

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: 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:

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).

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.

IF THE RRC FINDS THAT THE LANGUAGE IS A RESTATEMENT OF EXISTING LAW, STAFF RECOMMENDS OBJECTION AS THE RULE IS NOT REASONABLY NECESSARY PURSUANT TO G.S. 150B-21.9(A)(3). THE LANGUAGE DOES NOT, AS A RESTATEMENT OF EXISTING LAW, IMPLEMENT OR INTERPRET EXISTING LAW, AND TO THE EXTENT THAT IT DOES, IT IS UNNECESSARY. IN ITS REQUEST FOR CHANGES DATED SEPTEMBER 11, 2023, STAFF INQUIRED ABOUT THE NECESSITY OF THE RULE. THE SECRETARY WAS UNRESPONSIVE. ACCORDINGLY, STAFF RECOMMENDS OBJECTION PURSUANT TO G.S. 150B-21.9(A)(3).

III.

*WILLIAM W. PEASLEE
COMMISSION COUNSEL*

IF THE RRC FINDS THAT THE LANGUAGE WAS AN ATTEMPT TO REGULATE, THE SECRETARY DOES NOT HAVE THE AUTHORITY TO "SUBJECT" ANYONE TO A TAX, WHETHER THE TAX IS "APPLICABLE" OR NOT.

IV.

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 RESPONSES TO QUESTIONS IN THE REQUEST FOR CHANGES, STAFF BELIEVES THE SECRETARY IS INTENDING TO MAKE AN INTERPRETATION OF EXISTING LAW; HOWEVER AS PREVIOUSLY STATED THE LANGUAGE EMPLOYED BY THE SECRETARY IS AMBIGUOUS.

IN THE RULE'S HISTORY NOTE, THE SECRETARY CITES 12 U.S.C. 1464(H) WHICH STATES, "NO STATE, COUNTY, MUNICIPAL, OR LOCAL TAXING AUTHORITY MAY IMPOSE ANY TAX ON FEDERAL SAVINGS ASSOCIATIONS OR THEIR FRANCHISE, CAPITAL, RESERVES, SURPLUS, LOANS, OR INCOME GREATER THAN THAT IMPOSED BY SUCH AUTHORITY ON OTHER SIMILAR LOCAL MUTUAL OR COOPERATIVE THRIFT AND HOME FINANCING INSTITUTIONS."

IN THE RULE'S HISTORY NOTE, THE SECRETARY ALSO CITES 12 U.S.C. 548 WHICH STATES, "FOR THE PURPOSES OF ANY TAX LAW ENACTED UNDER AUTHORITY OF THE UNITED STATES OR ANY STATE, A NATIONAL BANK SHALL BE TREATED AS A BANK ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OR OTHER JURISDICTION WITHIN WHICH ITS PRINCIPAL OFFICE IS LOCATED."

IN THE RULE'S HISTORY NOTE, THE SECRETARY ALSO CITES G.S. 105-264.26, WHICH DOES NOT EXIST.

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.

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).

V.

AS WRITTEN, BOTH PARAGRAPH (A) AND (B) ARE FACIALLY UNNECESSARY AND AMBIGUOUS. THE RULE STATES THE CERTAIN SALES ARE SUBJECT TO APPLICABLE TAX RATES, "UNLESS EXEMPT". THIS IS TANTAMOUNT TO STATING THAT A SALE IS SUBJECT TO A TAX RATE UNLESS IT IS NOT. ACCORDINGLY, STAFF RECOMMENDS OBJECTION TO G.S. 150B-21.9(A)(2) & (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

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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,

Andrew O. Furuseth
Director, Sales and Use Tax Division
N.C. Department of Revenue
PO Box 871
Raleigh, NC 27602-0871
Mobile: 919.608.1115
Fax: 919.715.0295
andrew.furuseth@ncdor.gov

