where the food or prepared food is available to be consumed by the person.
- (h) **Admissions.** - The gross receipts derived from an admission charge, as defined in G.S. 105-164.4G, are sourced in accordance with G.S. 105-164.4G.
- (i) **Computer Software Renewal.** - The gross receipts derived from the renewal of a service contract for prewritten software is generally sourced pursuant to subdivision (a) of this section. However, sourcing the renewal to an address where the purchaser received the underlying prewritten software does not constitute bad faith provided the seller has not received information from the purchaser that indicates a change in the location of the underlying software. (2001-347, s. 2.9; 2002-16, s. 5; 2003-284, s. 45.3; 2004-170, s. 20; 2006-33, s. 3; 2006-66, s. 24.13(a); 2008-187, s. 42; 2009-445, s. 12; 2010-31, s. 31.6(b); 2010-123, s. 10.2; 2011-330, s. 29; 2012-79, s. 2.8; 2013-414, s. 23(b); 2014-3, ss. 4.1(c), 5.1(b); 2016-5, s. 3.3; 2017-204, s. 2.3; 2018-5, s. 38.5(d); 2019-169, s. 3.3(a).)

§ 105-164.13. Retail sales and use tax.

The sale at retail and the use, storage, or consumption in this State of the following items are specifically exempted from the tax imposed by this Article:

Agricultural Group.

- (1) Repealed by Session Laws 2013-316, s. 3.3(b), effective July 1, 2014, and applicable to sales made on or after that date.
- (1a), (1b) Repealed by Session Laws 2013-316, s. 3.3(b), effective July 1, 2014, and applicable to sales made on or after that date.
- (2) Repealed by Session Laws 2001, c. 514, s. 1, effective February 1, 2002.
- (2a) Repealed by Session Laws 2013-316, s. 3.3(b), effective July 1, 2014, and applicable to sales made on or after that date.
- (2b) Items for a farmer may be exempt as provided in G.S. 105-164.13E.
- (3) Products of forests and mines in their original or unmanufactured state when such sales are made by the producer in the capacity of producer.
- (4) Cotton, tobacco, peanuts or other farm products sold to manufacturers for further manufacturing or processing.
- (4a) Repealed by Session Laws 2013-316, s. 3.3(b), effective July 1, 2014, and applicable to sales made on or after that date.
- (4b) Products of a farm sold in their original state by the producer of the products if the producer is not primarily a retail merchant and ice used to preserve agriculture, aquaculture and commercial fishery products until the products are sold at retail.
- (4c), (4d) Repealed by Session Laws 2013-316, s. 3.3(b), effective July 1, 2014, and applicable to sales made on or after that date.
- (4e) Repealed by Session Laws 2006-162, s. 8(b), effective July 24, 2006.
- (4f) Sales of the following to a person who is engaged in the commercial logging business:
 - a. Logging machinery. - Logging machinery is machinery used to harvest raw forest products for transport to first market.
 - b. Attachments and repair parts for logging machinery.
 - c. Lubricants applied to logging machinery.
 - d. Fuel used to operate logging machinery.
- (4g) A wood chipper that meets all of the following requirements:
 - a. It is designed to be towed by a motor vehicle.
 - b. It is assigned a 17-digit vehicle identification number by the National Highway Transportation Safety Association.
 - c. It is sold to a person who purchases a motor vehicle in this State that is to be registered in another state and who uses the purchased motor vehicle to tow the wood chipper to the state in which the purchased motor vehicle is to be registered.

- (5) Manufactured products produced and sold by manufacturers or producers to other manufacturers, producers, or registered retailers or wholesale merchants, for the purpose of resale except as modified by G.S. 105-164.3(279). This exemption does not extend to or include retail sales to users or consumers not for resale.
- (5a) Repealed by Session Laws 2017-57, s. 38.8(c), as amended by Session Laws 2017-212, s. 7.2(a), effective July 1, 2018, and applicable to sales made on or after that date.
- (5b) Sales to a telephone company regularly engaged in providing telecommunications service to subscribers on a commercial basis of central office equipment, switchboard equipment, private branch exchange equipment, terminal equipment other than public pay telephone terminal equipment, and parts and accessories attached to the equipment.
- (5c) Sales of towers, broadcasting equipment, and parts and accessories attached to the equipment to a radio or television company licensed by the Federal Communications Commission.
- (5d) Sales of broadcasting equipment and parts and accessories attached to the equipment to a cable service provider. For the purposes of this subdivision, "broadcasting equipment" does not include cable.
- (5e) Sales of mill machinery or mill machinery parts or accessories to any of the persons listed in this subdivision. For purposes of this subdivision, the term "accessories" does not include electricity. The persons are:
 - a. A manufacturing industry or plant. A manufacturing industry or plant does not include (i) a delicatessen, cafe, cafeteria, restaurant, or another similar retailer that is principally engaged in the retail sale of food prepared by it for consumption on or off its premises or (ii) a production company.
 - b. A contractor or subcontractor if the purchase is for use in the performance of a contract with a manufacturing industry or plant.
 - c. A subcontractor if the purchase is for use in the performance of a contract with a general contractor that has a contract with a manufacturing industry or plant.
- (5f) Sales to a major recycling facility of any of the following tangible personal property for use in connection with the facility:
 - a. Cranes, structural steel crane support systems, and foundations related to the cranes and support systems.
 - b. Port and dock facilities.
 - c. Rail equipment.
 - d. Material handling equipment.
- (5g) Sales of equipment, or an attachment or repair part for equipment, that meets all of the following requirements:

- a. Is sold to a company primarily engaged at the establishment in research and development activities in the physical, engineering, and life sciences included in industry group 54171 of NAICS.
 - b. Is capitalized by the company for tax purposes under the Code.
 - c. Is used by the company at the establishment in the research and development of tangible personal property.
- (5h) Sales of equipment, or an attachment or repair part for equipment, that meets all of the following requirements:
- a. Is sold to a company primarily engaged at the establishment in software publishing activities included in industry group 5112 of NAICS.
 - b. Is capitalized by the company for tax purposes under the Code.
 - c. Is used by the company at the establishment in the research and development of tangible personal property.
- (5i) Sales of equipment, or an attachment or repair part for equipment, that meets all of the following requirements:
- a. Is sold to a company primarily engaged at the establishment in industrial machinery refurbishing activities included in industry group 811310 of NAICS.
 - b. Is capitalized by the company for tax purposes under the Code.
 - c. Is used by the company at the establishment in repairing or refurbishing tangible personal property.
- (5j) Sales of the following to a company located at a ports facility for waterborne commerce:
- a. Machinery and equipment that is used at the facility to unload or to facilitate the unloading or processing of bulk cargo to make it suitable for delivery to and use by manufacturing facilities.
 - b. Parts, accessories, or attachments used to maintain, repair, replace, upgrade, improve, or otherwise modify such machinery and equipment.
- (5k) Sales of the following to a secondary metals recycler:
- a. Equipment, or an attachment or repair part for equipment, that (i) is capitalized by the person for tax purposes under the Code, (ii) is used by the person in the secondary metals recycling process, and (iii) is not a motor vehicle or an attachment or repair part for a motor vehicle.
 - b. Fuel, piped natural gas, or electricity for use at the person's facility at which the primary activity is secondary metals recycling.
- (5l) Sales of equipment, or an attachment or repair part for equipment, that meets all of the following requirements:
- a. Is sold to a company primarily engaged at the establishment in processing tangible personal property for the purpose of

extracting precious metals, as defined in G.S. 66-406, to determine the value for potential purchase.

- b. Is capitalized by the company for tax purposes under the Code.
 - c. Is used by the company in the process described in this subdivision.
- (5m) Sales of equipment, or an attachment or repair part for equipment, that meets all of the following requirements:
- a. Is sold to a company that is engaged in the fabrication of metal work and that has annual gross receipts, including the gross receipts of all related persons, as defined in G.S. 105-163.010, from the fabrication of metal work of at least eight million dollars (\$8,000,000).
 - b. Is capitalized by the company for tax purposes under the Code.
 - c. Is used by the company at the establishment in the fabrication or manufacture of metal products or used by the company to create equipment for the fabrication or manufacture of metal products.
- (5n) Sales of repair or replacement parts for a ready-mix concrete mill, regardless of whether the mill is freestanding or affixed to a motor vehicle, to a company that primarily sells ready-mix concrete.
- (5o) Sales of equipment, or an accessory, an attachment, or a repair part for equipment, that meets all of the following requirements:
- a. Is sold to a large fulfillment facility or to a contractor or subcontractor if the purchase is for use in the performance of a contract with the large fulfillment facility.
 - b. Is used at the facility for any of the following purposes:
 - 1. In the distribution process, which includes receiving, inventorying, sorting, repackaging, or distributing finished retail products.
 - 2. Baling previously used packaging for resale, sanitizing required by federal law, or material handling.
 - c. Is not electricity.

If the level of investment or employment required by G.S. 105-164.3(119)b. is not timely made, achieved, or maintained, then the exemption provided under this subdivision is forfeited. If the exemption is forfeited due to a failure to timely make the required investment or to timely achieve the minimum required employment level, then the exemption provided under this subdivision is forfeited on all purchases. If the exemption is forfeited due to a failure to maintain the minimum required employment level once that level has been achieved, then the exemption provided under this subdivision is forfeited for those purchases occurring on or after the date the taxpayer fails to maintain the minimum required employment level. A taxpayer that forfeits an exemption under this subdivision is liable for all past sales and use taxes

avoided as a result of the forfeiture, computed at the applicable State and local rates from the date the taxes would otherwise have been due, plus interest at the rate established under G.S. 105-241.21. Interest is computed from the date the sales or use tax would otherwise have been due. The past taxes and interest are due 30 days after the date of forfeiture. A taxpayer that fails to pay the past taxes and interest by the due date is subject to the provisions of G.S. 105-236.

- (5p) Sales of equipment, or an attachment or repair part for equipment, which is used in cutting, shaping, polishing, and finishing rough cut slabs and blocks of natural and engineered stone and stone-like products and sold to a company primarily engaged in the business of providing made-to-order countertops, walls, or tubs.
- (5q) Sales of machinery, equipment, parts, and accessories to the following permittees for use in the manufacture of the following items and supplies and ingredients used or consumed by the permittee in the manufacturing process:
 - a. The holder of an unfortified winery permit for the manufacture of unfortified wine, as authorized in G.S. 18B-1101.
 - b. The holder of a fortified winery permit for the manufacture of fortified wine, as authorized in G.S. 18B-1102.
 - c. The holder of a brewer permit for the manufacture of malt beverages, as authorized in G.S. 18B-1104.
 - d. The holder of a distillery permit for the manufacture of spirituous liquor, as authorized in G.S. 18B-1105.
- (6) Repealed by Session Laws 1989 (Regular Session, 1990), c. 1068, s. 1.
- (7) Sales of products of waters in their original or unmanufactured state when such sales are made by the producer in the capacity of producer. Fish and seafoods are likewise exempt when sold by the fisherman in that capacity.
- (8) Sales to a manufacturer of tangible personal property that enters into or becomes an ingredient or component part of tangible personal property that is manufactured. This exemption does not apply to sales of electricity.
- (8a) Sales to a small power production facility, as defined in 16 U.S.C. § 796(17)(A), of fuel and piped natural gas used by the facility to generate electricity.
- (9) Boats, fuel oil, lubricating oils, machinery, equipment, nets, rigging, paints, parts, accessories, and supplies sold to any of the following:
 - a. The holder of a standard commercial fishing license issued under G.S. 113-168.2 for principal use in commercial fishing operations.
 - b. The holder of a shellfish license issued under G.S. 113-169.2 for principal use in commercial shellfishing operations.

- c. The operator of a for-hire vessel, as defined in G.S. 113-174, for principal use in the commercial use of the boat.
- (10) Sales of the following to commercial laundries or to pressing and dry cleaning establishments:
- a. Articles or materials used for the identification of garments being laundered or dry cleaned, wrapping paper, bags, hangers, starch, soaps, detergents, cleaning fluids and other compounds or chemicals applied directly to the garments in the direct performance of the laundering or the pressing and cleaning service.
 - b. Laundry and dry-cleaning machinery, parts and accessories attached to the machinery, and lubricants applied to the machinery.
 - c. Fuel and piped natural gas used in the direct performance of the laundering or the pressing and cleaning service. The exemption does not apply to electricity.

Motor Fuels Group.

- (10a) Sales of the following to a major recycling facility:
- a. Lubricants and other additives for motor vehicles or machinery and equipment used at the facility.
 - b. Materials, supplies, parts, and accessories, other than machinery and equipment, that are not capitalized by the taxpayer and are used or consumed in the manufacturing and material handling processes at the facility.
 - c. Electricity used at the facility.
- (10b) Recodified as G.S. 105-164.13(10a)c. by Session Laws 2005-276, s. 33.9, effective January 1, 2006.
- (11) Any of the following fuel:
- a. Motor fuel, as taxed in Article 36C of this Chapter, except motor fuel for which a refund of the per gallon excise tax is allowed under G.S. 105-449.105A, G.S. 105-449.106(c), G.S. 105-449.106(d), or G.S. 105-449.107.
 - b. Alternative fuel taxed under Article 36D of this Chapter, unless a refund of that tax is allowed under G.S. 105-449.107.
- (11a) Sales of diesel fuel to railroad companies for use in rolling stock other than motor vehicles. The definitions in G.S. 105-333 apply in this subdivision.
- (11b) **(Expires January 1, 2024)** Sales of aviation gasoline and jet fuel to an interstate air business for use in a commercial aircraft. For purposes of this subdivision, the term "commercial aircraft" has the same meaning as defined in subdivision (45a) of this section. This exemption also applies to aviation gasoline and jet fuel purchased for use in a commercial aircraft in interstate or foreign commerce by a person whose primary

business is scheduled passenger air transportation. This subdivision expires January 1, 2024.

Medical Group.

- (12) Sales of any of the following:
 - a. Prosthetic devices for human use.
 - b. Mobility enhancing equipment sold on a prescription.
 - c. Durable medical equipment sold on prescription.
 - d. Durable medical supplies sold on prescription.
 - e. Human blood, including whole, plasma, and derivatives.
 - f. Human tissue, eyes, DNA, or an organ.
- (13) All of the drugs listed in this subdivision, including their packaging materials and any instructions or information about the drugs included in the package with them. This subdivision does not apply to pet food or feed for animals. The drugs exempt under this subdivision are as follows:
 - a. Drugs required by federal law to be dispensed only on prescription.
 - b. Over-the-counter drugs sold on prescription. This subdivision does not apply to purchases of over-the-counter drugs by hospitals and other medical facilities for use and treatment of patients.
 - c. Insulin.
- (13a) Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 16.
- (13b) Repealed by Session Laws 1999, c. 438, s. 7, effective October 1, 1999.
- (13c) Repealed by Session Laws 2013-316, s. 3.2(a), effective January 1, 2014, and applicable to sales made on or after that date.
- (13d) **(Effective until contingency met - see note)** Sales of diapers or incontinence underpads on prescription by an enrolled State Medicaid provider for use by beneficiaries of the State Medicaid program when the provider is reimbursed by the State Medicaid program or a Medicaid managed care organization, as defined in 42 U.S.C. § 1396b(m).
- (13d) **(Effective once contingency met - see note)** Sales of diapers or incontinence underpads on prescription by an enrolled State Medicaid/Health Choice provider for use by beneficiaries of the State Medicaid program when the provider is reimbursed by the State Medicaid program or a Medicaid managed care organization, as defined in 42 U.S.C. § 1396b(m).
- (14) Public school books on the adopted list, the selling price of which is fixed by State contract.
- (14a) Recodified as subdivision (33a) by Session Laws 2000-120, s. 5, effective July 14, 2000.

Transactions Group.

- (15) Accounts of purchasers, representing taxable sales, on which the tax imposed by this Article has been paid, that are found to be worthless and actually charged off for income tax purposes may, at corresponding periods, be deducted from gross sales. In the case of a municipality that sells electricity, the account may be deducted if it meets all the conditions for charge-off that would apply if the municipality were subject to income tax. Any accounts deducted pursuant to this subdivision must be added to gross sales if afterwards collected. For purposes of this exemption, a worthless account of a purchaser is a "bad debt" as allowed under section 166 of the Code. The amount calculated pursuant to section 166 of the Code must be adjusted to exclude financing charges or interest, sales or use taxes charged on the sales price, uncollectible amounts on property that remains in the possession of the seller until the full purchase price is paid, expenses incurred in attempting to collect any debt, and repossessed property.
- (16) Sales of an article repossessed by the vendor if tax was paid on the sales price of the article.

Exempt Status Group.

- (17) Sales which a state would be without power to tax under the limitations of the Constitution or laws of the United States or under the Constitution of this State.

Unclassified Group.

- (18) Repealed by Session Laws 2005-276, s. 33.9, effective January 1, 2006.
- (19) Repealed by Session Laws 1991, c. 618, s. 1.
- (20) Sales by blind merchants operating under supervision of the Department of Health and Human Services.
- (21) The lease or rental of motion picture films used for exhibition purposes where the lease or rental of such property is an established business or part of an established business or the same is incidental or germane to said business of the lessee.
- (22) The lease or rental of films, motion picture films, transcriptions and recordings to radio stations and television stations operating under a certificate from the Federal Communications Commission.
- (22a) Sales of audiovisual masters made or used by a production company in making visual and audio images for first generation reproduction. For the purpose of this subdivision, an "audiovisual master" is an audio or video film, tape, or disk or another audio or video storage device from which all other copies are made.
- (23) Sales of the following packaging:
- a. Wrapping paper, labels, wrapping twine, paper, cloth, plastic bags, cartons, packages and containers, cores, cones or spools, wooden boxes, baskets, coops and barrels, including paper cups,

napkins and drinking straws and like articles sold to manufacturers, producers and retailers, when such materials are used for packaging, shipment or delivery of tangible personal property which is sold either at wholesale or retail and when such articles constitute a part of the sale of such tangible personal property and are delivered with it to the customer.

- b. A container that is used as packaging by the owner of the container or another person to enclose tangible personal property for delivery to a purchaser of the property and is required to be returned to its owner for reuse.
- (24) Sales of fuel and other tangible personal property for use or consumption by or on ocean-going vessels which ply the high seas in interstate or foreign commerce in the transport of freight and/or passengers for hire exclusively, when delivered to an officer or agent of such vessel for the use of such vessel; provided, however, that sales of fuel and other tangible personal property made to officers, agents, members of the crew or passengers of such vessels for their personal use shall not be exempted from payment of the sales tax.
 - (25) Sales by merchants on the Cherokee Indian Reservation when such merchants are authorized to do business on the Reservation and are paying the tribal gross receipts levy to the Tribal Council.
 - (26) Food and prepared food sold within the school building during the regular school day. For purposes of this exemption, the term "school" is an entity regulated under Chapter 115C of the General Statutes.
 - (26a) Food and prepared food sold not for profit by a public school cafeteria to a child care center that participates in the Child and Adult Care Food Program of the Department of Health and Human Services.
 - (26b) Food, prepared food, soft drinks, candy, and other tangible personal property sold not for profit for or at an event that is sponsored by an elementary or secondary school when the net proceeds of the sales will be given or contributed to the school or to a nonprofit charitable organization, one of whose purposes is to serve as a conduit through which the net proceeds will flow to the school. For purposes of this exemption, the term "school" is an entity regulated under Chapter 115C of the General Statutes.
 - (27) Repealed by Session Laws 2013-316, s. 3.2(a), effective January 1, 2014, and applicable to sales made on or after that date.
 - (27a) Repealed by Session Laws 2013-316, s. 3.4(a), effective July 1, 2014, and applicable to purchases made on or after that date.
 - (28) Repealed by Session Laws 2013-316, s. 3.2(a), effective January 1, 2014, and applicable to sales made on or after that date.
 - (29) Repealed by Session Laws 2005-435, s. 30, effective September 27, 2005.

- (29a) Repealed by Session Laws 1995 (Regular Session, 1996), c. 646, s. 5.
- (30) Repealed by Session Laws 2014-3, s. 8.3(a), effective October 1, 2014, and applicable to sales made on or after that date.
- (31) Sales of meals not for profit to elderly and incapacitated persons by charitable or religious organizations not operated for profit which are entitled to the refunds provided by G.S. 105-164.14(b), when such meals are delivered to the purchasers at their places of abode.
- (31a) Food and prepared food sold by a church or religious organization not operated for profit when the proceeds of the sales are actually used for religious activities.
- (31b) Repealed by Session Laws 1996, Second Extra Session, c. 14, s. 16.
- (32) Sales of motor vehicles, the sale of a motor vehicle body to be mounted on a motor vehicle chassis when a certificate of title has not been issued for the chassis, and the sale of a motor vehicle body mounted on a motor vehicle chassis that temporarily enters the State so the manufacturer of the body can mount the body on the chassis. For purposes of this subdivision, a park model RV, as defined in G.S. 105-187.1, is a motor vehicle.
- (33) Tangible personal property purchased solely for the purpose of export to a foreign country for exclusive use or consumption in that or some other foreign country, either in the direct performance or rendition of professional or commercial services, or in the direct conduct or operation of a trade or business, all of which purposes are actually consummated, or purchased by the government of a foreign country for export which purpose is actually consummated. "Export" shall include the acts of possessing and marshalling such property, by either the seller or the purchaser, for transportation to a foreign country, but shall not include devoting such property to any other use in North Carolina or the United States. "Foreign country" shall not include any territory or possession of the United States.

In order to qualify for this exemption, an affidavit of export indicating compliance with the terms and conditions of this exemption, as prescribed by the Secretary of Revenue, must be submitted by the purchaser to the seller, and retained by the seller to evidence qualification for the exemption.

If the purposes qualifying the property for exemption are not consummated, the purchaser shall be liable for the tax which was avoided by the execution of the aforesaid affidavit as well as for applicable penalties and interest and the affidavit shall contain express provision that the purchaser has recognized and assumed such liability.

The principal purpose of this exemption is to encourage the flow of commerce through North Carolina ports that is now moving through out-of-state ports. However, it is not intended that property acquired for

personal use or consumption by the purchaser, including gifts, shall be exempt hereunder.

- (33a) Tangible personal property sold by a retailer to a purchaser inside or outside this State, when the property is delivered by the retailer in this State to a common carrier or to the United States Postal Service for delivery to the purchaser or the purchaser's designees outside this State and the purchaser does not subsequently use the property in this State. This exemption includes printed material sold by a retailer to a purchaser inside or outside this State when the printed material is delivered directly to a mailing house, to a common carrier, or to the United States Postal Service for delivery to a mailing house in this State that will preaddress and presort the material and deliver it to a common carrier or to the United States Postal Service for delivery to recipients outside this State designated by the purchaser.
- (34) Repealed by Session Laws 2016-5, s. 3.9(a), effective January 1, 2017, and applicable to sales made on or after that date.
- (35) Sales by a nonprofit civic, charitable, educational, scientific, literary, or fraternal organization when all of the conditions listed in this subdivision are met. This exemption does not apply to gross receipts derived from an admission charge to an entertainment activity.
 - a. The sales are conducted only upon an annual basis for the purpose of raising funds for the organization's activities.
 - b. The proceeds of the sale are actually used for the organization's activities.
 - c. The products sold are delivered to the purchaser within 60 days after the first solicitation of any sale made during the organization's annual sales period.
- (36) Advertising supplements and any other printed matter ultimately to be distributed with or as part of a newspaper.
- (37) Repealed by Session Laws 2001-424, s. 34.23(a), effective December 1, 2001, and applicable to sales made on or after that date.
- (38) Food and other products lawfully purchased under the Supplemental Nutrition Assistance Program, 7 U.S.C. § 2011, and supplemental foods lawfully purchased with a food instrument issued under the Special Supplemental Nutrition Program, 42 U.S.C. § 1786, and supplemental foods purchased for direct distribution by the Special Supplemental Nutrition Program.
- (39) Sales of paper, ink, and other tangible personal property to commercial printers and commercial publishers for use as ingredients or component parts of free distribution periodicals and sales by printers of free distribution periodicals to the publishers of these periodicals. As used in this subdivision, the term "free distribution periodical" means a publication that is continuously published on a periodic basis monthly or

more frequently, is provided without charge to the recipient, and is distributed in any manner other than by mail.

