

## 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 .4202

RECOMMENDATION DATE: October 17, 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.*

*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 .4202 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 .4202 EXEMPT SALES TO THE UNITED STATES GOVERNMENT**

5 (a) ~~Purchase Requisitions:Retailer Records. -- A vendor making retailer that makes sales directly to the United States~~  
6 ~~Government, or any a qualifying agency or instrumentality thereof, that issues purchase requisitions or affidavits must~~  
7 ~~obtain and keep shall retain~~ copies of such ~~any Certificates of Exemption, Form E-595E,~~ purchase requisitions or  
8 ~~affidavits affidavits, signed by the purchasing officer stating that such sales are being made directly to the United~~  
9 ~~States Government or an agency or instrumentality thereof or other information provided to substantiate the exemption~~  
10 ~~from sales and use tax. Copies of such purchase requisitions or affidavits must the documentation be retained by the~~  
11 ~~vendor in his files for three years following the date of sale and must be available for inspection by the Secretary of~~  
12 ~~Revenue or her the Secretary's agents upon request. Records shall be kept in accordance with G.S. 105-241.6 and G.S.~~  
13 ~~105-241.8.~~

14 Qualifying United States Government agencies and instrumentalities are divisions of the federal government and non-  
15 governmental agencies that act independently and whose obligations are backed by the federal government, whose  
16 enabling legislation or charter is to provide a necessary public service and are immune from sales and use tax under  
17 federal law.

18 (b) ~~United States Government Credit Card Program – GSA Smartpay:Smartpay. -- Under the program, credit cards~~  
19 ~~may be centrally billed or individually billed. Card designs may be viewed on the following Internet website:~~  
20 ~~<http://www.gsa-smartpay.org/gsa-howidentify.html>.~~

21 (1) ~~Fleet Cards: All Federal Government fleet cards are centrally billed. This means that all charges~~  
22 ~~are billed directly to and paid directly by the Federal Government and are exempt from the general~~  
23 ~~rate of State tax and any applicable local sales and use tax. Centrally billed charges are billed directly~~  
24 ~~to and paid directly by the United States Government and are exempt from sales and use tax.~~

25 (2) ~~Purchase Cards: All Federal Government purchase cards are centrally billed. This means that all~~  
26 ~~charges are billed directly to and paid directly by the Federal Government and are exempt from the~~  
27 ~~general rate of State tax and any applicable local sales and use tax. Individually billed charges are~~  
28 ~~billed to and paid by the federal employee who is then reimbursed by the United States Government.~~  
29 ~~Individually billed charges are subject to the applicable rates of sales and use [tax.]tax, pursuant to~~  
30 ~~G.S. 105-164.4.~~

31 (3) ~~Travel Cards: Federal Government travel cards may be centrally billed or individually billed.~~  
32 ~~Individually billed charges are billed to and paid by the Federal employee who is then reimbursed~~  
33 ~~by the Federal Government. These charges are subject to the general rate of State tax and any~~  
34 ~~applicable local sales and use tax. Centrally billed charges are billed directly to and paid directly~~  
35 ~~by the Federal Government and are exempt from to the general rate of State tax and any applicable~~  
36 ~~local sales and use tax.~~

1           ~~(4) Integrated Cards: Federal Government integrated cards include fleet, travel, purchase transactions~~  
2           ~~or any combination thereof and offer the Federal Government a single card for all of its purchases.~~  
3           ~~This card is in use only at the Department of the Interior. All fleet and purchase type transactions~~  
4           ~~on an integrated card are centrally billed, and travel type transactions may be centrally billed or~~  
5           ~~individually billed. Centrally billed charges are billed directly to and paid directly by the Federal~~  
6           ~~Government and are exempt from the general rate of State tax and any applicable local sales and~~  
7           ~~use tax. Individually billed charges are billed to and paid by the Federal employee and then~~  
8           ~~reimbursed by the Federal Government. These charges are subject to the general rate of State tax~~  
9           ~~and any applicable local sales and use tax.~~

10       (c) [Other]Non-GSA Smartpay credit card programs implemented by qualifying agencies or instrumentalities of the  
11       United States Government are exempt from sales and use tax when the charges are centrally billed and directly paid  
12       by the qualifying agency or instrumentality.

