

RRC STAFF OPINION

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

AGENCY: North Carolina Department of Revenue

RULE CITATION: 17 NCAC 07B .0115

RECOMMENDATION DATE: September 19, 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:

Staff recommends objection to this rule as unnecessary. Secondly, staff recommends objection to this rule as ambiguous.

I. Necessity

G.S. 150B-21.9(a)(3) charges the Commission with determining whether a rule: "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."

The department is implementing G.S. 105-164.4(a)(1), which states in relevant part: "The general rate of tax applies to the following items sold at retail: . . . 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."

The rule at issue reads: "Sales of scientific or research equipment, or an attachment or repair part for scientific or research equipment, for use in performing research services are subject to the general State and applicable local and transit rates of sales or use tax, unless exempt by statute."

The Department is interpreting a law administered by the Secretary, an authority granted by G.S. 105-264(a), which reads in full:

Seth Ascher
Commission Counsel

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.

G.S. 105-264(a) establishes the Secretary's duty to interpret certain laws and acknowledges that such interpretations might be contained in rules, bulletins, or directives. This Department of Revenue statute does not provide guidance as to what types of interpretations should be adopted by rule or published in a bulletin directive. As a result, the APA's requirement that only "reasonably necessary" rules be approved by this Commission and put in the code would apply.

The Department's position is that the rule is "reasonably necessary to explain that sales of scientific or research equipment are subject to tax (per 105-164.4), unless exempt by statute." To the extent that this rule is interpreting statutory language, it is stating that "scientific or research equipment" is "tangible personal property." This appears to be plain on the face of the statute, as any owned object would be "tangible personal property." As a result, the rule is unnecessary.

Put another way, if this rule were 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.

In considering the cumulative effect of rules proposed for this purpose, staff estimates that of the ninety rules currently pending from the Department of Revenue, at least half raise a similar necessity problem by stating that a particular category of physical items is tangible personal property.

II. Clarity

G.S. 150B-21.9(a)(2) charges the Commission with determining whether a rule is "clear and unambiguous." This rule also presents three clarity problems.

First, identifying piecemeal categories of "tangible personal property" for special mention in the rules creates a potential ambiguity. When these categories are already covered by broad rules or statutes with an obvious application, as discussed in the necessity section, the negative implication created by leaving other categories out introduces legal ambiguity. To give a concrete example of this problem, there is no rule which makes the sales of toys for use in the amusement of children subject to sales tax. Someone reading the rules and seeing this level of granularity for "research equipment" could be misled into believing the lack of rules about toys excuses them from sales tax, contrary to the statute.

Second, the text of the rule suggests that the Department of Revenue is "subjecting" certain categories of purchase to sales tax. This is outside the scope of the Department's authority and is contrary to the Department's stated intent to "interpret" a statutory term. This distinction is important because G.S. 105-264(a) establishes that "an interpretation by the Secretary is prima facie correct," a different standard than would be applied to a rule enacting a new requirement.

Given this statutory language, taxpayers and judges reading the rule should be given a clear indication of the nature of the Department's enactment of the rule.

Third, this rule includes language indicating that sales are subject to "applicable local and transit rates of sales or use tax, unless exempt by statute." The question of what local and transit taxes are applicable is left unanswered by the rule and the Department has not identified other rules or statutes that would determine the issue. The Department has indicated that the applicable tax rates can be located on their website, which may offer a practical clarification. However, the rule itself is not clear as to how to determine the applicable taxes.

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

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

5 Sales of scientific or research ~~equipment~~equipment, or an attachment or repair part for scientific or research
6 ~~equipment, to independent contract research organizations~~for use in performing research services for clients are
7 subject to the ~~applicable statutory state~~general State, and ~~applicable local and transit rates of sales or use tax.~~tax, unless
8 ~~exempt by statute. If a contract research organization qualifies under G.S. 105-187.51B(a)(2), then research~~
9 ~~equipment that meets the requirements of that subsection are exempt from sales and use tax.~~

10
11 *History Note: Authority G.S. 105-164.4; 105-164.6; 105-164.13; 105-262; ~~105-164.13;105-264~~; Chapter 105,
12 Articles 39, 40, 42, 43, and 46; ~~105-467; 105-468; 105-469; 105-483; 105-498; 105-507.2; 105-~~
13 509.1; 105-510.1; 105-511.3; 105-537; 105-538; ~~Article 39; Article 40; Article 42; Article 43;~~
14 ~~Article 44; Article 46;~~
15 ~~Eff. February 1, 1976;~~
16 ~~Amended Eff. October 1, 2009; April 1, 2006; October 1, 1993; October 1, 1991-1991;~~
17 Readopted Eff. January 1, 2024.*

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AGENCY: North Carolina Department of Revenue

RULE CITATION: 17 NCAC 07B .3101

RECOMMENDATION DATE: September 19, 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:

Staff recommends objection to this rule as ambiguous. Secondly, staff recommends objection to paragraphs (b) and (c) of this rule as unnecessary.