- (40) Sales to the Department of Transportation.
- (41) Sales of mobile classrooms to local boards of education or to local boards of trustees of community colleges.
- (42) Tangible personal property that is purchased by a retailer for resale or is manufactured or purchased by a wholesale merchant for resale and then withdrawn from inventory and donated by the retailer or wholesale merchant to either a governmental entity or a nonprofit organization, contributions to which are deductible as charitable contributions for federal income tax purposes.
- (43) Custom computer software. Custom computer software and the portion of prewritten computer software that is modified or enhanced if the modification or enhancement is designed and developed to the specifications of a specific purchaser and the charges for the modification or enhancement are separately stated on the invoice or similar billing document given to the purchaser at the time of the sale.
- (43a) Computer software that meets any of the following descriptions:
 - a. It is purchased to run on an enterprise server operating system. The exemption includes a purchase or license of computer software for high-volume, simultaneous use on multiple computers that is housed or maintained on an enterprise server or end users' computers. The exemption includes software designed to run a computer system, an operating program, or application software.
 - b. It is sold to a person who operates a datacenter and is used within the datacenter.
 - c. It is sold to a person who provides cable service, telecommunications service, or video programming and is used to provide ancillary service, cable service, Internet access service, telecommunications service, or video programming.
- (43b) Computer software or certain digital property that becomes a component part of other computer software or certain digital property that is offered for sale or of a service that is offered for sale.
- (44) Repealed by Session Laws 2013-316, s. 4.1(d), effective July 1, 2014, and applicable to gross receipts billed on or after that date.
- (45) Sales of aircraft lubricants, aircraft repair parts, and aircraft accessories to an interstate passenger air carrier for use at its hub.
- (45a) Sales to an interstate air business of tangible personal property that becomes a component part of or is dispensed as a lubricant into commercial aircraft during its maintenance, repair, or overhaul. For the purpose of this subdivision, commercial aircraft includes only aircraft that has a certified maximum take-off weight of more than 12,500

pounds and is regularly used to carry for compensation passengers, commercial freight, or individually addressed letters and packages.

- (45b) Sales of the following items to an interstate air courier for use at its hub:
 - a. Aircraft lubricants, aircraft repair parts, and aircraft accessories.
 - b. Materials handling equipment, racking systems, and related parts and accessories for the storage or handling and movement of tangible personal property at an airport or in a warehouse or distribution facility.
- (45c) Sales of aircraft simulators to a company for flight crew training and maintenance training.
- (45d) Parts and accessories for use in the repair or maintenance of a qualified aircraft or a qualified jet engine.
- (45e) Sales to an interstate air and ground courier of materials handling equipment, automated conveyor systems, racking systems, and related parts and accessories for the storage or handling and movement of tangible personal property at its package sorting facility. A qualifying item listed in this subdivision purchased to fulfill a contract with an interstate air and ground courier is exempt to the same extent as if purchased directly by the interstate air and ground courier.

If the level of investment or employment required by G.S. 105-164.3(166)b. is not timely made, achieved, or maintained, then the exemption provided under this subdivision is forfeited. If the exemption is forfeited due to a failure to timely make the required investment or to timely achieve the minimum required employment level, then the exemption provided under this subdivision is forfeited on all purchases. If the exemption is forfeited due to a failure to maintain the minimum required employment level once that level has been achieved, then the exemption provided under this subdivision is forfeited for those purchases occurring on or after the date the taxpayer fails to maintain the minimum required employment level. A taxpayer that forfeits an exemption under this subdivision is liable for all past sales and use taxes avoided as a result of the forfeiture, computed at the applicable State and local rates from the date the taxes would otherwise have been due, plus interest at the rate established under G.S. 105-241.21. Interest is computed from the date the sales or use tax would otherwise have been due. The past taxes and interest are due 30 days after the date of forfeiture. A taxpayer that fails to pay the past taxes and interest by the due date is subject to the provisions of G.S. 105-236.

- (46) Sales of electricity by a municipality whose only wholesale supplier of electric power is a federal agency and who is required by a contract with that federal agency to make payments in lieu of taxes.

- (47) An amount charged as a deposit on a beverage container that is returnable to the vendor for reuse when the amount is refundable or creditable to the vendee, whether or not the deposit is separately charged.
- (48) An amount charged as a deposit on an aeronautic, automotive, industrial, marine, or farm replacement part that is returnable to the vendor for rebuilding or remanufacturing when the amount is refundable or creditable to the vendee, whether or not the deposit is separately charged. This exemption does not include tires or batteries.
- (49) Repealed by Session Laws 2015-241, s. 32.18(d), effective March 1, 2016, and applicable to sales occurring on or after March 1, 2016, and to gross receipts derived from repair, maintenance, and installation services provided on or after March 1, 2016.
- (49a) Delivery charges for delivery of direct mail if the charges are separately stated on an invoice or similar billing document given to the purchaser at the time of sale.
- (50) Fifty percent (50%) of the sales price of tangible personal property sold through a coin-operated vending machine, other than tobacco and newspapers.
- (51) Water delivered by or through main lines or pipes for either commercial or domestic use or consumption.
- (52) Items subject to sales and use tax under G.S. 105-164.4, other than electricity, telecommunications service, and ancillary service as defined in G.S. 105-164.3, if all of the following conditions are met:
 - a. The items are purchased by a State agency for its own use and in accordance with G.S. 105-164.29A.
 - b. The items are purchased pursuant to a valid purchase order issued by the State agency that contains the exemption number of the agency and a description of the property purchased, or the items purchased are paid for with a State-issued check, electronic deposit, credit card, procurement card, or credit account of the State agency.
 - c. For all purchases other than by an agency-issued purchase order, the agency must provide to or have on file with the retailer the agency's exemption number.
- (53) Sales to a professional land surveyor of tangible personal property on which custom aerial survey data is stored in digital form or is depicted in graphic form. Data is custom if it was created to the specifications of the professional land surveyor purchasing the property. A professional land surveyor is a person licensed as a surveyor under Chapter 89C of the General Statutes.
- (54) The following telecommunications services and charges:

- a. Telecommunications service that is a component part of or is integrated into a telecommunications service that is resold. This exemption does not apply to service purchased by a pay telephone provider who uses the service to provide pay telephone service. Examples of services that are resold include carrier charges for access to an intrastate or interstate interexchange network, interconnection charges paid by a provider of mobile telecommunications service, and charges for the sale of unbundled network elements. An unbundled network element is a network element, as defined in 47 U.S.C. § 153(29), to which access is provided on an unbundled basis pursuant to 47 U.S.C. § 251(c)(3).
 - b. Pay telephone service.
 - c. 911 charges imposed under G.S. 143B-1403 and remitted to the 911 Fund under that section.
 - d. Charges for telecommunications service made by a hotel, motel, or another entity whose gross receipts are taxable under G.S. 105-164.4(a)(3) when the charges are incidental to the occupancy of the entity's accommodations.
 - e. Telecommunications service purchased or provided by a State agency or a unit of local government for the State Network or another data network owned or leased by the State or unit of local government.
- (55) Sales of electricity for use at an eligible Internet datacenter and eligible business property to be located and used at an eligible Internet datacenter. As used in this subdivision, "eligible business property" is property that is capitalized for tax purposes under the Code and is used either:
- a. For the provision of a service included in the business of the primary user of the datacenter, including equipment cooling systems for managing the performance of the property.
 - b. For the generation, transformation, transmission, distribution, or management of electricity, including exterior substations and other business personal property used for these purposes.
 - c. To provide related computer engineering or computer science research.

If the level of investment required by G.S. 105-164.3(79)d. is not timely made, then the exemption provided under this subdivision is forfeited. If the level of investment required by G.S. 105-164.3(79)d. is timely made but any specific eligible business property is not located and used at an eligible Internet datacenter, then the exemption provided for such eligible business property under this subdivision is forfeited. If the level of investment required by G.S. 105-164.3(79)d. is timely made

but any portion of the electricity is not used at an eligible Internet datacenter, then the exemption provided for such electricity under this subdivision is forfeited. A taxpayer that forfeits an exemption under this subdivision is liable for all past taxes avoided as a result of the forfeited exemption, computed from the date the taxes would have been due if the exemption had not been allowed, plus interest at the rate established under G.S. 105-241.21. If the forfeiture is triggered due to the lack of a timely investment required by G.S. 105-164.3(79)d., then interest is computed from the date the taxes would have been due if the exemption had not been allowed. For all other forfeitures, interest is computed from the time as of which the eligible business property or electricity was put to a disqualifying use. The past taxes and interest are due 30 days after the date the exemption is forfeited. A taxpayer that fails to pay the past taxes and interest by the due date is subject to the provisions of G.S. 105-236.

(55a) Sales of electricity for use at a qualifying datacenter and datacenter support equipment to be located and used at the qualifying datacenter. As used in this subdivision, "datacenter support equipment" is property that is capitalized for tax purposes under the Code and is used for one of the following purposes:

- a. The provision of a service or function included in the business of an owner, user, or tenant of the datacenter.
- b. The generation, transformation, transmission, distribution, or management of electricity, including exterior substations, generators, transformers, unit substations, uninterruptible power supply systems, batteries, power distribution units, remote power panels, and other capital equipment used for these purposes.
- c. HVAC and mechanical systems, including chillers, cooling towers, air handlers, pumps, and other capital equipment used for these purposes.
- d. Hardware and software for distributed and mainframe computers and servers, data storage devices, network connectivity equipment, and peripheral components and equipment.
- e. To provide related computer engineering or computer science research.

If the level of investment required by G.S. 105-164.3(201) is not timely made, the exemption provided under this subdivision is forfeited. If the level of investment required by G.S. 105-164.3(201) is timely made but any specific datacenter support equipment is not located and used at the qualifying datacenter, the exemption provided for such datacenter support equipment under this subdivision is forfeited. If the level of investment required by G.S. 105-164.3(201) is timely made but any portion of electricity is not used at the qualifying datacenter, the

exemption provided for such electricity under this subdivision is forfeited. A taxpayer that forfeits an exemption under this subdivision is liable for all past taxes avoided as a result of the forfeited exemption, computed from the date the taxes would have been due if the exemption had not been allowed, plus interest at the rate established under G.S. 105-241.21. If the forfeiture is triggered due to the lack of a timely investment required by G.S. 105-164.3(201), interest is computed from the date the taxes would have been due if the exemption had not been allowed. For all other forfeitures, interest is computed from the time as of which the datacenter support equipment or electricity was put to a disqualifying use. The past taxes and interest are due 30 days after the date the exemption is forfeited. A taxpayer that fails to pay the past taxes and interest by the due date is subject to the provisions of G.S. 105-236.

- (56) Sales to the owner or lessee of an eligible railroad intermodal facility of intermodal cranes, intermodal hostler trucks, and railroad locomotives that reside on the premises of the facility and are used at the facility.
- (57) Fuel, electricity, and piped natural gas sold to a manufacturer for use in connection with the operation of a manufacturing facility. The exemption does not apply to the following:
 - a. Electricity used at a facility at which the primary activity is not manufacturing.
 - b. Fuel or piped natural gas that is used solely for comfort heating at a manufacturing facility where there is no use of fuel or piped natural gas in a manufacturing process.
- (57a) Repealed by Session Laws 2017-57, s. 38.8(c), as amended by Session Laws 2017-212, s. 7.2(a), effective July 1, 2018, and applicable to sales made on or after that date.
- (58) Tangible personal property purchased with a client assistance debit card issued for disaster assistance relief by a State agency or a federal agency or instrumentality.
- (59) Interior design services provided in conjunction with the sale of tangible personal property.
- (60) Gross receipts derived from an admission charge to an entertainment activity are exempt as provided in G.S. 105-164.4G.
- (61) A motor vehicle service contract.
- (61a) The sales price of or the gross receipts derived from the repair, maintenance, and installation services and service contracts listed in this subdivision are exempt from tax. Except as otherwise provided in this subdivision, an item used to fulfill either repair, maintenance, and installation services or service contracts exempt from tax under this subdivision is taxable. The list of repair, maintenance, and installation services and service contracts exempt from tax under this subdivision is as follows:

- a. A service and a service contract for an item exempt from tax under this Article, except as otherwise provided in this subdivision. Items used to fulfill a service or service contract exempt under this sub-subdivision are exempt from tax under this Article. This exemption does not apply to water for a pool, fish tank, or similar aquatic feature or to a motor vehicle, except as provided under subdivision (62a) of this section and fees under sub-subdivision b. of this subdivision.
- b. A motor vehicle emissions and safety inspection fee imposed pursuant to G.S. 20-183.7, provided the fee is separately stated on the invoice or other documentation provided to the purchaser at the time of the sale.
- c. A service performed for a person by a related member.
- d. Cleaning of real property, except where the service constitutes a part of the gross receipts derived from the rental of an accommodation subject to tax under G.S. 105-164.4 or for a pool, fish tank, or other similar aquatic feature. Examples of cleaning of real property include custodial services, window washing, mold remediation services, carpet cleaning, removal of debris from gutters, removal of dust and other pollutants from ductwork, and power washing other than for a pool.
- e. A service on roads, driveways, parking lots, and sidewalks.
- f. Removal of waste, trash, debris, grease, snow, and other similar tangible personal property from property, other than a motor vehicle. The exemption applies to a household or a commercial trash collection and removal service. The exemption applies to the removal of septage from property, including motor vehicles, but does not include removal of septage from portable toilets.
- g. The following inspections:
 - 1. An inspection performed where the results are included in a report for the sale or financing of real property.
 - 2. An inspection of the structural integrity of real property, provided the charge for the inspection is separately stated on the invoice or other documentation given to the purchaser at the time of the sale.
 - 3. An inspection to a system that is a capital improvement under G.S. 105-164.3(31)f., provided the inspection is to fulfill a safety requirement and provided the charge for the inspection is separately stated on the invoice or other documentation given to the purchaser at the time of the sale.
- h. Alteration and repair of clothing, except where the service constitutes a part of the gross receipts derived from the rental of

- clothing subject to tax under G.S. 105-164.4 or for alteration and repair of belts and shoes.
- i. Pest control service. For purposes of this exemption, the term "pest control service" means the application of pesticides to real property.
 - j. Moving service. For purposes of this exemption, the term "moving service" means a service for hire to transport or relocate a person's existing belongings to or from any destination.
 - k. Self-service vehicle wash or vacuum and limited-service vehicle wash. For purposes of this sub-subdivision, the following definitions apply:
 - 1. Limited-service vehicle wash. - The cleaning of a vehicle by mechanical means where the only activities performed by an employee include one or more of the following: (i) receiving payment for the transaction, (ii) guiding the vehicle into the entrance or exit of a conveyor, (iii) applying low-pressure spray of chemicals to the vehicle prior to the cleaning of the vehicle, or (iv) placing protective tape or covers on the vehicle prior to cleaning. The term does not include any activity whereby an employee physically touches the vehicle for the purpose of cleaning or restoring the vehicle, enters or cleans any part of the interior of the vehicle, or performs an activity on the vehicle other than one of those listed in this sub-sub-subdivision.
 - 2. Self-service vehicle wash or vacuum. - The cleaning of a vehicle by a customer without any cleaning or restoring activity performed by an employee.
 - l. Services performed on a transmission, distribution, or other network asset on land owned by a service provider or on a right-of-way or an easement in favor of a service provider. This exemption does not apply to charges billed to a customer for repair, maintenance, and installation services or a contribution in aid of construction and are included in the gross receipts derived from items subject to the combined general rate under G.S. 105-164.4. The terms "service provider" and "governmental entity" have the same meaning as defined in G.S. 105-164.3(31)c.
 - m. Any of the following:
 - 1. A qualified aircraft.
 - 2. A qualified jet engine.
 - 3. An aircraft with a gross take-off weight of more than 2,000 pounds.

- n. Funeral-related service, including a service for the burial of remains. This exemption does not apply to the sale of tangible personal property, such as caskets, headstones, and monuments.
 - o. A service performed on an animal, such as hoof shoeing and microchipping a pet.
 - p. A security or similar monitoring contract for real property. The exemption provided in this subdivision does not apply to charges for repair, maintenance, and installation services to repair security, alarm, and other similar monitoring systems for real property.
 - q. A contract to provide a certified operator for a wastewater system.
- (61b) Items purchased for resale under an exemption certificate in accordance with G.S. 105-164.28 or under a direct pay certificate in accordance with G.S. 105-164.27A.
- (61c) Installation charges that are a part of the sales price of tangible personal property purchased by a real property contractor to fulfill a real property contract for an item that is installed or applied to real property, provided the installation charges are separately stated and identified as such on the invoice or other documentation given to the real property contractor at the time of the sale. The exemption also applies to installation charges by a retailer-contractor when performing installation services for a real property contract. The exemption includes any labor costs provided by the real property contractor, including employees' wages, or labor purchased from a third party that would otherwise be included in the definition of "purchase price."
- (61d) Installation charges that are a part of the sales price of or gross receipts derived from repair, maintenance, and installation services or installation charges only purchased by a real property contractor to fulfill a real property contract, provided the installation charges are separately stated and identified as such on the invoice or other documentation given to the real property contractor at the time of the sale. The exemption also applies to installation charges by a retailer-contractor when performing a real property contract. The exemption includes any labor costs provided by the real property contractor, including employees' wages, or labor purchased from a third party that would otherwise be included in the definition of "purchase price."
- (62) An item, including repair, maintenance, and installation services, purchased or used to fulfill a service contract taxable under this Article if the purchaser of the contract is not charged for the item. This exemption does not apply to the purchase of tangible personal property or certain digital property used to fulfill a service contract for real property where the charge being covered would otherwise be subject to

tax as a real property contract. For purposes of this exemption, the term "item" does not include a tool, equipment, supply, or similar tangible personal property that is not deemed to be a component or repair part of the tangible personal property, real property, or certain digital property for which a service contract is sold to a purchaser.

- (62a) A replacement item, a repair part, or repair, maintenance, and installation services to maintain or repair tangible personal property or a motor vehicle pursuant to a manufacturer's warranty or a dealer's warranty. For purposes of this subdivision, the following definitions apply:
- a. Dealer's warranty. - An explicit warranty the seller of an item extends to the purchaser of the item as part of the purchase price of the item.
 - b. Manufacturer's warranty. - An explicit warranty the manufacturer of an item extends to the purchaser of the item as part of the purchase price of the item.
- (62b) The amount of repair, maintenance, and installation services for a boat, an aircraft, or a qualified jet engine for which the purchaser elects for the seller to collect and remit the tax due under G.S. 105-164.27A(a3).
- (63) Food and prepared food to be provided to a person entitled to the food and prepared food under a prepaid meal plan subject to tax under G.S. 105-164.4(a)(12). This exemption applies to packaging including wrapping paper, labels, plastic bags, cartons, packages and containers, paper cups, napkins and drinking straws, and like articles that meet all of the following requirements:
- a. Used for packaging, shipment, or delivery of the food and prepared food.
 - b. Constitute a part of the sale of the food and prepared food.
 - c. Delivered with the food and prepared food.
- (64) Fifty percent (50%) of the sales price of a modular home or a manufactured home, including all accessories attached when delivered to the purchaser.
- (65) **(Expires January 1, 2024)** This subdivision expires January 1, 2024. Sales of the following to a professional motorsports racing team or a related member of a team for use in competition in a sanctioned race series:
- a. The sale, lease, or rental of an engine.
 - b. The sales price of or gross receipts derived from a service contract on, or repair, maintenance, and installation services for, a transmission, an engine, rear-end gears, and any tangible personal property that is purchased, leased, or rented and that is exempt from tax under this subdivision or that is allowed a sales tax refund under G.S. 105-164.14A(a)(5).

- c. The gross receipts derived from an agreement to provide an engine to a professional motorsports racing team or related member of a team for use in competition in a sanctioned race series, where such agreement does not meet the definition of a "service contract" as defined in G.S. 105-164.3 but may meet the definition of the term "lease or rental" as defined in G.S. 105-164.3.
- (65a) **(Expires January 1, 2024)** An engine or a part to build or rebuild an engine for the purpose of providing an engine under an agreement to a professional motorsports racing team or a related member of a team for use in competition in a sanctioned race series. This subdivision expires January 1, 2024.
 - (66) Storage of a motor vehicle, provided the charge is separately stated on the invoice or other documentation provided to the purchaser at the time of the sale.
 - (67) Towing services, provided the charge is separately stated on the invoice or other documentation provided to the purchaser at the time of the sale.
 - (68) Sales of wastewater dispersal products approved by the Department of Health and Human Services under Article 11 of Chapter 130A of the General Statutes.
 - (69) Sales of non-coin currency, investment metal bullion, and investment coins. For purposes of this subdivision, the following definitions apply:
 - a. Investment coins. - Numismatic coins or other forms of money and legal tender manufactured of metal under the laws of the United States or any foreign nation with a fair market value greater than any statutory or nominal value of such coins.
 - b. Investment metal bullion. - Any elementary precious metal that has been put through a process of smelting or refining and that is in such state or condition that its value depends upon its content and not upon its form. The term does not include fabricated precious metal that has been processed or manufactured for one or more specific and customary industrial, professional, or artistic uses.
 - c. Non-coin currency. - Forms of money and legal tender manufactured of a material other than metal under the laws of the United States or any foreign nation with a fair market value greater than any statutory or nominal value of such currency.
 - (70) Gross receipts derived from a rental of an accommodation are exempt as provided in G.S. 105-164.4F.
 - (71) Sales of items to the North Carolina Life and Health Insurance Guaranty Association.