13  
14       *History Note: Authority G.S. 105-164.4; 105-164.13; 105-262; 105-264; Article 39; Article 40; Article 42; Article*  
15       *43; Article 44;*  
16       *Eff. February 1, 1976;*  
17       *Amended Eff. September 1, 2006; April 1, 1997; January 1, 1995; October 1, 1993; October 1,*  
18       *1991; August 1, ~~1988-1988~~;*  
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 .4707

RECOMMENDATION DATE: October 17, 2023

RECOMMENDED ACTION:

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

COMMENT:

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

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

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

*Chapter 105, Article 5., Part 2. imposes a sales and use tax generally which is collected by the Secretary.*

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

William W. Peaslee  
Commission Counsel

*G.S. 105-164.13 sets forth exemptions to sales and use taxation. This statute may be interpreted by the Secretary.*

*The Secretary appears to be interpreting G.S. 105-164.13(5e) and (8), however this is unclear.*

*G.S. 105-164.13 (8) exempts, "Sales to a manufacturer of **tangible personal property** that enters into or becomes an ingredient or component part of tangible personal property that is manufactured. This exemption does not apply to sales of electricity."*

*G.S. 105-164.3 (261) defines tangible personal property as "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."*

*Both "chemicals" and "printed material" fall squarely into the definition of "tangible personal property".*

*Paragraph (a)(1) of the Rule declares that "**chemicals** that enter into or become an ingredient or component part of **printed material** for resale" are exempt. Which raises the question, is this language reasonably necessary?*

*However, the same analysis can be applied to Subparagraph (a)(2) with perhaps a different result.*

*G.S. 105-164.13(5e) exempts "Sales of **mill machinery** or mill machinery parts or **accessories** to any of the persons listed in this subdivision. For purposes of this subdivision, the term "accessories" does not include electricity. The persons are: a. A **manufacturing industry or plant**. A manufacturing industry or plant does not include (i) a delicatessen, cafe, cafeteria, restaurant, or another similar retailer that is principally engaged in the retail sale of food prepared by it for consumption on or off its premises or (ii) a production company. ...*

*Subparagraph (a)(2) of the Rule declares that sale of "Chemicals used to clean printing machinery" are exempt. To reach this conclusion the Secretary is interpreting "commercial printers" to be "a manufacturing industry or plant", the printing machines to be "mill machinery"<sup>2</sup> and "chemicals used to clean printing machinery" to be "accessories."*

*Paragraph (b) states that the sale of chemicals not listed in Paragraph (a) are "subject to" tax. This language is unnecessary as sales that are not exempt are already subject to tax.*

*If Subparagraph (a)(1) and Paragraph (b) were repealed, it appears that nothing would change about the actual sales tax implementation in this State. Given such an effect, it could not be said that this rule is "necessary to implement or interpret" an enactment of the General Assembly.*

*Accordingly, staff recommends objection to the rule based on Subparagraph (a)(1) and Paragraph (b) pursuant to G.S. 150B-21.9(a)(3) for necessity.*

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*2 THE TERM "MILL MACHINERY" IS NOT DEFINED BY STATUTE OR CODE. THIS IS A GOOD EXAMPLE OF THAT WHICH THE SECRETARY SHOULD CONSIDER DEFINING BY RULE.*

## § 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

- (8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
- a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
  - b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.
  - c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
  - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
  - e. Statements of agency policy made in the context of another proceeding, including:
    1. Declaratory rulings under G.S. 150B-4.
    2. Orders establishing or fixing rates or tariffs.
  - f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
  - g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.

- h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.
- i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
- j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
- k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
- l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.

**§ 105-262. Rules.**

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

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

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

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

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

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

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

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

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

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



476, s. 193; 1991, c. 45, s. 29; 1993, c. 532, s. 9; 1998-98, s. 21; 2008-107, s. 28.16(e);  
2010-31, s. 31.7A(a); 2011-390, s. 6; 2016-103, s. 6.)

**§ 105-164.13. 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:

...