I. Clarity

G.S. 150B-21.9(a)(2) charges the Commission with determining whether a rule is "clear and unambiguous."

Paragraphs (b) and (c) include language indicating that sales are subject to "applicable local and transit rates of sales or use tax, unless exempt by statute." The question of what local and transit taxes are applicable is left unanswered by the rule and the Department has not identified other rules or statutes that would determine the issue. The Department has indicated that the applicable tax rates can be located on their website, which may offer a practical clarification. However, the rule itself is not clear as to how to determine the applicable taxes.

Additionally, it is unclear whether this entire rule is meant to create new regulations imposed by the Department or serve as an interpretation of existing rules or statutes. The rule is written as though it is a regulation imposed by the Department, but this is inconsistent with the Department's position that it is interpreting statutorily imposed taxes. This distinction is important because G.S. 105-264(a) establishes that "an interpretation by the Secretary is prima facie correct," a different standard than would be applied to a rule enacting a new requirement. Given this statutory

Seth Ascher
Commission Counsel

language, taxpayers and judges reading the rule should be given a clear indication of the nature of the Department's enactment of the rule.

II. Necessity

G.S. 150B-21.9(a)(3) charges the Commission with determining whether a rule: "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."

The Department has identified that paragraph (a) is interpreting the intersection of several statutory exceptions for sales tax for broadcasting or telecasting and the statutory imposition of taxes on certain digital property, video programming, and satellite digital audio radio service. Although the rule as written is not clear, the Department's explanation suggests that this is an area where a rule could be necessary.

Staff recommends objection to paragraphs (b) and (c) as unnecessary for similar reasons conveyed in the staff opinion for 17 NCAC 07B .0115.

Paragraph (b) states that "The gross receipts of movie theaters derived from admission charges are subject to the general State, and applicable local and transit rates of sale and use tax.

G.S. 105-164.4G(b) states that "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."

Paragraph (c) states that "Tangible personal property, including food, prepared food, and beverages, sold by movie theatres through concession stands or otherwise are subject to the general State, and applicable local and transit rates of sales and use tax."

G.S. 105-164.4(a)(1), which states in relevant part: "The general rate of tax applies to the following items sold at retail: . . . 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."

The Department asserts that paragraphs (b) and (c) of this rule are interpreting a law administered by the Secretary, an authority granted by G.S. 105-264(a), which reads in full:

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.

G.S. 105-264(a) establishes the Secretary's duty to interpret certain laws and acknowledges that such interpretations might be contained in rules, bulletins, or directives. This Department of Revenue statute does not provide guidance as to what types of interpretations should be adopted

by rule or published in a bulletin directive. As a result, the APA's requirement that only "reasonably necessary" rules be approved by this Commission and put in the code would apply.

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

Put another way, if these paragraphs were 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.

In considering the cumulative effect of rules proposed for this purpose, staff estimates that of the ninety rules currently pending from the Department of Revenue, at least half raise a similar necessity problem by stating that a particular category of physical items is tangible personal property or that a particular category of store is conducting retail sales.

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

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

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

8 (a) Receipts of radio and television companies ~~for derived from~~ the broadcasting or telecasting of programs are not
9 subject to sales or use ~~tax-tax~~, unless the receipts are derived from certain digital property, video programming, or
10 satellite digital audio radio service.

11 (b) ~~Receipts~~The gross receipts of motion picturemovie theatres derived from admission charges are notsubject to
12 the general State, and applicable local and transit rates of sales ~~or and~~ use tax.

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

17
18 *History Note:* Authority G.S. 105-164.3; 105-164.4; 105-164.4G; 105-262; 105-264; [Chapter 105, Articles 39,
19 40, 42, 43, and 46;]Article 39; Article 40; Article 42; Article 43; Article 44; Article 46; 105-467;
20 105-468; 105-469; 105-483; 105-498; 105-507.2; 105-509.1; 105-510.1; 105-511.3; 105-537; 105-
21 538;

22 *Eff. February 1, 1976;*

23 *Amended Eff. May 1, 2009; October 1, 1993; October 1, ~~1991~~.1991;*

24 *Readopted Eff. January 1, 2024.*

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AGENCY: North Carolina Department of Revenue

RULE CITATION: 17 NCAC 07B .3107

RECOMMENDATION DATE: September 19, 2023

RECOMMENDED ACTION:

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

COMMENT:

Staff recommends objection to this rule as ambiguous. Secondly, staff recommends objection to paragraph (a) of this rule as unnecessary.

I. *Clarity*

G.S. 150B-21.9(a)(2) charges the Commission with determining whether a rule is "clear and unambiguous."

Paragraph (a) indicates in part that "Sales to a production company, as defined in G.S. 105-164.3, of items including cameras, machinery, equipment, film, and props or building materials used in the construction of sets are subject to the general State, and applicable local and transit rates of sales and use tax." In the text of the rule, it is unclear what other items would be "included" in the sales covered here. The Department asserts that the rule is meant to encompass all taxable property.