- (72) Sales of a digital audio work or a digital audiovisual work that is a qualifying education expense under G.S. 115C-595(a)(3) to the operator of a home school as defined in G.S. 115C-563.
- (73) Sales of a digital audio work or digital audiovisual work that consists of nontaxable service content when the electronic transfer of the digital audio work or digital audiovisual work occurs contemporaneously with the provision of the nontaxable service in real time. (1957, c. 1340, s. 5; 1959, c. 670; c. 1259, s. 5; 1961, c. 826, s. 2; cc. 1103, 1163; 1963, c. 1169, ss. 7-9; 1965, c. 1041; 1967, c. 756; 1969, c. 907; 1971, c. 990; 1973, c. 476, s. 143; c. 708, s. 1; cc. 1064, 1076; c. 1287, s. 8; 1975, 2nd Sess., c. 982; 1977, c. 771, s. 4; 1977, 2nd Sess., c. 1219, s. 43.6; 1979, c. 46, ss. 1, 2; c. 156, s. 1; c. 201; c. 625, ss. 1, 2; c. 801, ss. 74, 75; 1979, 2nd Sess., c. 1099, s. 1; 1981, cc. 14, 207, 982; 1983, c. 156; c. 570, s. 21; c. 713, ss. 91, 92; c. 873; c. 887; 1983 (Reg. Sess., 1984), c. 1071, s. 1; 1985, c. 114, s. 4; c. 555; c. 656, ss. 24, 25; 1985 (Reg. Sess., 1986), c. 953; c. 973; c. 982, s. 2; 1987, c. 800, s. 1; 1987 (Reg. Sess., 1988), c. 937; 1989, c. 692, ss. 3.5, 3.6; c. 748, s. 1; 1989 (Reg. Sess., 1990), c. 989; c. 1060; c. 1068, ss. 1, 2; 1991, c. 45, s. 17; c. 79, s. 2; c. 618, s. 1; c. 689, s. 314; 1991 (Reg. Sess., 1992), c. 931, ss. 1, 2; c. 935, s. 1; c. 940, s. 1; c. 949, s. 1; c. 1007, s. 44; 1993, c. 484, s. 3; c. 513, s. 11; 1993 (Reg. Sess., 1994), c. 739, s. 1; 1995, c. 390, s. 14; c. 451, s. 1; c. 477, ss. 2, 3; 1995 (Reg. Sess., 1996), c. 646, ss. 4, 5; c. 649, s. 1; 1996, 2nd Ex. Sess., c. 14, ss. 15, 16; 1997-369, s. 2; 1997-370, s. 2; 1997-397, s. 1; 1997-423, s. 3; 1997-443, s. 11A.118(a); 1997-456, s. 27; 1997-506, s. 36; 1997-521, s. 1; 1998-22, s. 6; 1998-55, ss. 9, 15; 1998-98, ss. 14, 14.1, 49, 107; 1998-146, s. 9; 1998-171, s. 10(a), (b); 1998-225, s. 4.3; 1999-337, s. 31; 1999-360, s. 7(a)-(c); 1999-438, ss. 5-12; 2000-120, s. 5; 2000-153, s. 5; 2001-347, s. 2.12; 2001-424, s. 34.23(a); 2001-476, s. 17(e); 2001-509, s. 1; 2001-514, s. 1; 2002-184, s. 9; 2003-284, ss. 45.5, 45.5A; 2003-349, s. 11; 2003-416, ss. 18(a), 21; 2003-431, s. 1; 2004-124, ss. 32B.2, 32B.4; 2005-276, s. 33.9; 2005-435, ss. 30, 31; 2006-19, s. 1; 2006-33, s. 5; 2006-66, s. 24.17(b); 2006-162, ss. 8(a), 8(b); 2006-168, s. 4.2; 2006-252, s. 2.25(b); 2007-244, s. 4; 2007-323, s. 31.23(c); 2007-368, s. 1; 2007-383, s. 6; 2007-397, ss. 10(g), 10(h); 2007-491, s. 44(1)a; 2007-500, s. 1; 2007-527, ss. 10, 27; 2008-107, ss. 28.6(a), 28.20(a); 2009-451, s. 27A.3(f), (k); 2009-511, s. 1; 2010-91, s. 3; 2010-147, s. 6.1; 2011-330, s. 18; 2012-79, s. 1.4; 2013-316, ss. 3.2(a), (b), 3.3(b), 3.4(a), 4.1(d), 5(c), 6(c); 2013-360, s. 7.4(e); 2013-414, ss. 11(a), 58(e); 2014-3, ss. 4.1(e), 5.1(d)-(f), 6.1(c), (f), 8.3(a), (b); 2014-100, s. 37.3(a); 2015-6, ss. 2.12, 2.23(a); 2015-241, ss. 7A.3, 32.18(d), (e); 2015-259, ss. 3(b), 4.1(c), 4.2(d), 5(b), (c), 6(b); 2015-261, s. 5(a), (b); 2016-5, ss. 3.9(a), (b), 3.11(a), 3.19(b), 3.23(a); 2016-92, ss. 2.1(a), 2.5; 2016-94, ss. 38.2(c), 38.5(i), (p); 2016-123, s.

11.1; 2017-57, s. 38.8(a), (c), 38.9(b); 2017-102, s. 15.1; 2017-139, s. 1; 2017-181, s. 1; 2017-204, ss. 2.6, 2.9(a), 2.11(b), 2.12(a); 2017-212, s. 7.2(a); 2018-5, s. 38.5(j), (y); 2019-6, ss. 4.9, 5.1, 5.3; 2019-169, ss. 3.3(k), 3.4(c), 3.9(a), (b), 3.10, 3.11(a), 3.12, 3.13(b); 2019-237, ss. 4(a), 5(a), 8.1(a); 2019-246, ss. 6, 7(a); 2020-6, ss. 2(a), 3(b); 2021-150, s. 25.1; 2022-74, ss. 42.2(b); 42.4(e); 2022-74, ss. 9D.15(e), 42.2(b); 42.4(e).)

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 .4404

RECOMMENDATION DATE: November 13, 2023

RECOMMENDED ACTION:

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

COMMENT:

I.

LINE 5-8 OF PARAGRAPH (A) OF THE RULE IS AN INARTFUL AND CONFUSING PARAPHRASE OF G.S. 105-164.3(121); HOWEVER, IT IS ESSENTIALLY CORRECT. IT IS ALSO ARGUABLY UNNECESSARY.

*IN LINES 7-8, THE SECRETARY USES THE PHRASE "IF THE OPERATOR IS NECESSARY FOR THE EQUIPMENT TO PERFORM AS DESIGNED **AND FOR THE PURPOSES OF G.S.105-164.4, ...**" (EMPHASIS ADDED). AS WRITTEN, THE EMPHASIZED CLAUSE MODIFIES "OPERATOR". G.S. 105-164.4 IS THE STATUTE ESTABLISHING SALES AND USE TAX. IT DOES NOT APPEAR TO HAVE A LOGICAL CONNECTION AS A MODIFIER TO AN OPERATOR.*

*STAFF BELIEVES THE SECRETARY "**FOR THE PURPOSES OF G.S.105-164.4**" IS TO IDENTIFY THE AUTHORITY FOR THE IMPOSITION OF THE SALES AND USE TAX.¹*

ACCORDINGLY, STAFF RECOMMENDS OBJECTION PURSUANT TO G.S. 150B-21.9(A)(2) FOR LACK OF CLARITY.

II.

PARAGRAPH (B) OF THE RULE IS UNNECESSARY AS SALES OF ITEMS ARE TAXED PURSUANT TO G.S. 105-164.4 UNLESS EXEMPT BY ANOTHER STATUTE. IT IS UNCLEAR WHAT, IF ANY, STATUTE OR LANGUAGE WITHIN A STATUTE THE SECRETARY IS INTERPRETING FOR LACK OF CLARITY. WHILE

¹ IN WHICH CASE A COMMA WOULD NEED TO BE PLACED AFTER "DESIGNED" AND "AND" IN LINE 8. IT WOULD BE PREFERABLE TO BREAK THIS INTO TWO SENTENCES.

*WILLIAM W. PEASLEE
COMMISSION COUNSEL*

THE PARAGRAPH CITES G.S. 105-164.4, G.S. 105-164.4 IS THE STATUTE WHICH IMPOSES A TAX ON THE LEASE OR RENTAL OF TANGIBLE PERSONAL PROPERTY. THIS STATUTE HAS NO IDENTIFIED AMBIGUITY.

FURTHER, "LEASE OR RENTAL" IS DEFINED IN G.S. 105-164.3. IN SHORT, WHY WOULD A PURCHASER THINK THAT THEIR PURCHASE OF ITEMS TO PROVIDE A SERVICE WERE TAX EXEMPT? ACCORDINGLY, STAFF RECOMMENDS OBJECTION TO THE RULE PURSUANT TO G.S. 150B-21.9(A)(2) FOR LACK OF CLARITY.

III.

AS WRITTEN, PARAGRAPH (C) IS UNCLEAR AND AMBIGUOUS. THE PARAGRAPH REFERS TO "A PERSON THAT PROVIDES TANGIBLE PERSONAL PROPERTY WITH AN OPERATOR IDENTIFIED IN PARAGRAPH (A)." IT IS UNCLEAR WHETHER THE SECRETARY IS REFERRING TO ALL OPERATORS, ONLY THOSE NECESSARY OPERATORS, OR UNNECESSARY OPERATORS.

IT IS ALSO UNCLEAR WHETHER THE SECRETARY IS REQUIRING THE ITEMS BE KEPT SEPARATELY IN INVENTORY OR WHETHER AN ACCOUNTING OF THE REVENUES THEREFROM IS DESIRED.

ACCORDINGLY, STAFF RECOMMENDS OBJECTION TO THE RULE PURSUANT TO G.S. 150B-21.9(A)(2) FOR LACK OF CLARITY.

*WILLIAM W. PEASLEE
COMMISSION COUNSEL*

§ 150B-21.9. Standards and timetable for review by Commission.

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

§ 105-264. Effect of Secretary's interpretation of revenue laws.

(a) **Interpretation.** - It is the duty of the Secretary to interpret all laws administered by the Secretary. The Secretary's interpretation of these laws shall be consistent with the applicable rules. An interpretation by the Secretary is prima facie correct. When the Secretary interprets a law by adopting a rule or publishing a bulletin or directive on the law, the interpretation is a protection to the officers and taxpayers affected by the interpretation, and taxpayers are entitled to rely upon the interpretation. If the Secretary changes an interpretation, a taxpayer who relied on it before it was changed is not liable for any penalty or additional assessment on any tax that accrued before the interpretation was changed and was not paid by reason of reliance upon the interpretation.

(b) **Advice.** - If a taxpayer requests specific advice from the Department and receives erroneous advice in response, the taxpayer is not liable for any penalty or additional assessment attributable to the erroneous advice furnished by the Department to the extent that the following conditions are all satisfied:

- (1) The advice was reasonably relied upon by the taxpayer.
- (2) The penalty or additional assessment did not result from the taxpayer's failure to provide adequate or accurate information.
- (3) The Department provided the advice in writing or the Department's records establish that the Department provided erroneous verbal advice.

(c) **Revised Interpretations.** - This section does not prevent the Secretary from changing an interpretation, and it does not prevent a change in an interpretation from applying on and after the effective date of the change. An interpretation that revises a prior interpretation by expanding the scope of a tax or otherwise increasing the amount of tax due may not become effective sooner than the following:

- (1) For a tax that is payable on a monthly or quarterly basis, the first day of a month that is at least 90 days after the date the revised interpretation is issued.
- (2) For a tax that is payable on an annual basis, the first day of a tax year that begins after the date the revised interpretation is issued.

(d) **Fee.** - The Secretary may charge a fee for providing a written determination at the request of a taxpayer. The fee is a receipt of the Department and must be applied to the costs of providing the written determination. The proceeds of the fee must be credited to a special account within the Department and do not revert but remain in the special account until spent by the Department for the costs of providing the written determination. The Secretary may adopt a tiered fee structure based on the taxpayer's income or gross receipts, the relative complexity of the advice requested, or the tax schedule for which advice is requested. The fee shall not be less than one hundred dollars (\$100.00) or more than five thousand dollars (\$5,000). The fee may be waived by the Secretary. The term "written determination" has the same meaning as defined in G.S. 105-264.2. (1939, c. 158, s. 933; 1955, c. 1350, s. 4; 1957, c. 1340, s. 14; 1973, c. 476, s. 193; 1991, c. 45, s. 29; 1993, c. 532, s. 9; 1998-98, s. 21; 2008-107, s. 28.16(e); 2010-31, s. 31.7A(a); 2011-390, s. 6; 2016-103, s. 6.)

§ 105-164.4. Tax imposed on retailers and certain facilitators.

(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:

- (1) The general rate of tax applies to the following items sold at retail:
 - a. The sales price of each article of tangible personal property that is not subject to tax under another subdivision in this section. A sale of a freestanding appliance is a retail sale of tangible personal property.
 - b. The sales price of certain digital property. The tax applies regardless of whether the purchaser of the property has a right to use it permanently or to use it without making continued payments. The sale at retail or the use, storage, or consumption in this State of a digital code is treated the same as the sale at retail or the use, storage, or consumption in this State of certain digital property for which the digital code relates.
 - c. The sales price of or gross receipts derived from repair, maintenance, and installation services to tangible personal property or certain digital property, regardless of whether the tangible personal property or certain digital property is taxed under another subdivision in this section or is subject to a maximum tax under another subdivision in this section. Repair, maintenance, and installation services generally include any tangible personal property or certain digital property that becomes a part of or is applied to a purchaser's property. The use tax exemption in G.S. 105-164.27A(a3) may apply to these services. Repair, maintenance, and installation services for real property are taxable under subdivision (16) of this subsection.
- (1a) The general rate applies to the sales price of each of the following items sold at retail, including all accessories attached to the item when it is delivered to the purchaser:
 - a. A manufactured home.
 - b. A modular home. The sale of a modular home to a modular homebuilder is considered a retail sale, no matter that the modular home may be used to fulfill a real property contract. A person who sells a modular home at retail is allowed a credit against the tax imposed by this subdivision for sales or use tax paid to another state on tangible personal property incorporated in the modular home. The retail sale of a modular home occurs when a modular home manufacturer sells a modular home to a modular homebuilder or directly to the end user of the modular home.

- c. An aircraft. The maximum tax is two thousand five hundred dollars (\$2,500) per article.
- d. A qualified jet engine.
- (1b) The rate of three percent (3%) applies to the sales price of each boat sold at retail, including all accessories attached to the boat when it is delivered to the purchaser. The maximum tax is one thousand five hundred dollars (\$1,500) per article.
- (1c), (1d) and (1e) Repealed by Session Laws 2005-276, s. 33.4(b), effective January 1, 2006.
- (1f) Repealed by Session Laws 2013-316, s. 4.1(c), effective July 1, 2014, and applicable to gross receipts billed on or after July 1, 2014.
 - a. Repealed by Session Laws 2007-397, s. 10(b), effective October 1, 2007, and applicable to sales occurring on or after that date.
 - b. Repealed by Session Laws 2006-66, s. 24.19(a), effective July 1, 2007, and applicable to sales made on or after that date.
 - c. Repealed by Session Laws 2007-397, s. 10(b), effective October 1, 2007, and applicable to sales occurring on or after that date.
- (1g) Repealed by Session Laws 2004-110, s. 6.1, effective October 1, 2004, and applicable to sales of electricity made on or after that date.
- (1h) Expired pursuant to Session Laws 2004-110, s. 6.4, effective for sales made on or after October 1, 2007.
- (1i) Repealed by Session Laws 2007-397, s. 10(a), effective October 1, 2007, and applicable to sales occurring on or after that date.
- (1j) Repealed by Session Laws 2007-397, s. 10(f), effective July 1, 2010, and applicable to sales occurring on or after that date.
- (2) The applicable percentage rate applies to the gross receipts derived from the lease or rental of tangible personal property by a person who is engaged in business of leasing or renting tangible personal property, or is a retailer and leases or rents property of the type sold by the retailer. The applicable percentage rate is the rate and the maximum tax, if any, that applies to a sale of the property that is leased or rented. A person who leases or rents property shall also collect the tax imposed by this section on the separate retail sale of the property.
- (3) The general rate applies to the gross receipts derived from the rental of an accommodation. These rentals are taxed in accordance with G.S. 105-164.4F.
- (4) Every person engaged in the business of operating a dry cleaning, pressing, or hat-blocking establishment, a laundry, or any similar business, engaged in the business of renting clean linen or towels or wearing apparel, or any similar business, or engaged in the business of soliciting cleaning, pressing, hat blocking, laundering or linen rental business for any of these businesses, is considered a retailer under this Article. A tax at the general rate of tax is levied on the gross receipts

derived by these retailers from services rendered in engaging in any of the occupations or businesses named in this subdivision. The tax imposed by this subdivision does not apply to receipts derived from coin, token, or card-operated washing machines, extractors, and dryers. The tax imposed by this subdivision does not apply to gross receipts derived from services performed for resale by a retailer that pays the tax on the total gross receipts derived from the services.

- (4a) Repealed by Session Laws 2013-316, s. 4.1(c), effective July 1, 2014, and applicable to gross receipts billed on or after July 1, 2014.
- (4b) A person who sells tangible personal property at a specialty market or other event, other than the person's own household personal property, is considered a retailer under this Article. A tax at the general rate of tax is levied on the sales price of each article sold by the retailer at the specialty market or other event. The term "specialty market" has the same meaning as defined in G.S. 66-250.
- (4c) The combined general rate applies to the gross receipts derived from providing telecommunications service and ancillary service, including any separately stated charges billed to a customer for repair, maintenance, and installation services or a contribution in aid of construction. A person who provides telecommunications service or ancillary service is considered a retailer under this Article. These services are taxed in accordance with G.S. 105-164.4C.
- (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.
- (5) Repealed by Session Laws 1998-212, s. 29A.1(a), effective May 1, 1999.
- (6) The combined general rate applies to the gross receipts derived from providing video programming to a subscriber in this State, including any separately stated charges billed to a customer for repair, maintenance, and installation services or a contribution in aid of construction. A cable service provider, a direct-to-home satellite service provider, and any other person engaged in the business of providing video programming is considered a retailer under this Article.
- (6a) The general rate applies to the gross receipts derived from providing satellite digital audio radio service. For services received by a mobile or portable station, the service is sourced to the subscriber's business or

home address. A person engaged in the business of providing satellite digital audio radio service is a retailer under this Article.

- (6b) Repealed by Session Laws 2019-169, s. 3.2, effective July 26, 2019.
- (7) The combined general rate applies to the sales price of antique spirituous liquor and spirituous liquor other than mixed beverages. As used in this subdivision, the terms "antique spirituous liquor", "spirituous liquor", and "mixed beverage" have the meanings provided in G.S. 18B-101.
- (8) Repealed by Session Laws 2015-259, s. 4.2(b), effective October 1, 2015, and applicable to sales made on or after that date.
- (9) The combined general rate applies to the gross receipts derived from sales of electricity and piped natural gas, including any separately stated charges billed to a customer for repair, maintenance, and installation services or a contribution in aid of construction.
- (10) The general rate of tax applies to the gross receipts derived from an admission charge to an entertainment activity. Gross receipts derived from an admission charge to an entertainment activity are taxable in accordance with G.S. 105-164.4G.
- (11) The general rate of tax applies to the sales price of or the gross receipts derived from a service contract. A service contract is taxed in accordance with G.S. 105-164.4I.
- (12) The general rate of tax applies to the sales price of or gross receipts derived from a prepaid meal plan. A bundle that includes a prepaid meal plan is taxable in accordance with G.S. 105-164.4D.
- (13) Repealed by Session Laws 2017-204, s. 2.2. For effective date and applicability, see Editor's note.
- (14), (14a) Expired pursuant to Session Laws 2014-39, s. 1(e), effective July 1, 2015.
- (15) The combined general rate applies to the gross receipts derived from the sale of aviation gasoline and jet fuel.
- (16) The general rate applies to the sales price of or the gross receipts derived from repair, maintenance, and installation services for real property and generally includes any tangible personal property or certain digital property that becomes a part of or is applied to a purchaser's property. A mixed transaction contract and a real property contract are taxed in accordance with G.S. 105-164.4H. A property management contract is taxable in accordance with G.S. 105-164.4K.

(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.

(c) Certificate of Registration. - Before a person may engage in business as a retailer or a wholesale merchant in this State, the person must obtain a certificate of registration from the Department in accordance with G.S. 105-164.29. A facilitator that is liable for tax under this Article must obtain a certificate of registration from the Department in accordance with G.S. 105-164.29. (1957, c. 1340, s. 5; 1959, c. 1259, s. 5; 1961, c. 826, s. 2; 1963, c. 1169, ss. 3, 11; 1967, c. 1110, s. 6; c. 1116; 1969, c. 1075, s. 5; 1971, c. 887, s. 1; 1973, c. 476, s. 193; c. 1287, s. 8; 1975, c. 752; 1977, c. 903; 1977, 2nd Sess., c. 1218; 1979, c. 17, s. 1; c. 22; c. 48, s. 1; c. 527, s. 1; c. 801, s. 73; 1981, c. 984, ss. 1, 2; 1981 (Reg. Sess., 1982), cc. 1207, 1273; 1983, c. 510; c. 713, ss. 89, 93; c. 805, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 1065, ss. 1, 2, 4; c. 1097, ss. 6, 13; 1985, c. 704; 1985 (Reg. Sess., 1986), c. 925; c. 1005; 1987, c. 557, ss. 4, 5; c. 800, ss. 2, 3; c. 854, s. 1; 1987 (Reg. Sess., 1988), c. 1044, s. 4; 1989, c. 692, ss. 3.1, 3.3, 8.4(8); c. 770, s. 74.4; 1989 (Reg. Sess., 1990), c. 813, ss. 14, 15; 1991, c. 598, s. 5; c. 689, s. 311; c. 690, s. 1; 1993, c. 372, s. 1; c. 484, s. 2; 1995, c. 17, s. 6; c. 477, s. 1; 1996, 2nd Ex. Sess., c. 13, ss. 1.1, 9.1, 9.2; 1997-475, s. 1.1; 1998-22, s. 5; 1998-55, ss. 8, 14; 1998-98, ss. 13.2, 48(a), (b); 1998-121, ss. 3, 5; 1998-197, s. 1; 1998-212, s. 29A.1(a); 1999-337, ss. 29, 30; 1999-360, s. 3(a), (b); 1999-438, s. 1; 2000-140, s. 67(a); 2001-424, ss. 34.13(a), 34.17(a), 34.23(b), 34.25(a); 2001-430, ss. 3, 4, 5; 2001-476, ss. 17(b)-(d), (f); 2001-487, ss. 67(b), 122(a)-(c); 2002-16, s. 4; 2003-284, s. 38.1; 2003-400, s. 15; 2004-110, ss. 6.1, 6.2, 6.3; 2005-144, s. 9.1; 2005-276, ss. 33.1, 33.4(a), (b); 2006-33, ss. 2, 11; 2006-66, ss. 24.1(a), (b), (c), 24.19(a), (b); 2006-151, s. 3; 2007-145, s. 9(a); 2007-323, ss. 31.2(a), (b), 31.16.3(h), 31.16.4(g); 2007-397, s. 10(a)-(f); 2009-451, s. 27A.2(b), (e); 2010-31, s. 31.6(a); 2010-123, s. 10.2; 2011-330, s. 16; 2013-316, ss. 3.1(a), 4.1(c), (e), 5(b), 6(b); 2013-414, ss. 9, 40; 2014-3, ss. 4.1(b), 5.1(a), (f), 6.1(b), 7.1(b), 8.1(a), 14.8; 2014-39, s. 1(a); 2015-6, s. 2.1(b); 2015-98, s. 1(h); 2015-241, s. 32.18(b); 2015-259, ss. 4.1(b), 4.2(b); 2016-92, s. 2.3; 2016-94, s. 38.5(e); 2017-204, s. 2.2; 2018-5, s. 38.5(c); 2019-169, ss. 3.2, 3.4(a), 3.9(d); 2019-246, s. 7(a); 2020-58, s. 3.4.)

§ 105-164.3. Definitions.

The following definitions apply in this Article:

...

- (121) Lease or rental. - A transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration. The term does not include any of the following:
- a. A transfer of possession or control of property under a security agreement or deferred payment plan that requires the transfer of title upon completion of the required payments.
 - b. A transfer of possession or control of property under an agreement that requires the transfer of title upon completion of required payments and payment of an option price that does not exceed the greater of one hundred dollars (\$100.00) or one percent (1%) of the total required payments.
 - c. The providing of tangible personal property along with an operator for a fixed or indeterminate period of time if the operator is necessary for the equipment to perform as designed. For the purpose of this sub-subdivision, an operator must do more than maintain, inspect, or set up the tangible personal property.

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 .4415

RECOMMENDATION DATE: October 27, 2023

RECOMMENDED ACTION:

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

COMMENT:

THE SECRETARY HAS CHANGED THE RULE TO ADDRESS SOME OF THE OBJECTIONS RAISED BY THE RULES REVIEW COMMISSION'S OBJECTIONS OF SEPTEMBER 2023. IN THE REVISED RULE THE SECRETARY REFERENCES G.S. 105-164.4G. GIVEN THE LIMITED SCOPE OF THE STATUTE, IT APPEARS THAT THE SECRETARY IS INTERPRETING A STATUTE RATHER THAN ESTABLISHING LAW OF HIS OWN ACCORD. ACCORDINGLY, STAFF RECOMMENDS THAT THE COMMISSION FIND THAT THE SECRETARY HAS MET OBJECTIONS I-III.