- (5e) Sales of mill machinery or mill machinery parts or accessories to any of the persons listed in this subdivision. For purposes of this subdivision, the term "accessories" does not include electricity. The persons are:
- a. A manufacturing industry or plant. A manufacturing industry or plant does not include (i) a delicatessen, cafe, cafeteria, restaurant, or another similar retailer that is principally engaged in the retail sale of food prepared by it for consumption on or off its premises or (ii) a production company.
  - b. A contractor or subcontractor if the purchase is for use in the performance of a contract with a manufacturing industry or plant.
  - c. A subcontractor if the purchase is for use in the performance of a contract with a general contractor that has a contract with a manufacturing industry or plant.

...

- (8) Sales to a manufacturer of tangible personal property that enters into or becomes an ingredient or component part of tangible personal property that is manufactured. This exemption does not apply to sales of electricity.

...

**§ 105-164.3. Definitions.**

The following definitions apply in this Article:

...

(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.

...

1 17 NCAC 07B .4707 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 .4707 PRINTING CHEMICALS**

5 (a) [Sales] Pursuant to G.S. 105-164.13, sales of the following chemicals to commercial printers or publishers which  
6 enter into or become an ingredient or component part of printed matter which such purchasers sell are exempt from  
7 sales and use tax, tax:

- 8 (1) Chemicals that enter into or become an ingredient or component part of printed material for resale.  
9 (2) Chemicals used to clean printing machinery.

10 (b) Sales of chemicals not listed in paragraph (a), including Chemicals-chemicals used by commercial printers and  
11 publishers for [sanitation] cleaning, disinfecting, or sanitizing purposes purposes, are subject to the applicable statutory  
12 state general State and applicable local and transit rates of sales or and use tax. Local tax rates by county, including  
13 any transit tax can be found on the Department's website at [www.ncdor.gov](http://www.ncdor.gov).

14  
15 *History Note: Authority G.S. 105-164.4; 105-164.6; 105-164.13; 105-164.28; 105-262; 105-264; [Chapter 105,*  
16 *Articles 39, 40, 42, 43, and 46;] Article 39; Article 40; Article 42; Article 43; Article 44; 105-467;*  
17 *105-468; 105-469; 105-483; 105-498; 105-507.2; 105-509.1; 105-510.1; 105-511.3; 105-537; 105-*  
18 *538;*  
19 *Eff. February 1, 1976;*  
20 *Amended Eff. April 1, 2006; October 1, 1993; October 1, 1991; July 5, ~~1980~~ 1980;*  
21 *Readopted Eff. January 1, 2024.*  
22

## 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:

3  
4 **SECTION .4800 - BASIS OF REPORTING**

5  
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.

9  
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.*  
14

## 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 .5001

RECOMMENDATION DATE: October 16, 2023

RECOMMENDED ACTION:

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

COMMENT:

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

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

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

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

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

William W. Peaslee  
Commission Counsel

*G.S. 105-164.13 sets forth exemptions to sales and use taxation. This statute may be interpreted by the Secretary.*

*G.S. 105-164.13(12) exempts "prosthetic devices for human use".*

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

*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.*

*In Subparagraphs (a)(2) and (b)(2), the rule states that the sale of "non-corrective" lenses and contacts are subject to tax.*

*Staff recommends objection pursuant to G.S.150B-21.9(a)(3) for lack of reasonable necessity. If eyeglasses and contact lenses are "non-corrective" they clearly are not devices which "correct a physical deformity or malfunction". Accordingly, they cannot reasonably be considered a prosthetic device nor sales thereof be exempt. There does not appear to be any ambiguity in the statute for the Secretary to interpret.*

*Or does staff lack vision to see it? {Ba Dum Tss}*



## § 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

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

- i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
- j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
- k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
- l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.

**§ 105-262. Rules.**

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

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

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

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

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

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

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

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

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

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

476, s. 193; 1991, c. 45, s. 29; 1993, c. 532, s. 9; 1998-98, s. 21; 2008-107, s. 28.16(e);  
2010-31, s. 31.7A(a); 2011-390, s. 6; 2016-103, s. 6.)