WILLIAM W. PEASLEE
COMMISSION COUNSEL

1 17 NCAC 07B .4206 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 .4206 FED SAVINGS/LOAN ASSOC, NATL ~~BANKS/ST~~ BANKS/ST AND STATE**
5 **BANKS, CHARTERED CREDIT UNIONS**

6 (a) Sales ~~of tangible personal property to~~, or purchases by, federal savings and loan associations and national banks
7 ~~for use or consumption of items~~, as the term item is defined in G.S. 105-164.3, are subject to the applicable statutory
8 ~~state~~State and local ~~rates of sales or and use tax-tax~~, unless exempt by statute. See 12 U.S.C. § 1464(h) and 548.

9 (b) Sales ~~of tangible personal property to~~, or purchases by, state banks and state chartered credit unions ~~for use or~~
10 ~~consumption of items~~ are subject to the applicable statutory ~~state~~State and local ~~rates of sales or and use tax-tax~~, unless
11 ~~exempt by statute.~~

12
13 *History Note: Authority G.S. 105-164.3; 105-164.4; 105-164.6; 105-264.26; 105-262; 105-264; Article 39;*
14 *Article 40; Article 42; Article 43; Article 44; [Chapter 105, Articles 39, 40, 42, 43, and 46;] 105-*
15 *467; 105-468; 105-469; 105-483; 105-498; 105-507.2; 105-509.1; 105-510.1; 105-511.3; 105-537;*
16 *105-538; 12 U.S.C. 1464(h); 12 U.S.C. 548;*

17 *Eff. February 1, 1976;*

18 *Amended Eff. September 1, 2006; January 1, 1995; October 1, 1993; October 1, ~~1991~~1991;*

19 *Readopted Eff. January 1, 2024.*

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: 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:

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).

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:

PURSUANT TO G.S. 105-164.4G(B), "GROSS RECEIPTS FROM AN ADMISSION CHARGE TO AN ENTERTAINMENT ACTIVITY" ARE TAXABLE.

HOWEVER, G.S. 105-164.4G(E) PROVIDES EXCEPTIONS, INCLUDING INTER ALIA BOWLING FEES AND SKATING FEES.

- (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) ...
 - (6) An amount paid for the right to participate, other than to be a spectator, in the following activities:

*WILLIAM W. PEASLEE
COMMISSION COUNSEL*

- a. Rock climbing, **skating**, skiing, snowboarding, sledding, zip lining, or other similar activities.
- b. ...”

(emphasis added)

II.

LINES 6-9 OF THE RULE STATE THAT CERTAIN FEES AND SALES OF TANGIBLE PERSONAL PROPERTY ARE “SUBJECT TO” TAX.

IF THE RRC FINDS THAT THE LANGUAGE WAS AN ATTEMPT TO REGULATE, THE SECRETARY DOES NOT HAVE THE AUTHORITY TO “SUBJECT” ANYONE TO A TAX OR TO IMPOSE A TAX. 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 RESPONSES TO QUESTIONS ABOUT THE STATUTORY AUTHORITY FOR THIS RULE POSED IN THE REQUEST OR CHANGE, STAFF BELIEVES THE SECRETARY IS INTENDING TO MAKE AN INTERPRETATION OF EXISTING LAW IN LINES 6-9; 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.

IN THE RULE’S HISTORY NOTE, THE SECRETARY CITES G.S. 105-164.4 WHICH INTER ALIA IMPOSES A TAX ON “A RETAILER ENGAGED IN BUSINESS IN THE STATE”.

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).

IV.

IN LINES 6-8, IT APPEARS THAT THE SECRETARY IS ATTEMPTING TO MAKE CLEAR THAT THE RENTAL OF SKATES OR SHOES COMMENSURATE WITH SKATING OR BOWLING DOES NOT QUALIFY AS “AN AMOUNT PAID FOR THE RIGHT TO PARTICIPATE” PURSUANT TO G.S. 105-164.4G(E)(6)(A). GIVEN THE CLEAR LANGUAGE OF THE STATUTE, IT IS UNCLEAR WHAT THE RULES DOES THAT THE STATUTE DOES NOT ALREADY DO. ACCORDINGLY, STAFF RECOMMENDS OBJECTION PURSUANT TO G.S. 150B-21.9(A)(3) FOR LACK OF NECESSITY.