HOWEVER, NOW THAT THE SECRETARY'S INTENTIONS HAVE BEEN MADE CLEAR IN THE RULE, THE RE-WRITTEN RULE MUST ANALYZED ANEW.

G.S. 105-164.4G IMPOSES A TAX ON ADMISSION CHARGES TO ENTERTAINMENT ACTIVITIES. G.S. 105-164.4G(E) PROVIDES EXCEPTIONS TO THE TAX INCLUDING:

- (1) *AN AMOUNT PAID SOLELY FOR THE RIGHT TO PARTICIPATE, OTHER THAN TO BE A SPECTATOR, IN SPORTING ACTIVITIES. EXAMPLES OF THESE TYPES OF CHARGES INCLUDE **BOWLING FEES**, GOLF GREEN FEES, AND GYM MEMBERSHIPS. (EMPHASIS ADDED)*
- (6) *AN AMOUNT PAID FOR THE RIGHT TO PARTICIPATE, OTHER THAN TO BE A SPECTATOR, IN THE FOLLOWING ACTIVITIES: A. **ROCK CLIMBING, SKATING**, SKIING, SNOWBOARDING, SLEDDING, ZIP LINING, OR OTHER SIMILAR ACTIVITIES. (EMPHASIS ADDED)*

I.

*WILLIAM W. PEASLEE
COMMISSION COUNSEL*

PARAGRAPH (A) OF THE RULE IS A MERE RESTATEMENT OF THE LAW PROVIDED IN G.S. 105-164.4G(E). ACCORDINGLY, IT IS NOT REASONABLY NECESSARY PURSUANT TO G.S. 150B-21.9(A)(3).

II.

IN PARAGRAPH (B)(1), THE RULE STATES THAT THE RENTAL OF TANGIBLE PERSONAL PROPERTY COMMENSURATE WITH SKATING OR BOWLING IS NOT EXEMPT PURSUANT TO G.S. 105-164.4G(E). GIVEN THE CLEAR LANGUAGE OF THE STATUTE, NO REASONABLE READING OF THE STATUTE WOULD LEAD TO THE CONCLUSION THAT THE RENTALS WOULD BE EXEMPT. PUT ANOTHER WAY, IF THIS SUBPARAGRAPH WAS REPEALED, IT APPEARS THAT NOTHING WOULD CHANGE ABOUT THE ACTUAL SALES TAX IMPLEMENTATION IN THIS STATE. GIVEN SUCH AN EFFECT, IT COULD NOT BE SAID THAT THIS RULE IS "NECESSARY TO IMPLEMENT OR INTERPRET" AN ENACTMENT OF THE GENERAL ASSEMBLY. ACCORDINGLY, STAFF RECOMMENDS OBJECTION PURSUANT TO G.S. 150B-21.9(A)(3) FOR LACK OF NECESSITY.

III.

IN PARAGRAPH (B)(2), THE RULE STATES THAT THE SALE OF ITEMS, AS DEFINED IN G.S. 105-164.3, ARE NOT EXEMPT PURSUANT TO G.S. 105-164.4G(E). GIVEN THE CLEAR LANGUAGE OF THE STATUTE, NO REASONABLE READING OF THE STATUTE WOULD LEAD TO THE CONCLUSION THAT THE RENTALS WOULD BE EXEMPT. PUT ANOTHER WAY, THIS SUBPARAGRAPH WAS REPEALED, IT APPEARS THAT NOTHING WOULD CHANGE ABOUT THE ACTUAL SALES TAX IMPLEMENTATION IN THIS STATE. GIVEN SUCH AN EFFECT, IT COULD NOT BE SAID THAT THIS RULE IS "NECESSARY TO IMPLEMENT OR INTERPRET" AN ENACTMENT OF THE GENERAL ASSEMBLY. ACCORDINGLY, STAFF RECOMMENDS OBJECTION PURSUANT TO G.S. 150B-21.9(A)(3) FOR LACK OF NECESSITY.

§ 150B-21.9. Standards and timetable for review by Commission.

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

§ 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

- (1) Administrative law judge. - A person appointed under G.S. 7A-752, 7A-753, or 7A-757.
- (1a) Adopt. - To take final action to create, amend, or repeal a rule.
- (1b) Agency. - An agency or an officer in the executive branch of the government of this State. The term includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A local unit of government is not an agency.
- (1c) Codifier of Rules. - The person appointed by the Chief Administrative Law Judge of the Office of Administrative Hearings pursuant to G.S. 7A-760(b).
- (1d) Commission. - The Rules Review Commission.
- (2) Contested case. - An administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty. The term does not include rulemaking, declaratory rulings, or the award or denial of a scholarship, a grant, or a loan.
 - (2a) Repealed by Session Laws 1991, c. 418, s. 3.
 - (2b) Hearing officer. - A person or group of persons designated by an agency that is subject to Article 3A of this Chapter to preside in a contested case hearing conducted under that Article.
- (3) License. - Any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in any activity, except licenses issued under Chapter 20 and Subchapter I of Chapter 105 of the General Statutes, occupational licenses, and certifications of electronic poll books, ballot duplication systems, or voting systems under G.S. 163-165.7.
- (4) Licensing. - Any administrative action issuing, failing to issue, suspending, or revoking a license or occupational license. The term does not include controversies over whether an examination was fair or whether the applicant passed the examination.
 - (4a) Occupational license. - Any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in a profession, occupation, or field of endeavor that is issued by an occupational licensing agency.
 - (4b) Occupational licensing agency. - Any board, commission, committee, or other agency of the State that is established for the primary purpose of regulating the entry of persons into, or the conduct of persons within a particular profession, occupation, or field of endeavor, and that is authorized to issue and revoke licenses. The term does not include State

agencies or departments that may as only a part of their regular function issue permits or licenses.

- (5) Party. - Any person or agency named or admitted as a party or properly seeking as of right to be admitted as a party and includes the agency as appropriate.
- (5a) Person. - Any natural person, partnership, corporation, body politic, and any unincorporated association, organization, or society that may sue or be sued under a common name.
- (6) Person aggrieved. - Any person or group of persons of common interest directly or indirectly affected substantially in his, her, or its person, property, or employment by an administrative decision.
- (7) Recodified as subdivision (5a) of this section by Session Laws 2021-88, s. 16(a), effective July 22, 2021.
- (7a) Policy. - Any nonbinding interpretive statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.
- (8) Residence. - Domicile or principal place of business.
- (8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
 - a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
 - b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.
 - c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
 - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
 - e. Statements of agency policy made in the context of another proceeding, including:

1. Declaratory rulings under G.S. 150B-4.
 2. Orders establishing or fixing rates or tariffs.
- f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
 - g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
 - h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.
 - i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
 - j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
 - k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
 - l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.
- (8b) Repealed by Session Laws 2011-398, s. 61.2, effective July 25, 2011.
- (8c) Substantial evidence. - Relevant evidence a reasonable mind might accept as adequate to support a conclusion.
- (9) Repealed by Session Laws 1991, c. 418, s. 3. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, ss. 61, 62; 1977, c. 915, s. 5; 1983, c. 641, s. 1; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(2)-1(5); 1987, c. 878, ss. 1, 2, 21; 1987 (Reg. Sess., 1988), c. 1111, s. 17; 1991, c. 418, s. 3; c. 477, ss. 3.1, 3.2, 9; 1995, c. 390, s. 29; 1996, 2nd Ex. Sess., c. 18, s. 7.10(g); 1997-456, s. 27; 2003-229, s. 12; 2007-491, s. 44(1)b; 2011-13, s. 2; 2011-398, ss. 15, 61.2; 2013-188, s. 7; 2013-382, s. 9.1(c); 2013-413, s. 1; 2015-2, s. 2.2(c); 2015-241, ss. 7A.3, 30.16(a); 2017-6, s. 3; 2018-13, s. 3.8(b); 2018-146, ss. 3.1(a), (b), 4.5(b); 2021-88, s. 16(a), (b).)

§ 150B-19. Restrictions on what can be adopted as a rule.

An agency may not adopt a rule that does one or more of the following:

- (1) Implements or interprets a law unless that law or another law specifically authorizes the agency to do so.
- (2) Enlarges the scope of a profession, occupation, or field of endeavor for which an occupational license is required.
- (3) Imposes criminal liability or a civil penalty for an act or omission, including the violation of a rule, unless a law specifically authorizes the agency to do so or a law declares that violation of the rule is a criminal offense or is grounds for a civil penalty.
- (4) Repeats the content of a law, a rule, or a federal regulation. A brief statement that informs the public of a requirement imposed by law does not violate this subdivision and satisfies the "reasonably necessary" standard of review set in G.S. 150B-21.9(a)(3).
- (5) Establishes a fee or other charge for providing a service in fulfillment of a duty unless a law specifically authorizes the agency to do so or the fee or other charge is for one of the following:
 - a. A service to a State, federal, or local governmental unit.
 - b. A copy of part or all of a State publication or other document, the cost of mailing a document, or both.
 - c. A transcript of a public hearing.
 - d. A conference, workshop, or course.
 - e. Data processing services.
- (6) Allows the agency to waive or modify a requirement set in a rule unless a rule establishes specific guidelines the agency must follow in determining whether to waive or modify the requirement.
- (7) Repealed by Session Laws 2011-398, s. 61.2, effective July 25, 2011. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1991, c. 418, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 7.10(a); 2011-13, s. 1; 2011-398, s. 61.2.)

§ 105-264. Effect of Secretary's interpretation of revenue laws.

(a) **Interpretation.** - It is the duty of the Secretary to interpret all laws administered by the Secretary. The Secretary's interpretation of these laws shall be consistent with the applicable rules. An interpretation by the Secretary is prima facie correct. When the Secretary interprets a law by adopting a rule or publishing a bulletin or directive on the law, the interpretation is a protection to the officers and taxpayers affected by the interpretation, and taxpayers are entitled to rely upon the interpretation. If the Secretary changes an interpretation, a taxpayer who relied on it before it was changed is not liable for any penalty or additional assessment on any tax that accrued before the interpretation was changed and was not paid by reason of reliance upon the interpretation.

(b) **Advice.** - If a taxpayer requests specific advice from the Department and receives erroneous advice in response, the taxpayer is not liable for any penalty or additional assessment attributable to the erroneous advice furnished by the Department to the extent that the following conditions are all satisfied:

- (1) The advice was reasonably relied upon by the taxpayer.
- (2) The penalty or additional assessment did not result from the taxpayer's failure to provide adequate or accurate information.
- (3) The Department provided the advice in writing or the Department's records establish that the Department provided erroneous verbal advice.

(c) **Revised Interpretations.** - This section does not prevent the Secretary from changing an interpretation, and it does not prevent a change in an interpretation from applying on and after the effective date of the change. An interpretation that revises a prior interpretation by expanding the scope of a tax or otherwise increasing the amount of tax due may not become effective sooner than the following:

- (1) For a tax that is payable on a monthly or quarterly basis, the first day of a month that is at least 90 days after the date the revised interpretation is issued.
- (2) For a tax that is payable on an annual basis, the first day of a tax year that begins after the date the revised interpretation is issued.

(d) **Fee.** - The Secretary may charge a fee for providing a written determination at the request of a taxpayer. The fee is a receipt of the Department and must be applied to the costs of providing the written determination. The proceeds of the fee must be credited to a special account within the Department and do not revert but remain in the special account until spent by the Department for the costs of providing the written determination. The Secretary may adopt a tiered fee structure based on the taxpayer's income or gross receipts, the relative complexity of the advice requested, or the tax schedule for which advice is requested. The fee shall not be less than one hundred dollars (\$100.00) or more than five thousand dollars (\$5,000). The fee may be waived by the Secretary. The term "written determination" has the same meaning as defined in G.S. 105-264.2. (1939, c. 158, s. 933; 1955, c. 1350, s. 4; 1957, c. 1340, s. 14; 1973, c. 476, s. 193;

1991, c. 45, s. 29; 1993, c. 532, s. 9; 1998-98, s. 21; 2008-107, s. 28.16(e); 2010-31, s. 31.7A(a); 2011-390, s. 6; 2016-103, s. 6.)

WILLIAM W. PEASLEE
COMMISSION COUNSEL

From: [Andrew O. Furuseth](#)

To: [Ascher, Seth M](#); [Peaslee, William W](#); [Lansford, Laura L](#)

Cc: [Burgos, Alexander N](#); [Jacobs, Tenisha S](#)

Subject: RE: [External] RE: DOR Rules

Date: Wednesday, September 6, 2023 4:47:01 PM

CAUTION: External email. Do not click links or open attachments unless verified. Report suspicious emails with the Report Message button located on your Outlook menu bar on the Home tab.

Mr. Peaslee and Mr. Ascher,

We look forward to meeting with you tomorrow morning. We have included specific statute support and a brief explanation for each rule mentioned in your emails below. In addition, we want to provide a brief general explanation for the industry specific rules. While each of these industry specific rules have existed for a long time, it is my understanding that they were adopted to provide the interpretation for how sales and use tax applies to industries that have had questions or disputes about the application of sales and use tax to the industry. The objective is to provide the Secretary's interpretation of the law to the specific industry so they can comply with the law.

These types of interpretations are important because retailers become liable for sales and use tax that is incorrectly calculated. For example, if a business thinks an item they are selling is not subject to tax and does not collect tax from its customer, the business becomes liable for the tax. In the inverse situation, a retailer that collects tax on an item that is not subject to tax, can become liable to civil actions by its customers including class actions. See G.S. 105-164.11(c).

We also want to address the question about the articles referenced in the rules. We have 75 rules that where the Secretary has cited "Chapter 105, Articles 39, 40, 42, 43, and 46." The existing rules cite these articles for the authority to impose the local and transit rates of sales and use tax. The following citations provide the specific authority for those tax levies and the administration of those taxes: 105-467; 105-468; 105-469; 105-483; 105-498; 105-507.2; 105-509.1; 105-510.1; 105-511.3; 105-537; 105-538.

17 NCAC 07B .4415 - SKATING RINK AND BOWLING ALLEY RENTAL FEES
Statutes – G.S. 105-105-164.4(a)(1) and 164.4G(e)(1)

The rule interprets the exemption allowed per 105-164.4G(e)(1) which excepts from tax "[a]n amount paid solely for the right to participate, other than to be a spectator, in sporting activities. Examples of these types of charges include bowling fees..." In addition, the rule interprets the imposition of tax on tangible personal property for the rental of shoes etc.

.4201 US Government Exemption
Statute - G.S. 105-164.13(17)

Explanation – The rule interprets the exemption for sales which the states are without power to tax. The United States Constitution does not expressly provide that the federal government is immune from state taxation, however, numerous Supreme Court cases have held that the United State is generally exempt from direct state taxation.

.4202 US Government Exemption
Statute - G.S. 105-164.13(17)

Explanation – The rule interprets the exemption for sales which the states are without power to tax. The United States Constitution does not expressly provide that the federal government is immune from state taxation, however, numerous Supreme Court cases have held that the United State is generally exempt from direct state taxation.

WILLIAM W. PEASLEE
COMMISSION COUNSEL

.4203 US Government Contractor's Exemption
Statute - G.S. 105-164.13(17)

Explanation – The rule interprets the exemption for sales which the states are without power to tax. In the Supreme Court opinion of *United States v. County of Allegheny*, 322 U.S. 174 (1944), the court found that in instances where contractor purchases of property to which title passes to United States are exempt from state taxation. This was also applied in *General Dynamics v. NCDOR*, 09 REV 05695.

.4614 Recreational vehicles exemption

Statutes - G.S. 105-164.4(a)(1), 105-164.13(32), 105-164.3(149).

Explanation – This rule provides the interpretation for certain recreational vehicles being classified as motor vehicles which qualify for exemption from sales and use tax or taxable tangible personal property. Motor vehicles are defined in G.S. 105-164.3(149) and subject to the highway use tax or alternate highway use tax, not the sales and use tax.

.4700 Commercial printers and publishers' exemptions Statutes

- G.S. 105-164(a)(1), 105-164.13(5e) & (39)

Explanation - This rule covers all different types of transactions that a commercial printer or publisher may encounter and provides taxability information on items purchased and whether those items purchased are used or resold to a customer. The rule also covers commercial printers and publishers being classified as a manufacturing industry or plant and covers the taxability with respect to many items that fall under that exemption.

.4707 Printing Chemicals exemption

Statute- 105-164.13(8)

Explanation - Exemption allowed for chemicals that become ingredient and component part of printed materials and 105-164.13(5e) which is the mill machinery and mill machinery parts and accessories exemption for chemicals to clean printing machinery.

.4708 Postage Charges by printers exemption

Statute - 105-164.13(17) and 18 USC 8

Explanation - The rule interprets the exemption for sales which the states are without power to tax. 18 USC 8 states that stamps are an obligation of the US government and the states generally cannot tax the face value of an obligation of the US government.

.5002 Eyeglass frames and repair parts exemption Statutes

- 105-164.13(12)(a) and 164.4D(a)(1)c

Explanation - The rule interprets the exemption for prosthetic devices and bundled transactions on medical devices.

.5001 Eyeglass and contact lens exemption

Statutes - 105-164.13(12) and 105-164.3(192)

Explanation - The rule interprets the exemption for prosthetic devices and the definition of prosthetic devices.

.5004 Optical supply exemption.

Statutes - G.S. 105-164.4(a)(1) and 105-164.13(12)a

Explanation - The rule interprets the exemption for prosthetic devices and the tax imposed on tangible personal property.

WILLIAM W. PEASLEE
COMMISSION COUNSEL

.0112(c) Exemption for Business engaged in occasional and isolated sales
Statutes - 105-164.3(25) and 105-164.4(4b)

Explanation – The rule interprets the imposition of tax and the following exclusion in 105-164.3, “[t]he term does not include an occasional and isolated sale or transaction by a person who does not claim to be engaged in business.” In addition, G.S. 105-164.4(4b) differentiates between a person who sells TPP at a specialty market, who is considered a retailer, from a person who sells their own household items.

.0901 (a), (b) Advertising services
Statutes – 105-164.3(237), 105-164.4(a)(1) and 105-164.13.

Explanation – Generally, this rule interprets the imposition of tax on tangible personal property and the lack of imposition on professional services as it relates to advertising agencies. The rule interprets when a sale of tangible personal property takes place versus when a sale is of professional services and the tax consequences of those determinations. The rule also interprets the definition of sales prices for various charges by an advertising agency and the purchase for resale exemption.

.0902 Advertising artists
Statutes – 105-164.3(237), 105-164.4(a)(1) and 105-164.13.

Explanation – Generally, this rule interprets the imposition of tax on tangible personal property and the lack of imposition on professional services as it relates to advertising artists. The rule interprets when a sale of tangible personal property takes place versus when a sale is of professional services and the tax consequences of those determinations. The rule also interprets the definition of sales prices for various charges and the purchase for resale exemption.

.0904 Public relations firms
Statutes – 105-164.3(237), 105-164.4(a)(1) and 105-164.13.

Explanation – Generally, this rule interprets the imposition of tax on tangible personal property and the lack of imposition on professional services as it relates to public relations firms. The rule interprets when a sale is of tangible personal property versus when a sale is of professional services and the tax consequences of those determinations. The rule also interprets the definition of sales prices for various charges by a public relations firm and the purchase for resale exemption.

.0115 Research Services Statute –
105-164.4(a)(1)

Explanation - The rule interprets the imposition of tax on research equipment used by research firms.

.1202 Supplies and Equipment for an Accommodation
Statutes - GS 105-164.4(a)(1), GS 105-164.6, 105-164.13.

Explanation – The rule interprets the imposition of tax on items purchased by an accommodation provider and used in the accommodation. This has been an area of confusion in the past and the legislature gave relief from assessments in G.S. 105-244.4 for a period of time.

.1302 In-state deliveries
Statutes - G.S. 105-164.4(a)(1) and G.S. 105-164.13(33a)

Explanation - This rule interprets the imposition of tax on items sold at retail to the purchaser or purchaser’s agent even when they may be taken about of State. Even though these items could be transported out of this State, because they are delivered

in this State to the purchaser or purchaser's agent in this State, they are subject to North Carolina use tax.

.1303 Gifts to donees

Statutes - G.S. 105-164.4(a)(1) and 105-164.4B.

Explanation - This rule interprets the imposition of tax on items that are sold to a purchaser to be given to a donee or given directly to the donee.

.1404 Medical supplies, instruments, and equipment

Statutes - G.S. 105-164.3(229), 105-164.3(227), 105-164.3(43), 105-164.4(a)(1), 105-164.6.

Explanation - This rule interprets the treatment of sales to and purchases by hospitals and other institutions. For an example of disputes related to medical supplies, see *Feeling Great, Inc. and Sleep Medical Center, Inc. v. N.C. Department of Revenue*, 14 CVS 11139, Wake County Superior Court Division.

.1601 Sales to or purchases by nonprofit entities

Statutes - G.S. 105-164.4 and 105-164.14

Explanation – This rule interprets how the sales and use tax applies to purchases by and for non-profits. North Carolina is one of very few States that does not provide an exemption for these sales.

.1605 Sales by nonprofit entities

Statutes – G.S. 105-164.4 and 105-164.3(229)

Explanation – The rule interprets the imposition of tax on nonprofits that act as retailers. The rule makes clear that nonprofits making retail sales are retailers.

.1705 Housing authorities

Statutes – G.S. 105-164.4 and 105-164.14(c)

Explanation – This rule interprets the imposition of tax on housing and authorities and the non-profits eligible for refund. The housing authorities listed in the statute do not meet the requirements of 105-164.14(c) and thus are not eligible for a refund.

.1801 Sales to hospitals

Statutes – G.S. 105-164.4 and 105-164.13(12) and –(13).

Explanation – The rule interprets various impositions and exemptions and how they apply to hospitals. The rule interprets which items are purchased for use, which items are purchased for resale, and which items are subject to exemption.

.1905 Tire retreaders

Statutes – G.S. 105-164.4(a)(1)a., G.S. 105-164.4(a)(1)c.

Explanation – The rule interprets the imposition of tax on tangible personal property and repair, maintenance and installation services as they relate to tire retreaders. In addition, the rule interprets which items purchased by tire retreaders are subject to the exemption provided in G.S. 105-164.13(61b)

.2001 Sales to employees Statutes -

G.S. 105-164.4

Explanation – The rule interprets the imposition of tax on sales by employers to employees. This rule explains an employer engaged in business in this State that makes retail sales of items to their employees is a retailer. Therefore, the employer must collect and remit the sales and use tax due on its retail sales to employees.

.2002 Gifts to employees Statutes
– GS 105-164.4

Explanation - The rule interprets the imposition of tax on gifts to employees. This rule explains an employer that purchases items provided to an employee or other person as a gift or as compensation is the consumer of the items.

Thank You,

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COMMISSION COUNSEL

§ 105-164.4G. Entertainment activity.

(a) Repealed by Session Laws 2019-246, s. 4(i), effective February 1, 2020, and applicable to sales occurring on or after that date.

(b) **Tax.** - The gross receipts derived from an admission charge to an entertainment activity are taxed at the general rate set in G.S. 105-164.4. The tax is due and payable by the retailer in accordance with G.S. 105-164.16. For purposes of the tax imposed by this section, the retailer is the applicable person listed below:

- (1) The operator of the venue where the entertainment activity occurs, unless the retailer and the admission facilitator have a contract between them allowing for dual remittance, as provided in subsection (d) of this section.
- (2) The person that provides the entertainment and that receives admission charges directly from a purchaser.
- (3) A person other than a person listed in subdivision (1) or (2) of this subsection that receives gross receipts derived from an admission charge sold at retail.