1 17 NCAC 07B .5001 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 **SECTION .5000 - ~~EYEGLASSES~~ EYEGLASSES, CONTACT LENSES, AND OTHER OPHTHALMIC**  
5 **OPTICAL AIDS AND SUPPLIES: SUPPLIES    ~~OCULISTS: OPTOMETRISTS AND OPTICIANS~~**

6  
7 **17 NCAC 07B .5001    ~~PRESCRIPTION EYEGLASSES AND CONTACT LENSES~~**

8 **(a) Eyeglasses:**

9       (1) Corrective Eyeglasses. -- Sales of corrective eyeglasses for human use, ~~ground on prescription of~~  
10 physicians, oculists or optometrists, including frames as an integral part thereof, are not subject to  
11 the tax, exempt from sales and use tax as prosthetic ~~[devices.]~~ devices pursuant to G.S. 105-  
12 164.13(12). When eyeglass cases, lens wipes, and lens solution are given to the purchaser as part of  
13 the sale and included in the sales price of corrective eyeglasses for human use, they are also exempt  
14 under G.S. 105-164.13(12) from sales and use tax.

15 Corrective eyeglasses, whether prescription eyeglasses or reading glasses, are not required to be  
16 sold on prescription in order ~~[to be exempt]~~ for the exemption from sales and use ~~[tax.]~~ to apply.

17 A person who sells corrective eyeglasses shall keep sales records that clearly separate it sales of  
18 corrective eyeglasses from sales of other items. Failure of a person to keep records that establish a  
19 sale is exempt from sales and use tax subjects the person to liability for ~~[the general State, and~~  
20 applicable local and transit rates of] sales and use tax on the sale.

21       (2) Non-Corrective Eyeglasses. -- Sales of non-corrective eyeglasses for human use are subject to the  
22 general State, and applicable local and transit rates of sales and use tax unless specifically exempt  
23 by statute. Local tax rates by county, including any transit tax can be found on the Department's  
24 website at [www.ncdor.gov](http://www.ncdor.gov).

25 **(b) Contact Lenses:**

26       (1) Corrective Contact Lenses. -- Sales of corrective contact lenses for human use are exempt from sales  
27 and use tax as prosthetic ~~[devices.]~~ devices pursuant to G.S. 105-164.13(12). When carrying cases,  
28 patient instruction booklets, patient care kits, aseptors, salt tablets, lens solution, and squeeze bottles  
29 are given to the purchaser as part of the sale and included in the sales price of corrective contact  
30 lenses for human use, they are also exempt under G.S. 105-164.13(12) from sales and use tax.

31 A person who sells corrective contact lenses shall keep sales records that clearly separate its sales  
32 of corrective contact lenses from sales of other items. Failure of a person to keep records that  
33 establish a sale is exempt from sales and use tax subjects the person to liability for ~~[the general State,~~  
34 and applicable local and transit rates of] sales and use tax on the sale.

35       (2) Non-Corrective Contact Lenses. - Sales of non-corrective contact lenses for human use are subject  
36 to the general State, and applicable local and transit rates of sales and use tax unless specifically

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exempt by statute. Local tax rates by county, including any transit tax can be found on the Department's website at [www.ncdor.gov](http://www.ncdor.gov).

*History Note: Authority G.S. 105-164.3; 105-164.4; 105-164.4D; 105-164.13; 105-164.22; 105-262; 105-164.264; [Chapter 105, Articles 39, 40, 42, 43, and 46;] 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;*  
*Eff. February 1, ~~1976~~1976;*  
*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 .5004

RECOMMENDATION DATE: October 16, 2023

RECOMMENDED ACTION:

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

COMMENT:

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

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

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

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

William W. Peaslee  
Commission Counsel



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

*G.S. 105-164.13 sets forth exemptions to sales and use taxation. This statute may be interpreted by the Secretary.*

*G.S. 105-164.13(12) exempts "prosthetic devices for human use".*

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

*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.*

*Each paragraph of the rule declares the named items as subject to sales and use tax pursuant to G.S. 105-164.4. Again, sales which are not exempt are taxed. It is unnecessary to provide a list of items which are subject to tax as they are presumed subject to tax unless exempt. The Secretary makes no reference to which statute is being interpreted or to what language within the statute.*

