

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 .4801

RECOMMENDATION DATE: October 13, 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:

In paragraph (a), the rule establishes with greater specificity which records must be kept pursuant to G.S. 105-164.22. In response to a question raised in the Request for Changes concerning how long the records must be maintained, the Secretary revised the rule to reference two statutes, G.S. 105-241.6 and 241.8, which are statutes of limitation for tax refunds and the imposition of an assessment. However, the Secretary employed the language "in accordance with" the two statutes which does not make clear how long records must be maintained. Contextually the Secretary intends that the records must be kept for the same periods stated in the statutes, but that is not clear.

In paragraph (a), the Secretary provides a list of "records to establish a person's sales and use tax liability". Subparagraph (a)(5) requires the retention of "All items, as the term is defined in G.S. 105-164.3, used or consumed in the conduct of business." G.S. 105-164.3 defines "item" as "tangible personal property, digital property, or a service, unless context requires otherwise." This does not provide clarity about which "items" the taxpayer is required to maintain.

Accordingly, staff recommends objection pursuant to G.S. 105B-21.9(a)(2).

William W. Peaslee
Commission Counsel

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

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

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

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

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

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

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

§ 105-164.3. Definitions.

The following definitions apply in this Article:

...

(113) Item. - Tangible personal property, digital property, or a service, unless the context requires otherwise.

§ 105-164.22. Record-keeping requirements, inspection authority, and effect of failure to keep records.

(a) Record Keeping Generally. - Retailers, wholesale merchants, facilitators, real property contractors, and consumers must keep records that establish their tax liability under this Article. The Secretary or a person designated by the Secretary may inspect these records at any reasonable time during the day.

(b) Retailers. - A retailer's records must include records of the retailer's gross income, gross sales, net taxable sales, all items purchased for resale, and any reports or records related to transactions with a facilitator with whom it has a contract as provided in this Article. Failure of a retailer to keep records that establish a sale is exempt under this Article subjects the retailer to liability for tax on the sale.

(c) Wholesale Merchants. - A wholesale merchant's records must include a bill of sale for each customer that contains the name and address of the purchaser, the date of the purchase, the item purchased, and the sales price of the item. A wholesale merchant must also keep records that establish a sale is exempt from tax and any reports or records related to transactions with a facilitator with whom it has a contract as provided in this Article. Failure of a wholesale merchant to keep records that establish a sale is exempt from tax under this Article subjects the wholesale merchant to liability for tax at the rate that applies to the retail sale of the item.

(d) Facilitators. - A facilitator's records must include records of the facilitator's gross income, gross sales, net taxable sales, all items purchased for resale, any reports or records related to transactions with a retailer with whom it has a contract as provided in this Article, and any other records that establish its tax liability. Failure of a facilitator to keep records that establish a sale is exempt from tax under this Article subjects the facilitator to liability for tax on the sale.

(e) Real Property Contractors. - A real property contractor's records must include substantiation that a transaction is a real property contract or a mixed transaction contract pursuant to G.S. 105-164.4H(a1). Failure of a real property contractor to keep records that establish a real property contract under this Article subjects the real property contractor to liability for tax on the sale.

(f) Consumers. - A consumer's records must include an invoice or other statement of the purchase price of an item the consumer purchased from inside or outside the State and any sales and use tax paid thereon. Failure of the consumer to keep these records subjects the consumer to liability for tax on the purchase price of the item, as determined by the Secretary. (1957, c. 1340, s. 5; 1973, c. 476, s. 193; 1998-98, s. 51; 2009-451, s. 27A.3(n); 2016-5, s. 3.15; 2018-5, s. 38.5(t); 2019-246, s. 4(I).)

§ 105-241.6. Statute of limitations for refunds.

(a) General. - The general statute of limitations for obtaining a refund of an overpayment applies unless a different period applies under subsection (b) of this section. The general statute of limitations for obtaining a refund of an overpayment is the later of the following:

- (1) Three years after the due date of the return.
- (2) Two years after payment of the tax. The amount refunded under this subdivision shall not exceed the portion of the tax paid during the two years immediately preceding the taxpayer's request for refund.