(c) **Admission Facilitator.** - An admission facilitator must report to the retailer with whom it has a contract the admission charge a consumer pays to the admission facilitator for an entertainment activity. The admission facilitator must send the retailer the portion of the gross receipts the admission facilitator owes the retailer and the tax due on the gross receipts derived from an admission charge no later than 10 days after the end of each calendar month. An admission facilitator that does not send the retailer the tax due on the gross receipts derived from an admission charge is liable for the amount of tax the admission facilitator fails to send to the retailer. An admission facilitator is not liable for tax sent to a retailer but not remitted by the retailer to the Secretary. Tax payments received by a retailer from an admission facilitator are held in trust by the retailer for remittance to the Secretary. A retailer that receives a tax payment from an admission facilitator must remit the amount received to the Secretary. A retailer is not liable for tax due but not received from an admission facilitator. The requirements imposed by this subsection on a retailer and an admission facilitator are considered terms of the contract between the retailer and the admission facilitator.

(d) **Dual Remittance.** - The tax due on the gross receipts derived from an admission charge may be partially reported and remitted to the operator of the venue for remittance to the Department and partially reported and remitted by the admission facilitator directly to the Department. The portion of the tax not reported and remitted to the operator of the venue must be reported and remitted directly by the admission facilitator to the Department. An admission facilitator that elects to remit tax under the dual remittance option is required to obtain a certificate of registration in accordance with G.S. 105-164.29. An admission facilitator is subject to the provisions of Article 9 of this Chapter.

(e) **Exceptions.** - The tax imposed by this section does not apply to the following:

- (1) An amount paid solely for the right to participate, other than to be a spectator, in sporting activities. Examples of these types of charges include bowling fees, golf green fees, and gym memberships.
 - (2) Tuition, registration fees, or charges to attend instructional seminars, conferences, or workshops for educational purposes, notwithstanding that entertainment activity may be offered as an ancillary purpose of an event listed in this subdivision.
 - (3) A political contribution.
 - (4) A charge for lifetime seat rights, lease, or rental of a suite or box for an entertainment activity, provided the charge is separately stated on an invoice or similar billing document given to the purchaser at the time of sale.
 - (5) An amount paid solely for transportation.
 - (6) An amount paid for the right to participate, other than to be a spectator, in the following activities:
 - a. Rock climbing, skating, skiing, snowboarding, sledding, zip lining, or other similar activities.
 - b. Instruction classes related to the activities included in subdivision a. of this subdivision.
 - c. Riding on a carriage, boat, train, plane, horse, chairlift, or other similar rides.
 - d. Amusement rides, including a waterslide.
- (f) Exemptions. - The sale at retail and the use, storage, or consumption in this State of the following gross receipts derived from an admission charge to an entertainment activity are specifically exempt from the tax imposed by this Article:
- (1) The portion of a membership charge that is deductible as a charitable contribution under section 170 of the Code or that is described in section 170(D)(2) of the Code.
 - (2) A donation that is deductible as a charitable contribution under section 170 of the Code or that is described in section 170(D)(2) of the Code.
 - (3) Charges for an amenity. If charges for amenities are separately stated on a billing document given to the purchaser at the time of the sale, then the tax does not apply to the separately stated charges for amenities. If charges for amenities are not separately stated on the billing document given to the purchaser at the time of the sale, then the transaction is a bundled transaction and taxed in accordance with G.S. 105-164.4D except that G.S. 105-164.4D(a)(3) does not apply.
 - (4) An event that is sponsored by an elementary or secondary school. For purposes of this exemption, the term "school" is an entity regulated under Chapter 115C of the General Statutes.

- (5) An event sponsored solely by a nonprofit entity that is exempt from tax under Article 4 of this Chapter if all of the following conditions are met:
- a. The entire proceeds of the activity are used exclusively for the entity's nonprofit purposes.
 - b. The entity does not declare dividends, receive profits, or pay salary or other compensation to any members or individuals.
 - c. The entity does not compensate any person for participating in the event, performing in the event, placing in the event, or producing the event. For purposes of this subdivision, the term "compensate" means any remuneration included in a person's gross income as defined in section 61 of the Code.
- (6) An event sponsored by a farmer that takes place on farmland and is related to farming activities, such as a corn maze or a tutorial on raising crops or animals. For purposes of this exemption, a farmer is a person who holds a qualifying farmer sales tax exemption certificate and farmland is land that is enrolled in the present-use value program under G.S. 105-277.3.
- (g) Sourcing. - An admission charge to an entertainment activity is sourced to the location where admission to the entertainment activity may be gained by a person. When the location where admission may be gained is not known at the time of the receipt of the gross receipts for an admission charge, the sourcing principles in G.S. 105-164.4B(a) apply. (2014-3, s. 5.1(c); 2015-6, s. 2.11; 2016-5, s. 3.4; 2017-204, s. 2.10(a); 2018-5, s. 38.5(e), (u); 2019-169, s. 3.3(c); 2019-246, s. 4(i).)

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 .4503

RECOMMENDATION DATE: November 11, 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:

I.

SUBPARAGRAPH (A)(1) OF THE RULE EXEMPTS THE SALE OF "WASHING MACHINES" "PRESSING MACHINES" AND SIMILAR CLEANING MACHINES" FROM THE SALES AND USE TAX. THE SALE OF THESE ITEMS ARE ALREADY EXEMPT PURSUANT TO G.S. 105-164.13(10).

SIMILARLY, SUBPARAGRAPHS(A)(12) THROUGH (16) EXEMPT THE SALE OF ITEMS THAT ARE ALREADY EXEMPT PURSUANT TO G.S. 105-164.13(10).

ACCORDINGLY, STAFF RECOMMENDS OBJECTION TO THIS LANGUAGE PURSUANT TO G.S. 150B-21.9(A)(3) FOR LACK OF NECESSITY.

*WILLIAM W. PEASLEE
COMMISSION COUNSEL*

§ 150B-21.9. STANDARDS AND TIMETABLE FOR REVIEW BY COMMISSION.

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

§ 105-264. Effect of Secretary's interpretation of revenue laws.

(a) Interpretation. - It is the duty of the Secretary to interpret all laws administered by the Secretary. The Secretary's interpretation of these laws shall be consistent with the applicable rules. An interpretation by the Secretary is prima facie correct. When the Secretary interprets a law by adopting a rule or publishing a bulletin or directive on the law, the interpretation is a protection to the officers and taxpayers affected by the interpretation, and taxpayers are entitled to rely upon the interpretation. If the Secretary changes an interpretation, a taxpayer who relied on it before it was changed is not liable for any penalty or additional assessment on any tax that accrued before the interpretation was changed and was not paid by reason of reliance upon the interpretation.

(b) Advice. - If a taxpayer requests specific advice from the Department and receives erroneous advice in response, the taxpayer is not liable for any penalty or additional assessment attributable to the erroneous advice furnished by the Department to the extent that the following conditions are all satisfied:

- (1) The advice was reasonably relied upon by the taxpayer.
- (2) The penalty or additional assessment did not result from the taxpayer's failure to provide adequate or accurate information.
- (3) The Department provided the advice in writing or the Department's records establish that the Department provided erroneous verbal advice.

(c) Revised Interpretations. - This section does not prevent the Secretary from changing an interpretation, and it does not prevent a change in an interpretation from applying on and after the effective date of the change. An interpretation that revises a prior interpretation by expanding the scope of a tax or otherwise increasing the amount of tax due may not become effective sooner than the following:

- (1) For a tax that is payable on a monthly or quarterly basis, the first day of a month that is at least 90 days after the date the revised interpretation is issued.
- (2) For a tax that is payable on an annual basis, the first day of a tax year that begins after the date the revised interpretation is issued.

(d) Fee. - The Secretary may charge a fee for providing a written determination at the request of a taxpayer. The fee is a receipt of the Department and must be applied to the costs of providing the written determination. The proceeds of the fee must be credited to a special account within the Department and do not revert but remain in the special account until spent by the Department for the costs of providing the written determination. The Secretary may adopt a tiered fee structure based on the taxpayer's income or gross receipts, the relative complexity of the advice requested, or the tax schedule for which advice is requested. The fee shall not be less than one hundred dollars (\$100.00) or more than five thousand dollars (\$5,000). The fee may be waived by the Secretary. The term "written determination" has the same meaning as defined in G.S. 105-264.2. (1939, c. 158, s. 933; 1955, c. 1350, s. 4; 1957, c. 1340, s. 14; 1973, c. 476, s. 193; 1991, c. 45, s. 29; 1993, c. 532, s. 9; 1998-98, s. 21; 2008-107, s. 28.16(e); 2010-31, s. 31.7A(a); 2011-390, s. 6; 2016-103, s. 6.)

§ 105-164.13. Retail sales and use tax.

The sale at retail and the use, storage, or consumption in this State of the following items are specifically exempted from the tax imposed by this Article:

...

- (10) Sales of the following to commercial laundries or to pressing and dry cleaning establishments:
 - a. Articles or materials used for the identification of garments being laundered or dry cleaned, wrapping paper, bags, hangers, starch, soaps, detergents, cleaning fluids and other compounds or chemicals applied directly to the garments in the direct performance of the laundering or the pressing and cleaning service.
 - b. Laundry and dry-cleaning machinery, parts and accessories attached to the machinery, and lubricants applied to the machinery.
 - c. Fuel and piped natural gas used in the direct performance of the laundering or the pressing and cleaning service. The exemption does not apply to electricity.

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 .4609

RECOMMENDATION DATE: November 9, 2023

RECOMMENDED ACTION:

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

COMMENT:

I.

G.S. 105-164.13(32) EXEMPTS THE SALE OF "MOTOR VEHICLES" FROM SALES AND USE TAX.

PARAGRAPH (A) OF THE RULE EXEMPTS THE SALE OF FIRE TRUCKS TO LISTED ENTITIES. STAFF COUNSEL OPINES THAT A FIRE TRUCK IS A MOTOR VEHICLE, NOTWITHSTANDING THE PURCHASER, AND NO REASONABLE PERSON COULD AVER OTHERWISE. ACCORDINGLY, STAFF RECOMMENDS OBJECTION TO THIS LANGUAGE PURSUANT TO G.S. 150B-21.9(A)(3) FOR LACK OF NECESSITY.

II.

PARAGRAPH (A) OF THE RULE STATES, INTER ALIA, THAT THE FIRE TRUCKS SOLD TO LISTED ENTITIES ARE SUBJECT TO THE HIGHWAY USE TAX PURSUANT TO G.S. 105-187.3 UNLESS EXEMPT.

THE TAX IMPOSED BY G.S. 105-187.3 IS APPLIABLE TO MOTOR VEHICLES. STAFF COUNSEL OPINES THAT A FIRE TRUCK IS A MOTOR VEHICLE, NOTWITHSTANDING THE PURCHASER, AND NO REASONABLE PERSON COULD AVER OTHERWISE. ACCORDINGLY, STAFF RECOMMENDS OBJECTION TO THIS LANGUAGE PURSUANT TO G.S. 150B-21.9(A)(3) FOR LACK OF NECESSITY.

*WILLIAM W. PEASLEE
COMMISSION COUNSEL*

§ 150B-21.9. STANDARDS AND TIMETABLE FOR REVIEW BY COMMISSION.

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

§ 105-264. Effect of Secretary's interpretation of revenue laws.

(a) Interpretation. - It is the duty of the Secretary to interpret all laws administered by the Secretary. The Secretary's interpretation of these laws shall be consistent with the applicable rules. An interpretation by the Secretary is prima facie correct. When the Secretary interprets a law by adopting a rule or publishing a bulletin or directive on the law, the interpretation is a protection to the officers and taxpayers affected by the interpretation, and taxpayers are entitled to rely upon the interpretation. If the Secretary changes an interpretation, a taxpayer who relied on it before it was changed is not liable for any penalty or additional assessment on any tax that accrued before the interpretation was changed and was not paid by reason of reliance upon the interpretation.

(b) Advice. - If a taxpayer requests specific advice from the Department and receives erroneous advice in response, the taxpayer is not liable for any penalty or additional assessment attributable to the erroneous advice furnished by the Department to the extent that the following conditions are all satisfied:

- (1) The advice was reasonably relied upon by the taxpayer.
- (2) The penalty or additional assessment did not result from the taxpayer's failure to provide adequate or accurate information.
- (3) The Department provided the advice in writing or the Department's records establish that the Department provided erroneous verbal advice.

(c) Revised Interpretations. - This section does not prevent the Secretary from changing an interpretation, and it does not prevent a change in an interpretation from applying on and after the effective date of the change. An interpretation that revises a prior interpretation by expanding the scope of a tax or otherwise increasing the amount of tax due may not become effective sooner than the following:

- (1) For a tax that is payable on a monthly or quarterly basis, the first day of a month that is at least 90 days after the date the revised interpretation is issued.
- (2) For a tax that is payable on an annual basis, the first day of a tax year that begins after the date the revised interpretation is issued.

(d) Fee. - The Secretary may charge a fee for providing a written determination at the request of a taxpayer. The fee is a receipt of the Department and must be applied to the costs of providing the written determination. The proceeds of the fee must be credited to a special account within the Department and do not revert but remain in the special account until spent by the Department for the costs of providing the written determination. The Secretary may adopt a tiered fee structure based on the taxpayer's income or gross receipts, the relative complexity of the advice requested, or the tax schedule for which advice is requested. The fee shall not be less than one hundred dollars (\$100.00) or more than five thousand dollars (\$5,000). The fee may be waived by the Secretary. The term "written determination" has the same meaning as defined in G.S. 105-264.2. (1939, c. 158, s. 933; 1955, c. 1350, s. 4; 1957, c. 1340, s. 14; 1973, c. 476, s. 193; 1991, c. 45, s. 29; 1993, c. 532, s. 9; 1998-98, s. 21; 2008-107, s. 28.16(e); 2010-31, s. 31.7A(a); 2011-390, s. 6; 2016-103, s. 6.)

§ 105-164.13. Retail sales and use tax.

The sale at retail and the use, storage, or consumption in this State of the following items are specifically exempted from the tax imposed by this Article:

...

(32) **SALES OF MOTOR VEHICLES**, THE SALE OF A MOTOR VEHICLE BODY TO BE MOUNTED ON A MOTOR VEHICLE CHASSIS WHEN A CERTIFICATE OF TITLE HAS NOT BEEN ISSUED FOR THE CHASSIS, AND THE SALE OF A MOTOR VEHICLE BODY MOUNTED ON A MOTOR VEHICLE CHASSIS THAT TEMPORARILY ENTERS THE STATE SO THE MANUFACTURER OF THE BODY CAN MOUNT THE BODY ON THE CHASSIS. FOR PURPOSES OF THIS SUBDIVISION, A PARK MODEL RV, AS DEFINED IN G.S. 105-187.1, IS A MOTOR VEHICLE.

...

§ 105-187.3. Rate of tax.

(a) **Tax Base.** - The tax imposed by this Article is applied to the sum of the retail value of a **motor vehicle** for which a certificate of title is issued and any fee regulated by G.S. 20-101.1. The tax does not apply to the sales price of a service contract, provided the charge is separately stated on the bill of sale or other similar document given to the purchaser at the time of the sale.

(a1) **Tax Rate.** - The tax rate is three percent (3%). The maximum tax is two thousand dollars (\$2,000) for each certificate of title issued for a Class A or Class B motor vehicle that is a commercial motor vehicle, as defined in G.S. 20-4.01, and for each certificate of title issued for a recreational vehicle. The tax is payable as provided in G.S. 105-187.4.

(b) **Retail Value.** - The retail value of a motor vehicle for which a certificate of title is issued because of a sale of the motor vehicle by a retailer is the sales price of the motor vehicle, including all accessories attached to the vehicle when it is delivered to the purchaser, less the amount of any allowance given by the retailer for a motor vehicle taken in trade as a full or partial payment for the purchased motor vehicle.

The retail value of a motor vehicle for which a certificate of title is issued because of a sale of the motor vehicle by a seller who is not a retailer is the market value of the vehicle, less the amount of any allowance given by the seller for a motor vehicle taken in trade as a full or partial payment for the purchased motor vehicle. A transaction in which two parties exchange motor vehicles is considered a sale regardless of whether either party gives additional consideration as part of the transaction.

The retail value of a motor vehicle for which a certificate of title is issued because of a reason other than the sale of the motor vehicle is the market value of the vehicle. The market value of a vehicle is presumed to be the value of the vehicle set in a schedule of values adopted by the Commissioner.

The retail value of a vehicle for which a certificate of title is issued because of a transfer by a State agency that assists the United States Department of Defense with purchasing, transferring, or titling a vehicle to another State agency, a unit of local government, a volunteer fire department, or a volunteer rescue squad is the sales price paid by the State agency, unit of local government, volunteer fire department, or volunteer rescue squad.

(c) **Schedules.** - In adopting a schedule of values for motor vehicles, the Commissioner shall adopt a schedule whose values do not exceed the wholesale values of motor vehicles as published in a recognized automotive reference manual. (1989, c. 692, ss. 4.1, 4.2; c. 770, s. 74.13; 1993, c. 467, s. 3; 1995, c. 349, s. 1; c. 390, s. 30; 2001-424, s. 34.24(a); 2001-497, s. 2(a); 2009-550, s. 2(e); 2010-95, s. 5; 2013-360, s. 34.29(a); 2013-363, s. 8.1; 2014-3, s. 6.1(g); 2014-39, s. 3; 2015-241, s. 29.34A(a); 2015-259, s. 5(d); 2015-268, s. 10.1(d).)

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 .4614

RECOMMENDATION DATE: October 16, 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:

Pursuant to G.S. 105- 262, "The Secretary of Revenue may adopt rules needed to administer tax collected by the Secretary or to fulfil any other duty delegated to the Secretary."

*Pursuant to G.S. 105-264, the Secretary has the duty to interpret all laws administered by the Secretary. This statute also provides that, "When the Secretary interprets a law by adopting a rule or publishing a bulletin or directive on the law, the interpretation is a protection to the officers and taxpayers affected by the interpretation, and taxpayers are entitled to rely upon the interpretation."*¹

Pursuant to G.S. 150B(8a), a "rule" is defined as "Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency..."

Chapter 105, Article 5., Part 2. imposes a sales and use tax generally which is collected by the Secretary. In short, sales which are not exempt are taxed.

¹ AT THE SEPTEMBER RRC MEETING, THE REPRESENTATIVE OF THE SECRETARY AGREED THAT G. S. 105-264 DOES NOT GRANT THE SECRETARY ADDITIONAL RULEMAKING AUTHORITY.

William W. Peaslee
Commission Counsel

G.S. 105-164.13 sets forth exemptions to sales and use taxation. The Secretary may interpret this statute.

G.S. 105-164.13(32) exempts, "Sales of motor vehicles, the sale of a motor vehicle body to be mounted on a motor vehicle chassis when a certificate of title has not been issued for the chassis, and the sale of a motor vehicle body mounted on a motor vehicle chassis that temporarily enters the State so the manufacturer of the body can mount the body on the chassis. For purposes of this subdivision, a park model RV, as defined in G.S. 105-187.1, is a motor vehicle".

G.S. 105-164.3(149) defines "motor vehicles" as:

"Motor vehicle. - A vehicle that is designed primarily for use upon the highways and is either self-propelled or propelled by a self-propelled vehicle, but does not include:

- a. A moped.
- b. Special mobile equipment.
- c. A tow dolly that is exempt from motor vehicle title and registration requirements under G.S. 20-51(10) or (11).
- d. A farm tractor or other implement of husbandry.
- e. A manufactured home, a mobile office, or a mobile classroom.
- f. Road construction or road maintenance machinery or equipment."

The rule states that "retail sales of camper trailers, fifth-wheel trailers, motor homes, and travel trailers that are designed to run on streets and highways and are pulled by a motor vehicle, or are self-propelled, are classified as sales of motor vehicles." (emphasis added)

I.

The rule conflicts with the statute in three respects. The Secretary added that the items must be designed "to run" or "pulled" "on streets". The statute requires the items be designed "primarily for use upon the highways". Each departure from the statutory language changes the statutory analysis of exemption.

For example, street design is not mentioned in the statute, so this language is clearly an expansion of the requirements as the rule states "streets and highways." (emphasis added)

While the Secretary has authority to interpret sale and use tax statutes, the Secretary does not have the authority to supplant or alter unambiguous language provided by the General Assembly. Accordingly, staff recommends objection pursuant to G.S. 150B-21.9(a)(1) for lack of authority.

II.

The difference between an item being designed to run on streets and designed to run on highways is lost as neither of these concepts are further elucidated by the rule. The rule adds ambiguity rather than provide clarity to the law by the addition of designed to run on streets".

It should be noted that the rule does not declare that the items are designed to either run on or for use upon either streets or highways. The rule merely alters an ambiguous statutory analysis for a more ambiguous codified analysis.

Accordingly, staff recommends objection to the rule pursuant to G.S. 150B-21.9(a)(2) for lack of clarity and ambiguousness.

III.

As written, it is difficult to determine what, if any, statutory language the Secretary is attempting to interpret by the first sentence of the rule. It cannot be an interpretation of "motor vehicle" as the Secretary uses the term "motor vehicle" in the would-be interpretation. If that is the interpretation, the language is patently unclear and ambiguous as one cannot define a term using the term to be defined. Further, the term "motor vehicle" is already defined by G.S. 105-164.3(149).

Perhaps the Secretary is interpreting the word "vehicle" in the definition of motor vehicle provided by G.S. 105-164.3(149). "Vehicle" is an undefined term. Perhaps the Secretary is answering the question, are these items "vehicles"? If that is the interpretation, Secretary is answering in the affirmative,² but it nevertheless remains unclear what, if anything, is being interpreted.

Accordingly, staff recommends objection to the rule pursuant to G.S. 150B-21.9(a)(2) for lack of clarity and ambiguousness.

IV.

"Camper trailers, fifth-wheel trailers, motor homes, and travel trailers" are undefined terms in Article 5 of Chapter 105 and Title 17 of the North Carolina Administrative Code. Nor is "truck campers" as used in the last sentence of the rule.

Accordingly, staff recommends objection to the rule pursuant to G.S. 150B-21.9(a)(2) for lack of clarity and ambiguousness.

This can easily be fixed by referencing G.S. 105-187.1(a)(4) in Article 5A, the Highway Use Tax Article, or G.S. 20-4.01 if those definitions meet the Secretary's intention.

2 If this is the interpretation, it could have been much more succinctly stated; however, the quality of a rule is not a ground for objection.

§ 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

- (8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
- a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
 - b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.
 - c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
 - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
 - e. Statements of agency policy made in the context of another proceeding, including:
 1. Declaratory rulings under G.S. 150B-4.
 2. Orders establishing or fixing rates or tariffs.
 - f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
 - g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
 - h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.
 - i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
 - j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
 - k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by

the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.

- l.* Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.

§ 105-262. Rules.

(a) Authority. - The Secretary of Revenue may adopt rules needed to administer a tax collected by the Secretary or to fulfill another duty delegated to the Secretary. G.S. 150B-1 and Article 2A of Chapter 150B of the General Statutes set out the procedure for the adoption of rules by the Secretary.

(b) Repealed by Session Laws 2012-43, s. 1, effective June 20, 2012, and Session Laws 2012-79, s. 1.14(d), effective June 26, 2012.

(c) Fiscal Note. - The Secretary must ask the Office of State Budget and Management to prepare a fiscal note for a proposed new rule or a proposed change to a rule that has a substantial economic impact, as defined in G.S. 150B-21.4(b1). The Secretary shall not take final action on a proposed rule change that has a substantial economic impact until at least 60 days after the fiscal note has been prepared. (1939, c. 158, s. 931; 1955, c. 1350, s. 2; 1973, c. 476, s. 193; 1981, c. 859, s. 80; c. 1127, s. 53; 1991, c. 45, s. 28; c. 477, s. 7; 1995, c. 507, s. 27.8(p); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2007-491, s. 39; 2010-31, s. 31.10(f); 2012-43, s. 1; 2012-79, s. 1.14(d).)