V

IN LINES 8-9, IT APPEARS THAT THE SECRETARY IS ATTEMPTING TO MAKE CLEAR THAT RETAIL SALES OF ITEMS OF PERSONAL PROPERTY BY THE PROPRIETORS OF SKATING AND BOWLING ACTIVITIES ARE NOT AN EXCEPTION PURSUANT TO G.S. 105-164.4G. STAFF DOES NOT SEE ANY REASONABLE BASIS UPON WHICH ANYONE COULD AVER THAT G.S. 105-164.4G PROVIDES AN EXCEPTION TO SKATING OR BOWLING BUSINESSES FOR RETAIL SALES. THERE DOES NOT APPEAR

*WILLIAM W. PEASLEE
COMMISSION COUNSEL*

TO BE ANY AMBIGUITY IN THE LAW IN THE ABSENCE OF LINES 8-9. ACCORDINGLY, STAFF RECOMMENDS OBJECTION TO THE LANGUAGE IN LINES 8-9 PURSUANT TO G.S. 150B-29.9(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.)

§ 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.

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,

Andrew O. Furuseth
Director, Sales and Use Tax Division
N.C. Department of Revenue
PO Box 871
Raleigh, NC 27602-0871
Mobile: 919.608.1115
Fax: 919.715.0295
andrew.furuseth@ncdor.gov

WILLIAM W. PEASLEE
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(l)(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(l)(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).)

1 17 NCAC 07B .4415 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 .4415 SKATING RINK AND BOWLING ALLEY RENTAL FEES**

5 ~~Charges-Admission charges~~ for the use of a skating rink or bowling alley to skate or bowl are not subject to sales or
6 use taxes;tax pursuant to the exception in G.S. 105-164.4G. however, if such businesses rentCharges for the rental of
7 tangible personal property, such as skates and shoes, ~~charges for same~~shoes are subject to the general State, and
8 applicable local and transit rates of sales and use tax. ~~Sales-Retail sales of tangible personal property items~~ by such
9 businesses are subject to the applicable ~~statutory state and local~~rates of sales or use tax.

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11 *History Note:* Authority G.S. ~~105-164.3; 105-164.4;~~ 105-164.4G; 105-262; 105-264; [~~Chapter 105, Articles 39,~~
12 ~~40, 42, 43, and 46;~~Article 39; Article 40; Article 42; Article 43; Article 44; Article 46; 105-467;
13 105-468; 105-469; 105-483; 105-498; 105-507.2; 105-509.1; 105-510.1; 105-511.3; 105-537; 105-
14 538;

15 *Eff. February 1, 1976;*
16 *Amended Eff. May 1, 2009; October 1, 1993; October 1, ~~1991-1991;~~*
17 *Readopted Eff. January 1, 2024.*

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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 .5002

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:

Pursuant to G.S. 150B-262, "the Secretary of Revenue may adopt rules needed to administer a tax collected by the Secretary..."

Pursuant to G.S. 105-264(a), the Secretary has a duty to interpret all laws administered by the Secretary. G.S. 105-264 states, in part:

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.

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.

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.*

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

I.

The Department has stated that Paragraph (a) of the Rule is an interpretation of the definition of “prosthetic device”¹; however, that is not clear by the language employed.

While Staff would agree that the Secretary’s interpretation is within the Secretary’s authority to make using clear language, the language of the rule is ambiguous as to whether the Secretary is creating an exemption, or whether the Secretary is interpreting the language of a statute which creates the exemption. This is a subtle but important distinction.

Subparagraph (a) states that certain items of tangible personal property “are exempt from sales and use tax...”