(b) Exceptions. - The exceptions to the general statute of limitations for obtaining a refund of an overpayment are as follows:

- (1) Federal Determination. - If a taxpayer files a return reflecting a federal determination and the return is filed within the time required by this Subchapter, the period for requesting a refund is one year after the return reflecting the federal determination is filed or three years after the original return was filed or due to be filed, whichever is later.
- (2) Waiver. - A taxpayer's waiver of the statute of limitations for making a proposed assessment extends the period in which the taxpayer can obtain a refund to the end of the period extended by the waiver.
- (3) Worthless Debts or Securities. - Section 6511(d)(1) of the Code applies to an overpayment of the tax levied in Part 2 or 3 of Article 4 of this Chapter to the extent the overpayment is attributable to either of the following:
 - a. The deductibility by the taxpayer under section 166 of the Code of a debt that becomes worthless, or under section 165(g) of the Code of a loss from a security that becomes worthless.
 - b. The effect of the deductibility of a debt or loss described in subpart a. of this subdivision on the application of a carryover to the taxpayer.
- (4) Capital Loss and Net Operating Loss Carrybacks. - Section 6511(d)(2) of the Code applies to an overpayment of the tax levied in Part 2 or 3 of Article 4 of this Chapter to the extent the overpayment is attributable to a capital loss carryback under section 1212(c) of the Code or to a net operating loss carryback under section 172 of the Code.
- (5) Contingent Event. - The period to request a refund of an overpayment may be extended once as provided in this subdivision:
 - a. Litigation or a State Tax Audit. - If a taxpayer is subject to litigation or a state tax audit that prevents the taxpayer from filing an accurate and definite request for a refund of an overpayment within the period under this section, the period to request a refund of an overpayment is six months after the litigation or state tax audit concludes. The taxpayer must file written notice to the Secretary prior to expiration of the statute of limitations under this section. The notice must identify and describe the litigation or state tax audit, identify the type of tax, list the return or payment affected, and state in clear terms the basis for and an estimated amount of the overpayment.
 - b. Other Event. - If a taxpayer contends that an event has occurred that prevents the taxpayer from filing an accurate and definite request for a refund of an overpayment within the period under this section, the

taxpayer may submit a written request to the Secretary seeking an extension of the statute of limitations. The taxpayer must file a written request to the Secretary prior to expiration of the statute of limitations under this section. The request must establish by clear, convincing proof that the event is beyond the taxpayer's control and prevents the taxpayer from timely filing an accurate and definite request for a refund of an overpayment. The Secretary's decision on the request is final and is not subject to administrative or judicial review. If the Secretary agrees to the request, the period to file a request for a refund of an overpayment is six months after the event concludes.

- (6) Expired. (2007-491, s. 1; 2013-414, s. 47(a); 2015-6, s. 2.16; 2016-6, s. 5(a); 2019-169, s. 6.1(a); 2021-180, s. 42.13A(f); 2022-13, s. 5.2.)

§ 105-241.8. Statute of limitations for assessments.

(a) General. - The general statute of limitations for proposing an assessment applies unless a different period applies under subsection (b) of this section. The general statute of limitations for proposing an assessment is the later of the following:

- (1) Three years after the due date of the return.
- (2) Three years after the taxpayer filed the return.

(b) Exceptions. - The exceptions to the general statute of limitations for proposing an assessment are as follows:

- (1) Federal determination. - If a taxpayer files a return reflecting a federal determination and the return is filed within the time required by this Subchapter, the period for proposing an assessment of any tax due is one year after the return is filed or three years after the original return was filed or due to be filed, whichever is later. If there is a federal determination and the taxpayer does not file the return within the required time, the period for proposing an assessment of any tax due is three years after the date the Secretary received the final report of the federal determination.
- (1a) Federal amended return. - If a taxpayer files a return as a result of filing a federal amended return and the return is filed within the time required by this Subchapter, the period for proposing an assessment of any tax due is one year after the return is filed or three years after the original return was filed or due to be filed, whichever is later. If the taxpayer does not file the return within the required time, the period for proposing an assessment of any tax due is three years after the date the federal amended return was filed with the Commissioner of Internal Revenue. The date the federal amended return was filed is presumed to be the date recorded by the Internal Revenue Service.
- (2) Failure to file or filing false return. - There is no statute of limitations and the Secretary may propose an assessment of tax due from a taxpayer at any time if any of the following applies:
 - a. The taxpayer did not file a return.
 - b. The taxpayer filed a fraudulent return.
 - c. The taxpayer attempted in any manner to fraudulently evade or defeat the tax.
- (2a) Failure to pay trust taxes. - If a taxpayer, as a trustee, collects taxes on behalf of the State, but fails to remit all the taxes held in trust when due, the period for proposing an assessment is the later of the following:
 - a. Ten years after the due date of the return.
 - b. Ten years after the taxpayer filed the return.
- (3) Tax forfeiture. - If a taxpayer forfeits a tax credit or tax benefit pursuant to forfeiture provisions of this Chapter, the period for proposing an assessment of any tax due as a result of the forfeiture is three years after the date of the forfeiture.
- (4) Nonrecognition of gain. - If a taxpayer elects under section 1033(a)(2)(A) of the Code not to recognize gain from involuntary conversion of property into money, the period for proposing an assessment of any tax due as a result of the conversion or election is the applicable period provided under section