§ 105-264. Effect of Secretary's interpretation of revenue laws.

(a) Interpretation. - It is the duty of the Secretary to interpret all laws administered by the Secretary. The Secretary's interpretation of these laws shall be consistent with the applicable rules. An interpretation by the Secretary is prima facie correct. When the Secretary interprets a law by adopting a rule or publishing a bulletin or directive on the law, the interpretation is a protection to the officers and taxpayers affected by the interpretation, and taxpayers are entitled to rely upon the interpretation. If the Secretary changes an interpretation, a taxpayer who relied on it before it was changed is not liable for any penalty or additional assessment on any tax that accrued before the interpretation was changed and was not paid by reason of reliance upon the interpretation.

(b) Advice. - If a taxpayer requests specific advice from the Department and receives erroneous advice in response, the taxpayer is not liable for any penalty or additional assessment attributable to the erroneous advice furnished by the Department to the extent that the following conditions are all satisfied:

- (1) The advice was reasonably relied upon by the taxpayer.
- (2) The penalty or additional assessment did not result from the taxpayer's failure to provide adequate or accurate information.
- (3) The Department provided the advice in writing or the Department's records establish that the Department provided erroneous verbal advice.

(c) Revised Interpretations. - This section does not prevent the Secretary from changing an interpretation, and it does not prevent a change in an interpretation from applying on and after the effective date of the change. An interpretation that revises a prior interpretation by expanding the scope of a tax or otherwise increasing the amount of tax due may not become effective sooner than the following:

- (1) For a tax that is payable on a monthly or quarterly basis, the first day of a month that is at least 90 days after the date the revised interpretation is issued.
- (2) For a tax that is payable on an annual basis, the first day of a tax year that begins after the date the revised interpretation is issued.

(d) Fee. - The Secretary may charge a fee for providing a written determination at the request of a taxpayer. The fee is a receipt of the Department and must be applied to the costs of providing the written determination. The proceeds of the fee must be credited to a special account within the Department and do not revert but remain in the special account until spent by the Department for the costs of providing the written determination. The Secretary may adopt a tiered fee structure based on the taxpayer's income or gross receipts, the relative complexity of the advice requested, or the tax schedule for which advice is requested. The fee shall not be less than one hundred dollars (\$100.00) or more than five thousand dollars (\$5,000). The fee may be waived by the Secretary. The term "written determination" has the same meaning as defined in G.S. 105-264.2. (1939, c. 158, s. 933; 1955, c. 1350, s. 4; 1957, c. 1340, s. 14; 1973, c. 476, s. 193; 1991, c. 45, s. 29; 1993, c. 532, s. 9; 1998-98, s. 21; 2008-107, s. 28.16(e); 2010-31, s. 31.7A(a); 2011-390, s. 6; 2016-103, s. 6.)

§ 105-164.3. Definitions.

The following definitions apply in this Article:

...

- (149) Motor vehicle. – A vehicle that is designed primarily for use upon the highways and is either self-propelled or propelled by a self-propelled vehicle, but does not include:
- a. A moped.
 - b. Special mobile equipment.
 - c. A tow dolly that is exempt from motor vehicle title and registration requirements under G.S. 20-51(10) or (11).
 - d. A farm tractor or other implement of husbandry.
 - e. A manufactured home, a mobile office, or a mobile classroom.
 - f. Road construction or road maintenance machinery or equipment.

§ 105-164.13. Retail sales and use tax.

The sale at retail and the use, storage, or consumption in this State of the following items are specifically exempted from the tax imposed by this Article:

...

(32) Sales of motor vehicles, the sale of a motor vehicle body to be mounted on a motor vehicle chassis when a certificate of title has not been issued for the chassis, and the sale of a motor vehicle body mounted on a motor vehicle chassis that temporarily enters the State so the manufacturer of the body can mount the body on the chassis. For purposes of this subdivision, a park model RV, as defined in G.S. 105-187.1, is a motor vehicle.

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 .4701

RECOMMENDATION DATE: November 11, 2023

RECOMMENDED ACTION:

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

COMMENT:

I.

PARAGRAPH (A) OF THE RULE, STATES THAT RETAIL SALES OF ITEMS "BY COMMERCIAL PRINTERS OR PUBLISHERS ARE SUBJECT TO SALES AND USE TAX EXEMPT INCLUDING SUBSCRIPTIONS, PLATES AND DIES SOLD TO CUSTOMERS, BOOK BINDING, AND OTHER REPAIR, MAINTENANCE, AND INSTALLATION SERVICES."

IT IS UNCLEAR WHETHER THE SECRETARY INTENDS THE SALE OF THE ITEMS TO BE SUBJECT TO OR EXEMPT FROM THE SALES AND USE TAX. WITH THIS LACK OF CLARITY, THE COMMISSION IS UNABLE TO DETERMINE WHETHER PARAGRAPH (A) MEETS THE STANDARDS PRESCRIBED IN G.S. 150B-21.9(A).

ACCORDINGLY, STAFF RECOMMENDS OBJECTION TO G.S. 150B-21.9(A)(2).

*WILLIAM W. PEASLEE
COMMISSION COUNSEL*

§ 150B-21.9. STANDARDS AND TIMETABLE FOR REVIEW BY COMMISSION.

(a) Standards. - **The Commission must determine whether a rule meets all of the following criteria:**

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

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 .5002

RECOMMENDATION DATE: October 31, 2023

RECOMMENDED ACTION:

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

COMMENT:

The Secretary has revised the rule to address some of the objections made by the Rules Review Commission at its September 2023 meeting.

I.

The revised rule references G.S. 105-164.13. G.S. 105-164.13 provides seventy-three exemptions to the sales and use tax. While the Secretary does not cite the specific exemption being interpreted, to wit G.S. 105-164.13(12), the Rule indicates that the term "prosthetic devices," which is used in the statute, is the subject of the interpretation. While it would have been clearer to cite the specific exemption and the term being interpreted, the subject of the statutory interpretation can be gleaned.

As it now appears that the Secretary is interpreting a statute rather than establishing law of the Secretary's own accord, and the language being interpreted can be deduced, Staff recommends that the Commission find that the revision satisfies objection I of the September Commission objection concerning ambiguity and alternatively lack of authority.

II.

As the Secretary has deleted Paragraph(c) which was the subject of objection III, staff recommends that the Commission find that the revision satisfies objection III of the September Commission objection.

III.

Pursuant to G.S. 105-164.13(12)a., retail sales of "prosthetic devices" for human use are exempt from the tax imposed by Article 5 (Sales and Use Tax) of Chapter 105 of the North Carolina General Statutes.

WILLIAM W. PEASLEE
COMMISSION COUNSEL

G.S. 105-164.3(191) defines "prosthetic device".

Prosthetic device. - A replacement, corrective, or supporting device worn on or in the body that meets one of the conditions of this subdivision. The term includes repair and replacement parts for the device. The conditions are as follows:

- a. Artificially replaces a missing portion of the body.*
- b. Prevents or corrects a physical deformity or malfunction.*
- c. Supports a weak or deformed portion of the body.*

Paragraph (a) of the rule states, in essence, that the sale of eyeglass frames or other parts of corrective eyeglasses are prosthetic devices within the definition of G.S. 105-164.3(191), and, accordingly, are exempt pursuant to G.S. 105-164.13(12)a.

Paragraph (b) of the rule states that the sale of frames or other parts for non-corrective eyeglasses that do not meet the definition of prosthetic device are not exempt.

Paragraph (b) of the rule is unnecessary as sales of items are taxed under Article 5 of Chapter 105 unless exempt. There is no reasonable or responsible reading of the language of either the balance of rule or the statute by which one could conclude that parts for non-corrective eyeglasses are exempt or that non-corrective eyeglasses would meet the definition of prosthetic device. Accordingly, staff recommends objection pursuant to G.S. 150B-21.9(a)(3).

§ 150B-21.10. Commission action on permanent rule.

At the first meeting at which a permanent rule is before the Commission for review, the Commission must take one of the following actions:

- (1) Approve the rule, if the Commission determines that the rule meets the standards for review.
- (2) Object to the rule, if the Commission determines that the rule does not meet the standards for review.
- (3) Extend the period for reviewing the rule, if the Commission determines it needs additional information on the rule to be able to decide whether the rule meets the standards for review.

In reviewing a new rule or an amendment to an existing rule, the Commission may request an agency to make technical changes to the rule and may condition its approval of the rule on the agency's making the requested technical changes.

§ 150B-21.9. Standards and timetable for review by Commission.

(a) Standards. - **The Commission must determine whether a rule meets all of the following criteria:**

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

§ 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

- (1) Administrative law judge. - A person appointed under G.S. 7A-752, 7A-753, or 7A-757.
- (1a) Adopt. - To take final action to create, amend, or repeal a rule.
- (1b) Agency. - An agency or an officer in the executive branch of the government of this State. The term includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A local unit of government is not an agency.
- (1c) Codifier of Rules. - The person appointed by the Chief Administrative Law Judge of the Office of Administrative Hearings pursuant to G.S. 7A-760(b).
- (1d) Commission. - The Rules Review Commission.
- (2) Contested case. - An administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty. The term does not include rulemaking, declaratory rulings, or the award or denial of a scholarship, a grant, or a loan.
- (2a) Repealed by Session Laws 1991, c. 418, s. 3.
- (2b) Hearing officer. - A person or group of persons designated by an agency that is subject to Article 3A of this Chapter to preside in a contested case hearing conducted under that Article.
- (3) License. - Any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in any activity, except licenses issued under Chapter 20 and Subchapter I of Chapter 105 of the General Statutes, occupational licenses, and certifications of electronic poll books, ballot duplication systems, or voting systems under G.S. 163-165.7.
- (4) Licensing. - Any administrative action issuing, failing to issue, suspending, or revoking a license or occupational license. The term does not include controversies over whether an examination was fair or whether the applicant passed the examination.
- (4a) Occupational license. - Any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in a profession, occupation, or field of endeavor that is issued by an occupational licensing agency.
- (4b) Occupational licensing agency. - Any board, commission, committee, or other agency of the State that is established for the primary purpose of regulating the entry of persons into, or the conduct of persons within a particular profession, occupation, or field of endeavor, and that is authorized to issue and revoke licenses. The term does not include State

agencies or departments that may as only a part of their regular function issue permits or licenses.

- (5) Party. - Any person or agency named or admitted as a party or properly seeking as of right to be admitted as a party and includes the agency as appropriate.
- (5a) Person. - Any natural person, partnership, corporation, body politic, and any unincorporated association, organization, or society that may sue or be sued under a common name.
- (6) Person aggrieved. - Any person or group of persons of common interest directly or indirectly affected substantially in his, her, or its person, property, or employment by an administrative decision.
- (7) Recodified as subdivision (5a) of this section by Session Laws 2021-88, s. 16(a), effective July 22, 2021.
- (7a) Policy. - Any nonbinding interpretive statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.
- (8) Residence. - Domicile or principal place of business.
- (8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
 - a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
 - b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.
 - c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
 - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
 - e. Statements of agency policy made in the context of another proceeding, including:

1. Declaratory rulings under G.S. 150B-4.
 2. Orders establishing or fixing rates or tariffs.
- f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
 - g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
 - h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.
 - i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
 - j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
 - k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
 - l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.
- (8b) Repealed by Session Laws 2011-398, s. 61.2, effective July 25, 2011.
- (8c) Substantial evidence. - Relevant evidence a reasonable mind might accept as adequate to support a conclusion.
- (9) Repealed by Session Laws 1991, c. 418, s. 3. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, ss. 61, 62; 1977, c. 915, s. 5; 1983, c. 641, s. 1; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(2)-1(5); 1987, c. 878, ss. 1, 2, 21; 1987 (Reg. Sess., 1988), c. 1111, s. 17; 1991, c. 418, s. 3; c. 477, ss. 3.1, 3.2, 9; 1995, c. 390, s. 29; 1996, 2nd Ex. Sess., c. 18, s. 7.10(g); 1997-456, s. 27; 2003-229, s. 12; 2007-491, s. 44(1)b; 2011-13, s. 2; 2011-398, ss. 15, 61.2; 2013-188, s. 7; 2013-382, s. 9.1(c); 2013-413, s. 1; 2015-2, s. 2.2(c); 2015-241, ss. 7A.3, 30.16(a); 2017-6, s. 3; 2018-13, s. 3.8(b); 2018-146, ss. 3.1(a), (b), 4.5(b); 2021-88, s. 16(a), (b).)

§ 105-264. Effect of Secretary's interpretation of revenue laws.

(a) **Interpretation.** - It is the duty of the Secretary to interpret all laws administered by the Secretary. The Secretary's interpretation of these laws shall be consistent with the applicable rules. An interpretation by the Secretary is prima facie correct. When the Secretary interprets a law by adopting a rule or publishing a bulletin or directive on the law, the interpretation is a protection to the officers and taxpayers affected by the interpretation, and taxpayers are entitled to rely upon the interpretation. If the Secretary changes an interpretation, a taxpayer who relied on it before it was changed is not liable for any penalty or additional assessment on any tax that accrued before the interpretation was changed and was not paid by reason of reliance upon the interpretation.

(b) **Advice.** - If a taxpayer requests specific advice from the Department and receives erroneous advice in response, the taxpayer is not liable for any penalty or additional assessment attributable to the erroneous advice furnished by the Department to the extent that the following conditions are all satisfied:

- (1) The advice was reasonably relied upon by the taxpayer.
- (2) The penalty or additional assessment did not result from the taxpayer's failure to provide adequate or accurate information.
- (3) The Department provided the advice in writing or the Department's records establish that the Department provided erroneous verbal advice.

(c) **Revised Interpretations.** - This section does not prevent the Secretary from changing an interpretation, and it does not prevent a change in an interpretation from applying on and after the effective date of the change. An interpretation that revises a prior interpretation by expanding the scope of a tax or otherwise increasing the amount of tax due may not become effective sooner than the following:

- (1) For a tax that is payable on a monthly or quarterly basis, the first day of a month that is at least 90 days after the date the revised interpretation is issued.
- (2) For a tax that is payable on an annual basis, the first day of a tax year that begins after the date the revised interpretation is issued.

(d) **Fee.** - The Secretary may charge a fee for providing a written determination at the request of a taxpayer. The fee is a receipt of the Department and must be applied to the costs of providing the written determination. The proceeds of the fee must be credited to a special account within the Department and do not revert but remain in the special account until spent by the Department for the costs of providing the written determination. The Secretary may adopt a tiered fee structure based on the taxpayer's income or gross receipts, the relative complexity of the advice requested, or the tax schedule for which advice is requested. The fee shall not be less than one hundred dollars (\$100.00) or more than five thousand dollars (\$5,000). The fee may be waived by the Secretary. The term "written determination" has the same meaning as defined in G.S. 105-264.2. (1939, c. 158, s. 933; 1955, c. 1350, s. 4; 1957, c. 1340, s. 14; 1973, c. 476, s. 193; 1991, c. 45, s. 29; 1993, c. 532, s. 9; 1998-98, s. 21; 2008-107, s. 28.16(e); 2010-31, s. 31.7A(a); 2011-390, s. 6; 2016-103, s. 6.)

§ 105-164.3. Definitions.

The following definitions apply in this Article:

- (1) Accommodation. - A hotel room, a motel room, a residence, a cottage, or a similar lodging facility for occupancy by an individual.
- (3) Accommodation facilitator. - A person that contracts, either directly or indirectly, with a provider of an accommodation to perform, either directly or indirectly, one or more of the activities listed in this subdivision. The term includes a real estate broker as defined in G.S. 93A-2. The activities are:
 - a. Market the accommodation and accept payment or collect credit card or other payment information for the rental of the accommodation.
 - b. List the accommodation for rental on a forum, platform, or other application for a fee or other consideration.
- (5) Additional digital goods. - All of the following if transferred electronically:
 - a. A magazine, a newspaper, a newsletter, a report, or another publication.
 - b. A photograph.
 - c. A greeting card.
- (7) Admission charge. - Gross receipts derived for the right to attend an entertainment activity. The term includes a charge for a single ticket, a multi-occasion ticket, a seasonal pass, and an annual pass; a membership fee that provides for admission; a cover charge; a surcharge; a convenience fee, a processing fee, a facility charge, a facilitation fee, or similar charge; or any other charges included in gross receipts derived from admission.
- (9) Admission facilitator. - A person who accepts payment of an admission charge to an entertainment activity and who is not the operator of the venue where the entertainment activity occurs.
- (11) Advertising and promotional direct mail. - Printed material that meets the definition of "direct mail" and the primary purpose of which is to attract public attention to an item, person, business, or organization, or to attempt to sell, popularize, or secure financial support for an item, person, business, or organization.
- (13) Affiliate. - Defined in G.S. 105-130.2.
- (15) Amenity. - A feature that increases the value or attractiveness of an entertainment activity that allows a person access to items that are not subject to tax under this Article and that are not available with the purchase of admission to the same event without the feature. The term includes parking privileges, special entrances, access to areas other than general admission, mascot visits, and merchandise discounts. The term

does not include any charge for food, prepared food, and alcoholic beverages subject to tax under this Article.

- (17) Analytical services. - Testing laboratories that are included in national industry 541380 of NAICS or medical laboratories that are included in national industry 621511 of NAICS.
- (19) Ancillary service. - A service associated with or incidental to the provision of a telecommunications service. The term includes detailed communications billing, directory assistance, vertical service, and voice mail service. A vertical service is a service, such as call forwarding, caller ID, three-way calling, and conference bridging, that allows a customer to identify a caller or manage multiple calls and call connections.
- (21) Aviation gasoline. - Defined in G.S. 105-449.60.
- (23) Bundled transaction. - A retail sale of two or more distinct and identifiable items, at least one of which is taxable and one of which is nontaxable, for one nonitemized price. The term does not apply to real property or services to real property. Items are not sold for one nonitemized price if an invoice or another sales document made available to the purchaser separately identifies the price of each item. A bundled transaction does not include the retail sale of any of the following:
 - a. An item and any packaging that accompanies the item and is exempt under G.S. 105-164.13(23).
 - b. A sale of two or more items whose combined price varies, or is negotiable, depending on the items the purchaser selects.
 - c. A sale of an item accompanied by a transfer of another item with no additional consideration.
 - d. An item and the delivery or installation of the item.
 - e. An item and any service necessary to complete the sale.
- (25) Business. - An activity a person engages in or causes another to engage in with the object of gain, profit, benefit, or advantage, either direct or indirect. The term does not include an occasional and isolated sale or transaction by a person who does not claim to be engaged in business.
- (27) Cable service. - The one-way transmission to subscribers of video programming or other programming service and any subscriber interaction required to select or use the service.
- (29) Candy. - A preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts, or other ingredients or flavorings in the form of bars, drops, or pieces that do not require refrigeration. The term does not include any preparation that contains flour.
- (31) Capital improvement. - One or more of the following:
 - a. New construction, reconstruction, or remodeling.

- b. Performance of work that requires the issuance of a permit under the State Building Code, other than repair or replacement of electrical components, gas logs, water heater, and similar individual items that are not part of new construction, reconstruction, or remodeling.
- c. Installation of a transmission, distribution, or other network asset on land owned by a service provider or on a right-of-way or easement in favor of a service provider, notwithstanding that any separately stated charges billed to a customer for repair, maintenance, and installation services or a contribution in aid of construction are included in the gross receipts derived from services subject to the combined general rate under G.S. 105-164.4. For purposes of this sub-subdivision, the term "service provider" means a person, including a governmental entity, who provides any of the services listed in this sub-subdivision, and the term "governmental entity" means a State agency, the federal government, or a governmental entity listed in G.S. 105-164.14(c). The services are:
 - 1. Telecommunications service or ancillary service.
 - 2. Video programming.
 - 3. Electricity or piped natural gas.
 - 4. Water or sewer service.
- d. Installation of equipment or a fixture that is attached to real property and that meets one or more of the following conditions:
 - 1. Is capitalized and depreciated under Generally Accepted Accounting Principles or International Financial Reporting Standards.
 - 2. Is depreciated under the Code.
 - 3. Is expensed under Section 179 of the Code.
- e. Painting or wallpapering of real property, except where painting or wallpapering is incidental to the repair, maintenance, and installation services.
- f. Replacement or installation of a septic tank system, siding, roof, plumbing, electrical, commercial refrigeration, irrigation, sprinkler, or other similar system. The term does not include the repair, replacement, or installation of electrical or plumbing components, water heaters, gutters, and similar individual items that are not part of new construction, reconstruction, or remodeling.
- g. Replacement or installation of a heating or air conditioning unit or a heating, ventilation, or air conditioning system. The term does not include the repair, replacement, or installation of gas

- logs, water heaters, pool heaters, and similar individual items that are not part of new construction, reconstruction, or remodeling.
- h. Replacement or installation of roads, driveways, parking lots, patios, decks, and sidewalks.
 - i. Services performed to resolve an issue that was part of a real property contract if the services are performed within six months of completion of the real property contract or, for new construction, within 12 months of the new structure being occupied for the first time.
 - j. Landscaping.
 - k. An addition or alteration to real property that is permanently affixed or installed to real property and is not an activity listed in subdivision (225) of this section as repair, maintenance, and installation services.
- (33) Certain digital property. - Specified digital products and additional digital goods. The term does not include an information service or an educational service.
- (35) Clothing. - All human wearing apparel suitable for general use.
- (37) Combined general rate. - The State's general rate of tax set in G.S. 105-164.4(a) plus the sum of the rates of the local sales and use taxes authorized by Subchapter VIII of this Chapter for every county in this State.
- (39) Computer. - An electronic device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions.
- (41) Computer software. - A set of coded instructions designed to cause a computer or automatic data processing equipment to perform a task.
- (43) Consumer. - A person who stores, uses, or otherwise consumes in this State an item purchased or received from a retailer or supplier either within or without this State.
- (45) Custom computer software. - Computer software that is not prewritten computer software. The term includes a user manual or other documentation that accompanies the sale of the software.
- (47) Datacenter. - A facility that provides infrastructure for hosting or data processing services and that has power and cooling systems that are created and maintained to be concurrently maintainable and to include redundant capacity components and multiple distribution paths serving the computer equipment at the facility. Although the facility must have multiple distribution paths serving the computer equipment, a single distribution path may serve the computer equipment at any one time. The following definitions apply in this subdivision:
- a. Concurrently maintainable. - Capable of having any capacity component or distribution element serviced or repaired on a

- planned basis without interrupting or impeding the performance of the computer equipment.
- b. Multiple distribution paths. - A series of distribution paths configured to ensure that failure on one distribution path does not interrupt or impede other distribution paths.
 - c. Redundant capacity components. - Components beyond those required to support the computer equipment.
- (49) Delivery charges. - Charges imposed by the retailer for preparation and delivery of an item to a location designated by the consumer.
 - (51) Development tier. - The classification assigned to an area pursuant to G.S. 143B-437.08.
 - (53) Diaper. - An absorbent garment worn by humans who are incapable of, or have difficulty, controlling their bladder or bowel movements.
 - (55) Dietary supplement. - A product that is intended to supplement the diet of humans and is required to be labeled as a dietary supplement under federal law, identifiable by the "Supplement Facts" box found on the label.
 - (57) Digital audio work. - A work that results from the fixation of a series of musical, spoken, or other sounds, including a ringtone, that is transferred electronically.
 - (59) Digital audiovisual work. - A series of related images, that when shown in succession, impart an impression of motion, together with accompanying sounds, if any, and that is transferred electronically.
 - (61) Digital book. - A work that is generally recognized in the ordinary and usual sense as a book that is transferred electronically.
 - (63) Digital code. - A code that gives a purchaser of the code a right to receive an item by electronic delivery or electronic access. A digital code may be obtained by an electronic means or by a tangible means. A digital code does not include a gift certificate or a gift card.
 - (65) Direct mail. - Printed material delivered or distributed by the United States Postal Service or other delivery service to a mass audience or to addresses on a mailing list provided by the purchaser or at the direction of the purchaser when the cost of the items is not billed directly to the recipients. The term includes tangible personal property supplied directly or indirectly by the purchaser to the direct mail seller for inclusion in the package containing the printed material. The term does not include multiple items of printed material delivered to a single address.
 - (67) Direct-to-home satellite service. - Programming transmitted or broadcast by satellite directly to the subscribers' premises without the use of ground equipment or distribution equipment, except equipment at the subscribers' premises or the uplink process to the satellite.