Paragraph (a) also includes language in two places indicating that sales are subject to "applicable local and transit rates of sales or use tax, unless exempt by statute." The question of what local and transit taxes are applicable is left unanswered by the rule and the Department has not identified other rules or statutes that would determine the issue. The Department has indicated that the applicable tax rates can be located on their website, which may offer a practical clarification. However, the rule itself is not clear as to how to determine the applicable taxes.

Seth Ascher
Commission Counsel

Finally, it is unclear whether this entire rule is meant to create new regulations imposed by the Department or serve as an interpretation of existing rules or statutes. The rule is written as though it is a regulation imposed by the Department, but the Department has indicated it is meant to be an interpretation of statutory language. This distinction is important because G.S. 105-264(a) establishes that “an interpretation by the Secretary is prima facie correct,” a different standard than would be applied to a rule enacting a new requirement. Given this statutory language, taxpayers and judges reading the rule should be given a clear indication of the nature of the Department’s enactment of the rule.

II. Necessity

G.S. 150B-21.9(a)(3) charges the Commission with determining whether a rule: “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.”

Staff recommends objection to paragraph (a) as unnecessary for similar reasons conveyed in the staff opinion for 17 NCAC 07B .0115.

Paragraph (a) lists a variety of physical objects which are subject to sales and use tax when purchased by a production company.

G.S. 105-164.4(a)(1) states in relevant part: “The general rate of tax applies to the following items sold at retail: . . . 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.”

The Department asserts that paragraph (a) of this rule is interpreting a law administered by the Secretary, an authority granted by G.S. 105-264(a), which reads in full:

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.

G.S. 105-264(a) establishes the Secretary’s duty to interpret certain laws and acknowledges that such interpretations might be contained in rules, bulletins, or directives. This Department of Revenue statute does not provide guidance as to what types of interpretations should be adopted by rule or published in a bulletin directive. As a result, the APA’s requirement that only “reasonably necessary” rules be approved by this Commission and put in the code would apply.

To the extent that paragraph (a) of this rule is interpreting statutory language, paragraph (a) states that sales of tangible personal property to production companies are retail sales. This

“interpretation” appears to be plain on the face of the statute. As a result, paragraph (a) of this rule is unnecessary.

Put another way, if this paragraph 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.

In considering the cumulative effect of rules proposed for this purpose, staff estimates that of the ninety rules currently pending from the Department of Revenue, at least half raise a similar necessity problem by stating that a particular category of physical items is tangible personal property or that a particular category of store is conducting retail sales.

The Department has identified that paragraph (b) is interpreting the application of the resale exception to the imposition of sales tax in G.S. 105-164.13(61b). That exception reads: “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.” To the extent paragraph (b) is identifying that items which are incorporated into release prints which are actually sold are items purchased for resale under the statute, staff believes the rule could be reasonably necessary.

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

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

5 (a) Sales to ~~motion picture production firms~~ a production company, as defined in G.S. 105-164.3, of items including
6 cameras, ~~film~~ machinery, equipment, film, and props or building materials used in the construction of sets ~~which are~~
7 ~~used in the actual filming of movies for sale, lease or rental are exempt from~~ are subject to the general State, and
8 applicable local and transit rates of sales and use tax. The sale Sales of ~~chemicals~~ chemicals, film, and equipment used
9 to develop and edit film ~~which is used to~~ that produce release prints ~~is exempt from~~ are subject to the general State, and
10 applicable local and transit rates of sales and use tax unless exempt by ~~[paragraph]~~ Paragraph (b) of this Rule or
11 other exemption.

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

15 (e)(b) ~~The purchase~~ Sales of film ~~by a movie~~ to a production company ~~which~~ that becomes an ingredient or a
16 component part of release prints that are actually produced and sold, leased ~~leased~~, or rented to its customers are
17 exempt from sales and use tax. ~~Also,~~ Sales of chemicals ~~which are~~ used to develop release prints ~~that are~~ for sale,
18 ~~lease~~ lease, or rental that become an ingredient or a component part of the release prints are exempt from tax.

19
20 *History Note:* Authority G.S. 105-164.3; 105-164.4; 105-164.6; 105-164.13; 105-262; 105-264; ~~105-164.13;~~
21 Article 39; Article 40; Article 42; Article 43; Article 44; Article 46; ~~Chapter 105, Articles 39, 40,~~
22 ~~42, 43, and 46;~~ 105-467; 105-468; 105-469; 105-483; 105-498; 105-507.2; 105-509.1; 105-510.1;
23 105-511.3; 105-537; 105-538;

24 *Eff. June 1, 1992;*

25 *Amended Eff. October 1, 2009; October 1, ~~1993-1993;~~*

26 *Readopted Eff. January 1, 2024.*