1033(a)(2)(C) or section 1033(a)(2)(D) of the Code. (2007-491, s. 1; 2018-5, s. 38.3(e); 2019-169, s. 6.2(a); 2020-58, s. 6.2(a).)

1 17 NCAC 07B .4801 is readopted with substantive changes pursuant to G.S. 150B-21.3A(c)(2)g without notice
2 pursuant to G.S. 150B-1(D)(4) as follows:

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4 **SECTION .4800 - BASIS OF REPORTING**

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6 **17 NCAC 07B .4801 VENDOR'S RECORDS REQUIRED TO BE KEPT**

7 (a) Persons making sales or purchases of an item, as the term item is defined in G.S. 105-164.3, shall keep records as
8 required in G.S. 105-164.22 that establish~~Every vendor must keep adequate and complete records as required by G.S.~~
9 ~~105-164.31 to determine the amount of the person's sales and use tax for which he may be liable.~~ liability. Records
10 shall be kept in accordance with G.S. 105-241.6 and G.S. 105-241.8.

11 Records to establish a person's sales and use tax liability include the following:

- 12 (1) All cash and credit sales, including sales under any type of financing or installation plan.
- 13 (2) The amount of all items purchased and copies of all bills of lading, invoices, and purchase orders.
- 14 (3) Copies of all sales invoices furnished by wholesale merchants that shall show the name and address
15 of the purchaser, the date of purchase, the item or items purchased, and the purchase price of the
16 item.
- 17 (4) All deductions and exemptions claimed in sales and use tax returns for each transaction.
- 18 (5) All items, as the term item is defined in G.S. 105-164.3, used or consumed in the conduct of
19 business.
- 20 (6) A true and complete inventory of the value of the [stock]the materials, supplies, goods or
21 merchandise on hand
- 22 (7) All exemption certificates, and records of all sales made to a person furnishing an exemption
23 certificate.
- 24 (8) All affidavits of capital improvement or [other records]written contracts that establish a transaction
25 is a real property contract.
- 26 (9) All affidavits certifying tax paid by the purchaser on an item that becomes a part of real property.
- 27 (10) Records of all sales made through a facilitator engaged in business in the State.
- 28 (11) All affidavits of export.
- 29 (12) All shipping records for items that are delivered.
- 30 (13) All agreements with facilitators.
- 31 (14) All bank account records.
- 32 (15) All point-of-sale records and cash register z-tapes.
- 33 (16) Any other document, report, form, or other similar record that establishes a person's sales and use
34 tax liability.

35 (b) Except for persons listed in G.S. 105-164.20(b), Vendors~~person's~~ having both cash and credit sales may elect to
36 report their tax liability on either the cash or accrual basis of accounting provided their records are kept in such a
37 manner that they can determine their tax liability correctly on the basis used. If a [taxpayer]person wishes to change

1 ~~[from one]~~ the basis of reporting selected when applying for a Certificate of Registration in accordance with 17 NCAC
2 07B .0104 to another, ~~he must~~ the [taxpayer]person shall apply to the Secretary of Revenue by written letter signed by
3 the [taxpayer]person and mailed to the attention of the Sales and Use Tax Division to the Department's mailing address
4 set out in 17 NCAC 01A .0101 for permission to make such change. A [taxpayer's]person's selected basis continues
5 in effect until the person receives permission from the Secretary, or the Secretary's designee, to change the basis
6 selected. The Secretary, or the Secretary's designee, shall only grant permission allowing a person to change the basis
7 of reporting upon a showing that the person's accounting system and processes shall establish the amount of the
8 person's sales and use tax liability using the requested basis of accounting.

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10 *History Note: Authority G.S. 105-164.20; 105-164.22; 105-262; 105-264;*
11 *Eff. February 1, 1976;*
12 *Amended Eff. October 1, ~~1993~~1993;*
13 *Readopted Eff. January 1, 2024.*