- (69) Drug. - A compound, substance, or preparation or a component of one of these that meets any of the following descriptions and is not food, a dietary supplement, or an alcoholic beverage:
- a. Is recognized in the United States Pharmacopoeia, Homeopathic Pharmacopoeia of the United States, or National Formulary.
 - b. Is intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease.
 - c. Is intended to affect the structure or function of the body.
- (71) Durable medical equipment. - Equipment that meets all of the conditions of this subdivision. The term includes repair and replacement parts for the equipment. The term does not include mobility enhancing equipment.
- a. Can withstand repeated use.
 - b. Primarily and customarily used to serve a medical purpose.
 - c. Generally not useful to a person in the absence of an illness or injury.
 - d. Not worn in or on the body.
- (73) Durable medical supplies. - Supplies related to use with durable medical equipment that are eligible to be covered under the Medicare or Medicaid program.
- (75) Educational service. - The delivery of instruction or training, whether provided in real time, on demand, or at another set time, by or on behalf of a qualifying educational entity where at least one of the following conditions applies:
- a. The instruction or training is part of the curriculum for an enrolled student.
 - b. The instruction or training is encompassed within the institution's accreditation or prepares an enrolled student for gainful employment in a recognized occupation.
 - c. The participant is evaluated by an instructor. "Evaluated by an instructor" does not include being graded by, scored by, or evaluated by a computer program or an interactive, automated method.
 - d. The participant is connected to the presenter or instructor via the Internet or other networks, allowing the participant to provide, receive, or discuss information through live interaction, contemporaneous with the presentation.
- (77) Electronic. - Relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
- (79) Eligible Internet datacenter. - A datacenter that satisfies each of the following conditions:
- a. The facility is used primarily or is to be used primarily by a business engaged in software publishing included in industry

511210 of NAICS or an Internet activity included in industry 519130 of NAICS.

- b. The facility is comprised of a structure or series of structures located or to be located on a single parcel of land or on contiguous parcels of land that are commonly owned or owned by affiliation with the operator of that facility.
 - c. The facility is located or to be located in a county that was designated, at the time of application for the written determination required under sub-subdivision d. of this subdivision, either an enterprise tier one, two, or three area or a development tier one or two area pursuant to G.S. 105-129.3 or G.S. 143B-437.08, regardless of any subsequent change in county enterprise or development tier status.
 - d. The Secretary of Commerce has made a written determination that at least two hundred fifty million dollars (\$250,000,000) in private funds has been or will be invested in real property or eligible business property, or a combination of both, at the facility within five years after the commencement of construction of the facility.
- (81) Eligible railroad intermodal facility. - Defined in G.S. 105-129.95.
- (83) Engaged in business. - Any of the following:
- a. Maintaining, occupying, or using permanently or temporarily, directly or indirectly, or through a subsidiary or agent, by whatever name called, any office, place of distribution, sales or sample room, warehouse or storage place, or other place of business in this State, or permanently or temporarily, directly or through a subsidiary, having any representative, agent, sales representative, marketplace facilitator subject to the requirements of G.S. 105-164.4J, or solicitor operating or transacting business by mobile phone application or other applications in this State. The fact that any corporate retailer, agent, or subsidiary engaged in business in this State may not be legally domesticated or qualified to do business in this State is immaterial.
 - b. Maintaining in this State, either permanently or temporarily, directly or through a subsidiary, tangible personal property or certain digital property for the purpose of lease or rental.
 - c. Making a remote sale, if one of the conditions listed in G.S. 105-164.8(b) is met.
 - d. Shipping wine directly to a purchaser in this State as authorized by G.S. 18B-1001.1.
 - e. Making marketplace-facilitated sales subject to the requirements of G.S. 105-164.4J.
- (85) Entertainment activity. - An activity listed in this subdivision:

- a. A live performance or other live event of any kind, the purpose of which is for entertainment.
 - b. A movie, motion picture, or film.
 - c. A museum, a cultural site, a garden, an exhibit, a show, or a similar attraction.
 - d. A guided tour at any of the activities listed in sub-subdivision c. of this subdivision.
- (87) Facilitator. - An accommodation facilitator, an admission facilitator, or a service contract facilitator.
- (89) Food. - Substances that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. The substances may be in liquid, concentrated, solid, frozen, dried, or dehydrated form. The term does not include an alcoholic beverage, as defined in G.S. 105-113.68, or a tobacco product, as defined in G.S. 105-113.4.
- (91) Food sold through a vending machine. - Food dispensed from a machine or another mechanical device that accepts payment.
- (93) Freestanding appliance. - A machine commonly thought of as an appliance operated by gas or electric current. Examples include a dishwasher, washing machine, clothes dryer, refrigerator, freezer, microwave, and range, regardless of whether the range is slide-in or drop-in.
- (95) Gross sales. - The sum total of the sales price of all sales of tangible personal property, digital property, and services.
- (97) Hub. - Either of the following:
- a. An interstate air courier's hub is the interstate air courier's principal airport within the State for sorting and distributing letters and packages and from which the interstate air courier has, or expects to have upon completion of construction, no less than 150 departures a month under normal operating conditions.
 - b. An interstate passenger air carrier's hub is the airport in this State that meets both of the following conditions:
 - 1. The air carrier has allocated to the airport under G.S. 105-338 more than sixty percent (60%) of its aircraft value apportioned to this State.
 - 2. The majority of the air carrier's passengers boarding at the airport are connecting from other airports rather than originating at that airport.
- (99) In this (the) State. - Within the exterior limits of the State of North Carolina, including all territory within these limits owned by or ceded to the United States of America.
- (101) Incontinence underpad. - An absorbent product, not worn on the body, designed to protect furniture or other tangible personal property from soiling or damage due to human incontinence.

- (103) Information service. - A service that generates, acquires, stores, processes, or retrieves data and information and delivers it electronically to or allows electronic access by a consumer whose primary purpose for using the service is to obtain the processed data or information.
- (104) Interstate air and ground courier. - A person whose primary business is the furnishing of air and ground delivery of individually addressed letters and packages for compensation, in interstate commerce, except by the United States Postal Service.
- (105) Interstate air business. - An interstate air courier, an interstate freight air carrier, or an interstate passenger air carrier.
- (107) Interstate air courier. - A person whose primary business is the furnishing of air delivery of individually addressed letters and packages for compensation, in interstate commerce, except by the United States Postal Service.
- (109) Interstate freight air carrier. - A person whose primary business is scheduled freight air transportation, as defined in the North American Industry Classification System adopted by the United States Office of Management and Budget, in interstate commerce.
- (111) Interstate passenger air carrier. - A person whose primary business is scheduled passenger air transportation, as defined in the North American Industry Classification System adopted by the United States Office of Management and Budget, in interstate commerce.
- (113) Item. - Tangible personal property, digital property, or a service, unless the context requires otherwise.
- (115) Jet fuel. - Defined in G.S. 105-449.60.
- (117) Landscaping. A service that modifies the living elements of an area of land. Examples include the installation of trees, shrubs, or flowers on land; tree trimming; mowing; and the application of seed, mulch, pine straw, or fertilizer to an area of land. The term does not include services to trees, shrubs, flowers, or similar tangible personal property in pots or in buildings.
- (119) Large fulfillment facility. - A facility that satisfies both of the following conditions:
- a. The facility is used primarily for receiving, inventorying, sorting, repackaging, and distributing finished retail products for the purpose of fulfilling customer orders.
 - b. The Secretary of Commerce has certified that an investment of private funds of at least one hundred million dollars (\$100,000,000) has been or will be made in real and tangible personal property for the facility within five years after the date on which the first property investment is made and that the facility will achieve an employment level of at least 400 within five years after the date the facility is placed into service and

- maintain that minimum level of employment throughout its operation.
- (121) Lease or rental. - A transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration. The term does not include any of the following:
- a. A transfer of possession or control of property under a security agreement or deferred payment plan that requires the transfer of title upon completion of the required payments.
 - b. A transfer of possession or control of property under an agreement that requires the transfer of title upon completion of required payments and payment of an option price that does not exceed the greater of one hundred dollars (\$100.00) or one percent (1%) of the total required payments.
 - c. The providing of tangible personal property along with an operator for a fixed or indeterminate period of time if the operator is necessary for the equipment to perform as designed. For the purpose of this sub-subdivision, an operator must do more than maintain, inspect, or set up the tangible personal property.
- (123) Livestock. - Cattle, sheep, goats, swine, horses, or mules.
- (125) Major recycling facility. - Defined in G.S. 105-129.25.
- (127) Manufactured home. - A structure that is designed to be used as a dwelling and is manufactured in accordance with the specifications for manufactured homes issued by the United States Department of Housing and Urban Development.
- (129) Marketplace. - A physical or electronic place, forum, platform, application, or other method by which a marketplace seller sells or offers to sell items, the delivery of or first use of which is sourced to this State.
- (131) Marketplace-facilitated sale. - The sale of an item by a marketplace facilitator on behalf of a marketplace seller that occurs through a marketplace.
- (133) Marketplace facilitator. - A person that, directly or indirectly and whether through one or more affiliates, does both of the following:
- a. Lists or otherwise makes available for sale a marketplace seller's items through a marketplace owned or operated by the marketplace facilitator.
 - b. Does one or more of the following:
 1. Collects the sales price or purchase price of a marketplace seller's items or otherwise processes payment.
 2. Makes payment processing services available to purchasers for the sale of a marketplace seller's items.
- (135) Marketplace seller. - A person that sells or offers to sell items through a marketplace regardless of any of the following:
- a. Whether the person has a physical presence in this State.

- b. Whether the person is registered as a retailer in this State.
 - c. Whether the person would have been required to collect and remit sales and use tax had the sales not been made through a marketplace.
 - d. Whether the person would not have been required to collect and remit sales and use tax had the sales not been made through a marketplace.
- (137) Mixed transaction contract. - A contract that includes both a real property contract for a capital improvement and repair, maintenance, and installation services for real property that are not related to the capital improvement.
- (139) Mobile telecommunications service. - A radio communication service carried on between mobile stations or receivers and land stations and by mobile stations communicating among themselves and includes all of the following:
- a. Both one-way and two-way radio communication services.
 - b. A mobile service that provides a regularly interacting group of base, mobile, portable, and associated control and relay stations for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation.
 - c. Any service for which a federal license is required in a personal communications service.
- (141) Mobility enhancing equipment. - Equipment that meets all of the conditions of this subdivision. The term includes repair and replacement parts for the equipment. The term does not include durable medical equipment.
- a. Primarily and customarily used to provide or increase the ability of an individual to move from one place to another.
 - b. Appropriate for use either in a home or motor vehicle.
 - c. Not generally used by a person with normal mobility.
 - d. Not normally provided on a motor vehicle by a motor vehicle manufacturer.
- (143) Modular home. - A factory-built structure that is designed to be used as a dwelling, is manufactured in accordance with the specifications for modular homes under the North Carolina State Residential Building Code, and bears a seal or label issued by the Department of Insurance pursuant to G.S. 143-139.1.
- (145) Modular homebuilder. - A person who furnishes for consideration a modular home to a purchaser that will occupy the modular home. The purchaser can be a person that will lease or rent the unit as real property.
- (147) Moped. - As defined in G.S. 20-4.01(27)j.

- (149) Motor vehicle. - A vehicle that is designed primarily for use upon the highways and is either self-propelled or propelled by a self-propelled vehicle, but does not include:
- a. A moped.
 - b. Special mobile equipment.
 - c. A tow dolly that is exempt from motor vehicle title and registration requirements under G.S. 20-51(10) or (11).
 - d. A farm tractor or other implement of husbandry.
 - e. A manufactured home, a mobile office, or a mobile classroom.
 - f. Road construction or road maintenance machinery or equipment.
- (151) Motor vehicle service contract. - A service contract for a motor vehicle or for one or more components, systems, or accessories for a motor vehicle when sold by a motor vehicle dealer, by a motor vehicle service agreement company, or by a motor vehicle dealer on behalf of a motor vehicle service agreement company. For purposes of this subdivision, the term "motor vehicle dealer" has the same meaning as defined in G.S. 20-286 and the term "motor vehicle service agreement company" is a person other than a motor vehicle dealer that is an obligor of a service contract for a motor vehicle or for one or more components, systems, or accessories for a motor vehicle and who is not an insurer.
- (153) NAICS. - Defined in G.S. 105-228.90.
- (155) Net taxable sales. - The gross sales or gross receipts of a retailer or another person taxed under this Article after deducting exempt sales and nontaxable sales.
- (157) New construction. - Construction of or site preparation for a permanent new building, structure, or fixture on land or an increase in the square footage of an existing building, structure, or fixture on land.
- (159) Nonresident retail or wholesale merchant. - A person who does not have a place of business in this State, is registered for sales and use tax purposes in a taxing jurisdiction outside the State, and is engaged in the business of acquiring, by purchase, consignment, or otherwise, tangible personal property or certain digital property and selling the property outside the State or in the business of providing a service.
- (161) Repealed by Session Laws 2022-13, s. 3.1, effective June 29, 2022.
- (163) Other direct mail. - Any direct mail that is not advertising and promotional mail regardless of whether advertising and promotional direct mail is included in the same mailing.
- (165) Over-the-counter drug. - A drug that contains a label that identifies the product as a drug as required by 21 C.F.R. § 201.66. The label includes either of the following:
- a. A "Drug Facts" panel.
 - b. A statement of its active ingredients with a list of those ingredients contained in the compound, substance, or preparation.

- (166) Package sorting facility. - A facility that satisfies both of the following conditions:
- a. The facility is used primarily for sorting and distributing letters and packages for an interstate air and ground courier.
 - b. The Secretary of Commerce has certified that an investment of private funds of at least one hundred million dollars (\$100,000,000) has been or will be made in real and tangible personal property for the facility within five years after the date on which the first property investment is made and that the facility will achieve an employment level of at least 400 within five years after the date the facility is placed into service and maintain that minimum level of employment throughout its operation.
- (167) Person. - Defined in G.S. 105-228.90.
- (169) Place of primary use. - The street address representative of where the use of a customer's telecommunications service primarily occurs. The street address must be the customer's residential street address or primary business street address. For mobile telecommunications service, the street address must be within the licensed service area of the service provider. If the customer who contracted with the telecommunications provider for the telecommunications service is not the end user of the service, the end user is considered the customer for the purpose of determining the place of primary use.
- (171) Prepaid calling service. - A right that meets all of the following requirements:
- a. Authorizes the exclusive purchase of telecommunications service.
 - b. Must be paid for in advance.
 - c. Enables the origination of calls by means of an access number, authorization code, or another similar means, regardless of whether the access number or authorization code is manually or electronically dialed.
 - d. Is sold in predetermined units or dollars whose number or dollar value declines with use and is known on a continuous basis.
- (173) Prepaid meal plan. - A plan offered by an institution of higher education that meets all of the following requirements:
- a. Entitles a person to food or prepared food.
 - b. Must be billed or paid for in advance.
 - c. Provides for predetermined units or unlimited access to food or prepared food but does not include a dollar value that declines with use.
- (175) Prepaid telephone calling service. - Prepaid calling service or prepaid wireless calling service.

- (177) Prepaid wireless calling service. - A right that meets all of the following requirements:
- a. Authorizes the purchase of mobile telecommunications service, either exclusively or in conjunction with other services.
 - b. Must be paid for in advance.
 - c. Is sold in predetermined units or dollars whose number or dollar value declines with use and is known on a continuous basis.
- (179) Prepared food. - Food that meets at least one of the conditions of this subdivision. Prepared food does not include food the retailer sliced, repackaged, or pasteurized but did not heat, mix, or sell with eating utensils.
- a. It is sold in a heated state or it is heated by the retailer.
 - b. It consists of two or more foods mixed or combined by the retailer for sale as a single item. This sub-subdivision does not include foods containing raw eggs, fish, meat, or poultry that require cooking by the consumer as recommended by the Food and Drug Administration to prevent food borne illnesses.
 - c. It is sold with eating utensils provided by the retailer, such as plates, knives, forks, spoons, glasses, cups, napkins, and straws. A plate does not include a container or packaging used to transport the food.
- (181) Prescription. - An order, formula, or recipe issued orally, in writing, electronically, or by another means of transmission by a physician, dentist, veterinarian, or another person licensed to prescribe drugs.
- (183) Prewritten computer software. - Computer software, including prewritten upgrades, that is not designed and developed by the author or another creator to the specifications of a specific purchaser. The term includes software designed and developed by the author or another creator to the specifications of a specific purchaser when it is sold to a person other than the specific purchaser.
- (185) Production company. - A person engaged in the business of making original motion picture, television, or radio images for theatrical, commercial, advertising, or educational purposes.
- (187) Professional motorsports racing team. - A racing team that satisfies all of the following conditions:
- a. The team is operated for profit.
 - b. The team does not claim a deduction under section 183 of the Code.
 - c. The team competes in at least sixty-six percent (66%) of the races sponsored in a race series in a single season by a motorsports sanctioning body.
- (189) Property management contract. - A written contract obligating a person to provide five or more real property management services.

- (191) Prosthetic device. - A replacement, corrective, or supporting device worn on or in the body that meets one of the conditions of this subdivision. The term includes repair and replacement parts for the device. The conditions are as follows:
- a. Artificially replaces a missing portion of the body.
 - b. Prevents or corrects a physical deformity or malfunction.
 - c. Supports a weak or deformed portion of the body.
- (193) Purchase. - Acquired for consideration or consideration in exchange for a service, regardless of any of the following:
- a. Whether the acquisition was effected by a transfer of title or possession, or both, or a license to use or consume.
 - b. Whether the transfer was absolute or conditional regardless of the means by which it was effected.
 - c. Whether the consideration is a price or rental in money or by way of exchange or barter.
- (195) Purchase price. - The term has the same meaning as the term "sales price" when applied to an item subject to use tax.
- (197) Qualified aircraft. - An aircraft with a maximum take-off weight of more than 9,000 pounds but not in excess of 15,000 pounds.
- (199) Qualified jet engine. - An engine certified pursuant to Part 33 of Title 14 of the Code of Federal Regulations.
- (201) Qualifying datacenter. - A datacenter that satisfies each of the following conditions:
- a. The datacenter certifies that it satisfies or will satisfy the wage standard for the development tier area or zone in which the datacenter is located. There is no wage standard for a development tier one area. If an urban progress zone or an agrarian growth zone is not in a development tier one area, then the wage standard for that zone is an average weekly wage that is at least equal to ninety percent (90%) of the lesser of the average wage for all insured private employers in the State and the average wage for all insured private employers in the county in which the datacenter is located. The wage standard for a development tier two area or a development tier three area is an average weekly wage that is at least equal to one hundred ten percent (110%) of the lesser of the average wage for all insured private employers in the State and ninety percent (90%) of the average wage for all insured private employers in the county in which the datacenter is located.
 - b. The Secretary of Commerce has made a written determination that at least seventy-five million dollars (\$75,000,000) in private funds has been or will be invested by one or more owners, users, or tenants of the datacenter within five years of the date the

owner, user, or tenant of the datacenter makes its first real or tangible property investment in the datacenter on or after January 1, 2012. Investments in real or tangible property in the datacenter made prior to January 1, 2012, may not be included in the investment required by this subdivision.

- c. The datacenter certifies that it provides or will provide health insurance for all of its full-time employees as long as the datacenter operates. The datacenter provides health insurance if it pays or will pay at least fifty percent (50%) of the premiums for health care coverage that equals or exceeds the minimum provisions of the basic health care plan of coverage recommended by the Small Employer Carrier Committee pursuant to G.S. 58-50-125.
- (203) Qualifying educational entity. - An entity listed in this subdivision. For purposes of this definition, references to the United States Code mean the United States Code as enacted as of January 1, 2020. The entities are:
- a. An elementary or secondary school, as defined in 20 U.S.C. § 7801.
 - b. An institution of higher education, as defined in 20 U.S.C. § 1002.
- (205) Real property. - Any one or more of the following:
- a. Land.
 - b. Building or structure on land.
 - c. Permanent fixture on land.
 - d. A manufactured home or a modular home on land.
- (207) Real property contract. - A contract between a real property contractor and another person to perform a capital improvement to real property.
- (209) Real property contractor. - A person that contracts to perform a real property contract in accordance with G.S. 105-164.4H. The term includes a general contractor, a subcontractor, or a builder for purposes of this Article.
- (211) Real property management services. - Any of the following activities:
- a. Hiring and supervising employees for the real property.
 - b. Providing a person to manage the real property.
 - c. Receiving and applying revenues received from property owners or tenants of the real property.
 - d. Providing repair, maintenance, and installation services to comply with obligations of a homeowners' association or a landlord under a lease, rental, or management agreement.
 - e. Arranging for a third party to provide repair, maintenance, and installation services.