The Secretary does not have authority to grant an exemption. However, the Secretary can interpret language within the statute which would then make the items exempt pursuant to the statute.

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

To the extent that the language in Paragraph (a) creates an exemption, staff recommends objection pursuant to G.S. 150B-21.9(a)(1) for lack of authority.

II.

Paragraph (b) is unnecessary pursuant to G.S. 150B-21.9(a)(3). Accordingly, staff recommends objection. The language is a restatement of the statutes.

III.

Like Paragraph (a), Paragraph (c) declares the sale of certain items “registered by retail and wholesale” merchants are exempt. For the same reasons outlined above, staff would recommend objection.

¹ THE INTERPRETATION IS THAT CERTAIN EYE GLASS FRAMES MEET THE DEFINITION OF PROSTHETIC DEVICES.

§ 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.

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

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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).)

WILLIAM W. PEASLEE

COMMISSION COUNSEL

§ 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

§ 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:

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- 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:

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- 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.

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- (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.

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- (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.

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- 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.

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- (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.

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- (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.

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- (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

WILLIAM W. PEASLEE

COMMISSION COUNSEL

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.

WILLIAM W. PEASLEE

COMMISSION COUNSEL

- (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.

WILLIAM W. PEASLEE

COMMISSION COUNSEL

- 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).)

WILLIAM W. PEASLEE

COMMISSION COUNSEL

§ 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

WILLIAM W. PEASLEE

COMMISSION COUNSEL

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 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 meeting 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

Raleigh, NC 27602-0871

Mobile: 919.608.1115

Fax: 919.715.0295

andrew.furuseth@ncdor.gov

WILLIAM W. PEASLEE
COMMISSION COUNSEL

1 17 NCAC 07B .5002 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 .5002 EYEGLASS FRAMES AND REPAIR PARTS**

5 (a) Eyeglass frames sold in connection with the repair or replacement of corrective eyeglasses for human use ~~ground~~
6 ~~on prescription of physicians, oculists, or optometrists~~ are not subject to the tax-exempt from sales and use tax as
7 prosthetic devices. Sales of [temples and similar items that are considered] repair or replacement parts for prosthetic
8 [devices] devices, such as temples, nose pads, temple hinges, screws, and ear tips, are also exempt from sales and use
9 tax. A person who sells corrective eyeglass frames and repair parts for corrective eyeglasses for human use shall keep
10 sales records that clearly separate its sales of corrective eyeglass frames and repair parts for corrective eyeglasses for
11 human use from sales of other items. [Failure of a person to keep records that establish a sale is exempt from sales
12 and use tax subjects the person to liability for the general State, and applicable local and transit rates of sales and use
13 tax on the sale.]

14 (b) Eyeglass frames or other parts sold in connection with the repair or replacement of non-corrective eyeglasses for
15 human use that do not meet the definition of a prosthetic device in G.S. 105-164.3, or are not specifically exempt by
16 statute, are subject to the general State, and applicable local and transit rates of sales and use tax.

17 ~~(b)(c)~~ Sales of eyeglass frames, repair parts for eyeglasses, cases, optical merchandise ~~merchandise,~~ and optical
18 supplies by optical supply houses and opticians to registered merchants, including oculists and optometrists, retailers
19 or wholesale [merchants] merchants, in accordance with 17 NCAC 07B .0104, for resale are not subject to the
20 tax-exempt from sales and use tax.

21
22 *History Note: Authority G.S. 105-164.3; 105-164.4; ~~105-164.5; 105-164.6; 105-164.13; 105-164.22; 105-262;~~*
23 *105-264; [Chapter 105, Articles 39, 40, 42, 43, and 46;] 105-467; 105-468; 105-469; 105-483;*
24 *105-498; 105-507.2; 105-509.1; 105-510.1; 105-511.3; 105-537; 105-538;*
25 *Eff. February 1, 1976-1976;*
26 *Readopted Eff. January 1, 2024.*