- f. Incurring and paying expenses for the management, repair, and maintenance of the real property.
 - g. Handling administrative affairs for the real property.
- (213) Real property manager. - A person that provides real property management services pursuant to a property management contract.
- (215) Reconstruction. - Rebuild or construct again a prior existing permanent building, structure, or fixture on land and may include a change in the square footage from the prior existing building, structure, or fixture on land.
- (217) Related member. - Defined in G.S. 105-130.7A.
- (219) Remodeling. - A transaction comprised of multiple services performed by one or more persons to restore, improve, alter, or update real property that may otherwise be subject to tax as repair, maintenance, and installation services if separately performed. The term includes a transaction where the internal structure or design of one or more rooms or areas within a room or building are substantially changed. The term does not include a single service that is included in repair, maintenance, and installation services. The term does not include a transaction where the true purpose is repair, maintenance, and installation services no matter that another service included in repair, maintenance, and installation services is performed that is incidental to the true purpose of the transaction; examples include repair of sheetrock that includes applying paint, replacement of cabinets that includes installation of caulk or molding, and the installation of hardwood floors that includes installation of shoe molding.
- (221) Remote sale. - A sale of an item ordered by mail, telephone, Internet, mobile phone application, or another method by a retailer who receives the order in another state and delivers the item or makes it accessible to a person in this State or causes the item to be delivered or made accessible to a person in this State or performs a service sourced to this State. It is presumed that a resident of this State who makes an order was in this State at the time the order was made.
- (223) Renovation. - Same meaning as the term "remodeling."
- (225) Repair, maintenance, and installation services. - The term includes the activities listed in this subdivision and applies to tangible personal property, motor vehicles, certain digital property, and real property. The term does not include a service used to fulfill a real property contract taxed in accordance with G.S. 105-164.4H. The included activities are:
- a. To keep or attempt to keep property or a motor vehicle in working order to avoid breakdown and prevent deterioration or repairs. Examples include to clean, wash, or polish property.
 - b. To calibrate, refinish, restore, or attempt to calibrate, refinish, or restore property or a motor vehicle to proper working order or

- good condition. This activity may include replacing or putting together what is torn or broken.
- c. To troubleshoot, identify, or attempt to identify the source of a problem for the purpose of determining what is needed to restore property or a motor vehicle to proper working order or good condition. The term includes activities that may lead to the issuance of an inspection report.
 - d. To install, apply, connect, adjust, or set into position tangible personal property or certain digital property. The term includes floor refinishing and the installation of carpet, flooring, floor coverings, windows, doors, cabinets, countertops, and other installations where the item being installed may replace a similar existing item. The replacement of more than one of a like-kind item, such as replacing one or more windows, is repair, maintenance, and installation services. The term does not include an installation defined as a capital improvement under subdivision (31)d. of this section and substantiated as a capital improvement under G.S. 105-164.4H(a1).
 - e. To inspect or monitor property or install, apply, or connect tangible personal property or certain digital property on a motor vehicle or adjust a motor vehicle.
- (227) Retail sale or sale at retail. - The sale, lease, or rental for any purpose other than for resale, sublease, or subrent.
- (229) Retailer. - 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.
- (231) Retailer-contractor. - A person that acts as a retailer when it makes a sale at retail and as a real property contractor when it performs a real property contract.
- (233) Ringtone. - A digitized sound file that is downloaded onto a device and that may be used to alert the user of the device with respect to a communication.
- (235) Sale or selling. - The transfer for consideration of title, license to use or consume, or possession of tangible personal property or certain digital property or the performance for consideration of a service. The transfer or performance may be conditional or in any manner or by any means. The term applies to the following:
- a. Fabrication of tangible personal property for consumers by persons engaged in business who furnish either directly or indirectly the materials used in the fabrication work.
 - b. Furnishing or preparing tangible personal property consumed on the premises of the person furnishing or preparing the property or consumed at the place at which the property is furnished or prepared.
 - c. A transaction in which the possession of the tangible personal property or certain digital property is transferred but the seller retains title or security for the payment of the consideration.
 - d. A lease or rental.
 - e. Transfer of a digital code.
 - f. An accommodation.
 - g. A service contract.
 - h. Any other item subject to tax under this Article.
- (237) Sales price. - The total amount or consideration for which an item is sold, leased, or rented. The consideration may be in the form of cash, credit, property, or services. The sales price must be valued in money, regardless of whether it is received in money.
- a. The term includes all of the following:
 - 1. The retailer's cost of the item sold.
 - 2. The cost of materials used, labor or service costs, interest, losses, all costs of transportation to the retailer, all taxes imposed on the retailer, and any other expense of the retailer.

3. Charges by the retailer for any services necessary to complete the sale.
 4. Delivery charges.
 5. Installation charges.
 6. Repealed by Session Laws 2007-244, s. 1, effective October 1, 2007.
 7. Credit for trade-in. The amount of any credit for trade-in is not a reduction of the sales price.
 8. The amount of any discounts that are reimbursable by a third party and can be determined at the time of sale through any of the following:
 - I. Presentation by the consumer of a coupon or other documentation.
 - II. Identification of the consumer as a member of a group eligible for a discount.
 - III. The invoice the retailer gives the consumer.
- b. The term does not include any of the following:
1. Discounts that are not reimbursable by a third party, are allowed by the retailer, and are taken by a consumer on a sale.
 2. Interest, financing, and carrying charges from credit extended on the sale, if the amount is separately stated on the invoice, bill of sale, or a similar document given to the consumer.
 3. Any taxes imposed directly on the consumer that are separately stated on the invoice, bill of sale, or similar document given to the consumer.
- (239) Satellite digital audio radio service. - A radio communication service in which audio programming is digitally transmitted by satellite to an earth-based receiver, whether directly or via a repeater station.
- (241) Secondary metals recycler. - A person that gathers and obtains ferrous metals, nonferrous metals, and products that have served their original economic purpose and that converts them by processes, including sorting, cutting, classifying, cleaning, baling, wrapping, shredding, or shearing into a new or different product for sale consisting of prepared grades.
- (243) Secretary. - The Secretary of the North Carolina Department of Revenue.
- (245) Service contract. - A contract where the obligor under the contract agrees to maintain, monitor, inspect, repair, or provide another service included in the definition of repair, maintenance, and installation services to certain digital property, tangible personal property, or real property for a period of time or some other defined measure. The term

does not include a single service included in repair, maintenance, or installation services, but does include a contract where the obligor may provide a service included in the definition of repair, maintenance, and installation services as a condition of the contract. The term includes a service contract for a pool, fish tank, or similar aquatic feature and a home warranty. Examples include a warranty agreement other than a manufacturer's warranty or dealer's warranty provided at no charge to the purchaser, an extended warranty agreement, a maintenance agreement, a repair agreement, or a similar agreement or contract.

- (247) Service contract facilitator. - A person who contracts with the obligor of a service contract to market the service contract and accepts payment from the purchaser for the service contract.
- (249) Soft drink. - A nonalcoholic beverage that contains natural or artificial sweeteners. The term does not include beverages that contain one or more of the following:
- a. Milk or milk products.
 - b. Soy, rice, or similar milk substitutes.
 - c. More than fifty percent (50%) vegetable or fruit juice.
- (251) Special mobile equipment. - Any of the following:
- a. A vehicle that has a permanently attached crane, mill, well-boring apparatus, ditch-digging apparatus, air compressor, electric welder, feed mixer, grinder, or other similar apparatus is driven on the highway only to get to and from a nonhighway job and is not designed or used primarily for the transportation of persons or property.
 - b. A vehicle that has permanently attached special equipment and is used only for parade purposes.
 - c. A vehicle that is privately owned, has permanently attached fire-fighting equipment, and is used only for fire-fighting purposes.
 - d. A vehicle that has permanently attached playground equipment and is used only for playground purposes.
- (253) Specified digital products. - Digital audio works, digital audiovisual works, and digital books.
- (255) State agency. - A unit of the executive, legislative, or judicial branch of State government, such as a department, a commission, a board, a council, or The University of North Carolina. The term does not include a local board of education.
- (257) Storage. - The keeping or retention in this State for any purpose, except sale in the regular course of business, of tangible personal property or certain digital property for any period of time purchased from a person in business.
- (259) Streamlined Agreement. - The Streamlined Sales and Use Tax Agreement as amended as of December 21, 2021.

- (261) Tangible personal property. - Personal property that may be seen, weighed, measured, felt, or touched or is in any other manner perceptible to the senses. The term includes electricity, water, gas, steam, and prewritten computer software.
- (263) Taxing area. - Any of the following specific geographic areas:
- a. A street address.
 - b. The area within a nine-digit zip code.
 - c. The area within a five-digit zip code.
- (265) Taxing district. - A county or any other district, by or for which ad valorem taxes or sales taxes are levied, excluding the State.
- (267) Taxpayer. - Any person liable for taxes under this Article.
- (269) Telecommunications service. - The electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points. The term includes any transmission, conveyance, or routing in which a computer processing application is used to act on the form, code, or protocol of the content for purposes of the transmission, conveyance, or routing, regardless of whether it is referred to as voice-over Internet protocol or the Federal Communications Commission classifies it as enhanced or value added. The term does not include the following:
- a. An information service.
 - b. The sale, installation, maintenance, or repair of tangible personal property.
 - c. Directory advertising and other advertising.
 - d. Billing and collection services provided to a third party.
 - e. Internet access service.
 - f. Radio and television audio and video programming service, regardless of the medium of delivery, and the transmission, conveyance, or routing of the service by the programming service provider. The term includes cable service and audio and video programming service provided by a mobile telecommunications service provider.
 - g. Ancillary service.
 - h. Certain digital property.
- (271) Transferred electronically. - Obtained by the purchaser by means other than tangible storage media and includes delivered or accessed electronically.
- (273) Use. - The exercise of any right, power, or dominion whatsoever over an item by the purchaser of the item. The term includes withdrawal from storage, distribution, installation, affixation to real or personal property, and exhaustion or consumption of the item by the owner or purchaser. The term does not include a sale of an item in the regular course of business.

- (275) Use tax. - The tax imposed by Part 2 of this Article.
- (277) Video programming. - Programming provided by, or generally considered comparable to programming provided by, a television broadcast station, regardless of the method of delivery.
- (279) Wholesale merchant. - A person engaged in the business of any of the following:
- a. Making wholesale sales.
 - b. Buying or manufacturing items and selling them to a registered person or nonresident retail or wholesale merchant for resale.
 - c. Manufacturing, producing, processing, or blending any articles of commerce and maintaining a store, warehouse, or any other place that is separate and apart from the place of manufacture or production for the sale or distribution of the articles, other than bakery products, to another for the purpose of resale.
- (281) Wholesale sale. - A sale of an item for the purpose of resale. The term includes a sale of certain digital property for reproduction into certain digital property or tangible personal property offered for sale. The term does not include a sale to a user or consumer not for resale or, in the case of certain digital property, not for reproduction and sale of the reproduced property. (1957, c. 1340, s. 5; 1959, c. 1259, s. 5; 1961, c. 1213, s. 1; 1967, c. 1110, s. 6; 1973, c. 476, s. 193; c. 1287, s. 8; 1975, c. 104; c. 275, s. 6; 1979, c. 48, s. 2; c. 71; c. 801, s. 72; 1983, c. 713, ss. 87, 88; 1983 (Reg. Sess., 1984), c. 1097, ss. 4, 5; 1985, c. 23; 1987, c. 27; c. 557, s. 3.1; c. 854, ss. 2, 3; 1987 (Reg. Sess., 1988), c. 1044, s. 3; c. 1096, ss. 1-3; 1989, c. 692, s. 3.2; 1989 (Reg. Sess., 1990), c. 813, s. 13; 1991, c. 45, s. 15; c. 79, ss. 1, 3; c. 689, s. 190.1(a); 1991 (Reg. Sess., 1992), c. 949, s. 3; 1993, c. 354, s. 16; c. 484, s. 1; c. 507, s. 1; 1995 (Reg. Sess., 1996), c. 649, s. 2; 1996, 2nd Ex. Sess., c. 14, ss. 13, 14; 1997-6, s. 7; 1997-370, s. 1; 1997-426, s. 4; 1998-22, s. 4; 1998-55, ss. 7, 13; 1998-98, ss. 13.1(a), 106; 1999-337, s. 28(a), (b); 1999-360, s. 6(a)-(c); 1999-438, s. 4; 2000-153, s. 4; 2000-173, s. 9; 2001-347, ss. 2.1-2.7; 2001-414, s. 14; 2001-424, s. 34.17(b); 2001-430, ss. 1, 2; 2001-476, s. 18(a); 2001-489, s. 3(a); 2002-16, ss. 1, 2, 3; 2002-170, s. 6; 2003-284, s. 45.2; 2003-400, ss. 13, 14; 2003-402, s. 12; 2004-124, s. 32B.3; 2004-170, ss. 18, 19; 2005-276, ss. 33.2, 33.3; 2006-33, s. 1; 2006-66, ss. 24.10(a), 24.17(a); 2006-151, s. 2; 2006-162, s. 5(a); 2006-168, ss. 4.1, 4.3; 2006-252, ss. 2.25(a), (a1), (c), 2.26; 2007-244, s. 1; 2007-323, ss. 31.14(a), 31.20(a), 31.23(b); 2008-107, s. 28.12(a); 2009-445, s. 11; 2009-451, s. 27A.3(d), (g); 2010-91, ss. 1, 2; 2010-166, s. 3.3; 2011-330, ss. 15(a), (b), 31(c); 2012-79, s. 2.7; 2013-316, s. 6(a); 2013-414, ss. 8, 23(a); 2014-3, ss. 4.1(a), 6.1(a), 7.1(a), 14.7; 2015-6, ss. 2.1(b), 2.10; 2015-241, s. 32.18(a); 2015-259, ss. 3(a), 6(a), 4.1(a), 4.2(a); 2015-268, s. 10.1(g); 2016-5, ss. 3.2(a), 3.2(b), 5.5(a); 2016-90,

s. 13(h); 2016-92, s. 2.2; 2016-94, s. 38.5(d); 2017-39, s. 5; 2017-57, ss. 38.8(d), 38.9(a); 2017-102, s. 5.2(b); 2017-204, ss. 2.1, 2.9(i); 2018-5, s. 38.5(a), (b), (x); 2019-169, ss. 3.1(a), 3.1(b), 3.4(b), 3.5(a), 3.9(a)-(c), 3.13(a); 2019-177, s. 9(b); 2019-237, s. 8.1(b); 2019-246, ss. 4(a), (d), (h), (j), (m), (p), 7(a), 8; 2020-6, ss. 1(b), 3(a), (c); 2022-13, ss. 3.1, 3.2; 2022-74, s. 42.2(a).)

§ 105-164.13. Retail sales and use tax.

The sale at retail and the use, storage, or consumption in this State of the following items are specifically exempted from the tax imposed by this Article:

...

- (12) Sales of any of the following:
 - a. **Prosthetic devices for human use.**
 - b. Mobility enhancing equipment sold on a prescription.
 - c. Durable medical equipment sold on prescription.
 - d. Durable medical supplies sold on prescription.
 - e. Human blood, including whole, plasma, and derivatives.
 - f. Human tissue, eyes, DNA, or an organ.

From: [Andrew O. Furuseth](#)

To: [Ascher, Seth M](#); [Peaslee, William W](#); [Lansford, Laura L](#)

Cc: [Burgos, Alexander N](#); [Jacobs, Tenisha S](#)

Subject: RE: [External] RE: DOR Rules

Date: Wednesday, September 6, 2023 4:47:01 PM

CAUTION: External email. Do not click links or open attachments unless verified. Report suspicious emails with the Report Message button located on your Outlook menu bar on the Home tab.

Mr. Peaslee and Mr. Ascher,

We look forward to meeting with you tomorrow morning. We have included specific statute support and a brief explanation for each rule mentioned in your emails below. In addition, we want to provide a brief general explanation for the industry specific rules. While each of these industry specific rules have existed for a long time, it is my understanding that they were adopted to provide the interpretation for how sales and use tax applies to industries that have had questions or disputes about the application of sales and use tax to the industry. The objective is to provide the Secretary's interpretation of the law to the specific industry so they can comply with the law.

These types of interpretations are important because retailers become liable for sales and use tax that is incorrectly calculated. For example, if a business thinks an item they are selling is not subject to tax and does not collect tax from its customer, the business becomes liable for the tax. In the inverse situation, a retailer that collects tax on an item that is not subject to tax, can become liable to civil actions by its customers including class actions. See G.S. 105-164.11(c).

We also want to address the question about the articles referenced in the rules. We have 75 rules that where the Secretary has cited "Chapter 105, Articles 39, 40, 42, 43, and 46." The existing rules cite these articles for the authority to impose the local and transit rates of sales and use tax. The following citations provide the specific authority for those tax levies and the administration of those taxes: 105-467; 105-468; 105-469; 105-483; 105-498; 105-507.2; 105-509.1; 105-510.1; 105-511.3; 105-537; 105-538.

17 NCAC 07B .4415 - SKATING RINK AND BOWLING ALLEY RENTAL FEES
Statutes – G.S. 105-105-164.4(a)(1) and 164.4G(e)(1)

The rule interprets the exemption allowed per 105-164.4G(e)(1) which excepts from tax "[a]n amount paid solely for the right to participate, other than to be a spectator, in sporting activities. Examples of these types of charges include bowling fees...." In addition, the rule interprets the imposition of tax on tangible personal property for the rental of shoes etc.

.4201 US Government Exemption
Statute - G.S. 105-164.13(17)

Explanation – The rule interprets the exemption for sales which the states are without power to tax. The United States Constitution does not expressly provide that the federal government is immune from state taxation, however, numerous Supreme Court cases have held that the United State is generally exempt from direct state taxation.

.4202 US Government Exemption
Statute - G.S. 105-164.13(17)

Explanation – The rule interprets the exemption for sales which the states are without power to tax. The United States Constitution does not expressly provide that the federal government is immune from state taxation, however, numerous Supreme Court cases have held that the United State is generally exempt from direct state taxation.

WILLIAM W. PEASLEE
COMMISSION COUNSEL

.4203 US Government Contractor's Exemption
Statute - G.S. 105-164.13(17)

Explanation – The rule interprets the exemption for sales which the states are without power to tax. In the Supreme Court opinion of *United States v. County of Allegheny*, 322 U.S. 174 (1944), the court found that in instances where contractor purchases of property to which title passes to United States are exempt from state taxation. This was also applied in *General Dynamics v. NCDOR*, 09 REV 05695.

.4614 Recreational vehicles exemption

Statutes - G.S. 105-164.4(a)(1), 105-164.13(32), 105-164.3(149).

Explanation – This rule provides the interpretation for certain recreational vehicles being classified as motor vehicles which qualify for exemption from sales and use tax or taxable tangible personal property. Motor vehicles are defined in G.S. 105-164.3(149) and subject to the highway use tax or alternate highway use tax, not the sales and use tax.

.4700 Commercial printers and publishers' exemptions Statutes

- G.S. 105-164(a)(1), 105-164.13(5e) & (39)

Explanation - This rule covers all different types of transactions that a commercial printer or publisher may encounter and provides taxability information on items purchased and whether those items purchased are used or resold to a customer. The rule also covers commercial printers and publishers being classified as a manufacturing industry or plant and covers the taxability with respect to many items that fall under that exemption.

.4707 Printing Chemicals exemption

Statute- 105-164.13(8)

Explanation - Exemption allowed for chemicals that become ingredient and component part of printed materials and 105-164.13(5e) which is the mill machinery and mill machinery parts and accessories exemption for chemicals to clean printing machinery.

.4708 Postage Charges by printers exemption

Statute - 105-164.13(17) and 18 USC 8

Explanation - The rule interprets the exemption for sales which the states are without power to tax. 18 USC 8 states that stamps are an obligation of the US government and the states generally cannot tax the face value of an obligation of the US government.

.5002 Eyeglass frames and repair parts exemption Statutes

- 105-164.13(12)(a) and 164.4D(a)(1)c

Explanation - The rule interprets the exemption for prosthetic devices and bundled transactions on medical devices.

.5001 Eyeglass and contact lens exemption

Statutes - 105-164.13(12) and 105-164.3(192)

Explanation - The rule interprets the exemption for prosthetic devices and the definition of prosthetic devices.

.5004 Optical supply exemption.

Statutes - G.S. 105-164.4(a)(1) and 105-164.13(12)a

Explanation - The rule interprets the exemption for prosthetic devices and the tax imposed on tangible personal property.

.0112(c) Exemption for Business engaged in occasional and isolated sales
Statutes - 105-164.3(25) and 105-164.4(4b)

Explanation – The rule interprets the imposition of tax and the following exclusion in 105-164.3, “[t]he term does not include an occasional and isolated sale or transaction by a person who does not claim to be engaged in business.” In addition, G.S. 105-164.4(4b) differentiates between a person who sells TPP at a specialty market, who is considered a retailer, from a person who sells their own household items.

.0901 (a), (b) Advertising services
Statutes – 105-164.3(237), 105-164.4(a)(1) and 105-164.13.

Explanation – Generally, this rule interprets the imposition of tax on tangible personal property and the lack of imposition on professional services as it relates to advertising agencies. The rule interprets when a sale of tangible personal property takes place versus when a sale is of professional services and the tax consequences of those determinations. The rule also interprets the definition of sales prices for various charges by an advertising agency and the purchase for resale exemption.

.0902 Advertising artists
Statutes – 105-164.3(237), 105-164.4(a)(1) and 105-164.13.

Explanation – Generally, this rule interprets the imposition of tax on tangible personal property and the lack of imposition on professional services as it relates to advertising artists. The rule interprets when a sale of tangible personal property takes place versus when a sale is of professional services and the tax consequences of those determinations. The rule also interprets the definition of sales prices for various charges and the purchase for resale exemption.

.0904 Public relations firms
Statutes – 105-164.3(237), 105-164.4(a)(1) and 105-164.13.

Explanation – Generally, this rule interprets the imposition of tax on tangible personal property and the lack of imposition on professional services as it relates to public relations firms. The rule interprets when a sale is of tangible personal property versus when a sale is of professional services and the tax consequences of those determinations. The rule also interprets the definition of sales prices for various charges by a public relations firm and the purchase for resale exemption.

.0115 Research Services Statute –
105-164.4(a)(1)

Explanation - The rule interprets the imposition of tax on research equipment used by research firms.

.1202 Supplies and Equipment for an Accommodation
Statutes - GS 105-164.4(a)(1), GS 105-164.6, 105-164.13.

Explanation – The rule interprets the imposition of tax on items purchased by an accommodation provider and used in the accommodation. This has been an area of confusion in the past and the legislature gave relief from assessments in G.S. 105-244.4 for a period of time.

.1302 In-state deliveries
Statutes - G.S. 105-164.4(a)(1) and G.S. 105-164.13(33a)

Explanation - This rule interprets the imposition of tax on items sold at retail to the purchaser or purchaser’s agent even when they may be taken about of State. Even though these items could be transported out of this State, because they are delivered

in this State to the purchaser or purchaser's agent in this State, they are subject to North Carolina use tax.

.1303 Gifts to donees

Statutes - G.S. 105-164.4(a)(1) and 105-164.4B.

Explanation - This rule interprets the imposition of tax on items that are sold to a purchaser to be given to a donee or given directly to the donee.

.1404 Medical supplies, instruments, and equipment

Statutes - G.S. 105-164.3(229), 105-164.3(227), 105-164.3(43), 105-164.4(a)(1), 105-164.6.

Explanation - This rule interprets the treatment of sales to and purchases by hospitals and other institutions. For an example of disputes related to medical supplies, see *Feeling Great, Inc. and Sleep Medical Center, Inc. v. N.C. Department of Revenue*, 14 CVS 11139, Wake County Superior Court Division.

.1601 Sales to or purchases by nonprofit entities

Statutes - G.S. 105-164.4 and 105-164.14

Explanation – This rule interprets how the sales and use tax applies to purchases by and for non-profits. North Carolina is one of very few States that does not provide an exemption for these sales.

.1605 Sales by nonprofit entities

Statutes – G.S. 105-164.4 and 105-164.3(229)

Explanation – The rule interprets the imposition of tax on nonprofits that act as retailers. The rule makes clear that nonprofits making retail sales are retailers.

.1705 Housing authorities

Statutes – G.S. 105-164.4 and 105-164.14(c)

Explanation – This rule interprets the imposition of tax on housing and authorities and the non-profits eligible for refund. The housing authorities listed in the statute do not meet the requirements of 105-164.14(c) and thus are not eligible for a refund.

.1801 Sales to hospitals

Statutes – G.S. 105-164.4 and 105-164.13(12) and –(13).

Explanation – The rule interprets various impositions and exemptions and how they apply to hospitals. The rule interprets which items are purchased for use, which items are purchased for resale, and which items are subject to exemption.

.1905 Tire retreaders

Statutes – G.S. 105-164.4(a)(1)a., G.S. 105-164.4(a)(1)c.

Explanation – The rule interprets the imposition of tax on tangible personal property and repair, maintenance and installation services as they relate to tire retreaders. In addition, the rule interprets which items purchased by tire retreaders are subject to the exemption provided in G.S. 105-164.13(61b)

.2001 Sales to employees Statutes -

G.S. 105-164.4

Explanation – The rule interprets the imposition of tax on sales by employers to employees. This rule explains an employer engaged in business in this State that makes retail sales of items to their employees is a retailer. Therefore, the employer must collect and remit the sales and use tax due on its retail sales to employees.

.2002 Gifts to employees Statutes
– GS 105-164.4

Explanation - The rule interprets the imposition of tax on gifts to employees. This rule explains an employer that purchases items provided to an employee or other person as a gift or as compensation is the consumer of the items.

Thank You,

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