*Presumably, the Secretary is interpreting G.S. 105-164.3(191) and the interpretation is that the named items are not "prosthetic devices".*

*In Paragraph (d), the rule states that the of "telescopes, binoculars, opera glasses, and similar items" are taxable. Staff does not see, if you will pardon the pun, how these items could be considered "prosthetic devices" as the term is defined. This paragraph would therefore be unnecessary, and staff recommends objection pursuant to G.S. 150B-21.9(a)(3).*

**§ 150B-2. Definitions.**

As used in this Chapter, the following definitions apply:

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

- i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
- j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
- k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
- l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.

**§ 105-262. Rules.**

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

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

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

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

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

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

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

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

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

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

476, s. 193; 1991, c. 45, s. 29; 1993, c. 532, s. 9; 1998-98, s. 21; 2008-107, s. 28.16(e); 2010-31, s. 31.7A(a); 2011-390, s. 6; 2016-103, s. 6.)

**§ 105-164.3. Definitions.**

The following definitions apply in this Article:

...

(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.

**§ 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.



1 17 NCAC 07B .5004 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 .5004 TAXABLE OPTICAL SUPPLIES**

5 (a) Supplies for Corrective Eyeglasses - All sales to users or Sales to consumers of eyeglass frames not for use in  
6 connection with eyeglasses ground on prescription, sunglasses not ground on prescription, solutions for cleaning  
7 eyeglasses, telescopes, binoculars, opera glasses, and similar items, by whomsoever made, eyeglass cleaning cloths or  
8 wipes, eyeglass cases, eyeglass chains or cords, and similar corrective eyeglass supplies when such sales are made  
9 separate and apart from a corrective eyeglass sale or when they are sold with corrective eyeglasses, but billed separate  
10 and apart from the corrective eyeglasses, are subject to the applicable statutory state and local sales or use tax, general  
11 State, and applicable local and transit rates of sales and use [tax.]tax, pursuant to G.S. 105-164.4. In addition, the

12 retail sale of nose pads, temples and any other repair parts for eyeglass frames are subject to the tax without regard to  
13 whether the repair parts are sold to be used on frames with prescription lens. All persons, including opticians,  
14 optometrists, and oculists, making such sales shall register as retail merchants and collect and remit the tax due thereon.

15 (b) Supplies for Corrective Contact Lenses - Sales to consumers of aseptors, salt tablets, squeeze bottles, carrying  
16 cases, patient instruction booklets, patient care kits, and similar corrective contact lens supplies when such sales are  
17 made separate and apart from a corrective contact lens sale or when they are sold with corrective contact lenses, but  
18 billed separate and apart from the corrective contact lenses, are subject to the general State, and applicable local and  
19 transit rates of sales and use [tax.]tax, pursuant to G.S. 105-164.4.

20 (c) Supplies for Non-Corrective Eyeglasses or Contact Lenses - Sales to consumers of optical supplies for non-  
21 corrective eyeglasses or contact lenses are subject to the general State, and applicable local and transit rates of sales  
22 and use [tax.]tax, pursuant to G.S. 105-164.4.

23 (d) Other Optical Items - Sales to consumers of telescopes, binoculars, opera glasses, and similar items are subject to  
24 the general State, and applicable local and transit rates of sales and use [tax.]tax, pursuant to G.S. 105-164.4.

25 (e) Local tax rates by county, including any transit tax can be found on the Department's website at [www.ncdor.gov](http://www.ncdor.gov).

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27 *History Note:* Authority G.S. 105-164.4; 105-164.6; 105-164.13; 105-262; 105-264; ~~Article 39; Article 40; Article~~  
28 ~~42; Article 43; Article 44; Article 46;~~ [Chapter 105, Articles 39, 40, 42, 43, and 46;] 105-467; 105-  
29 468; 105-469; 105-483; 105-498; 105-507.2; 105-509.1; 105-510.1; 105-511.3; 105-537; 105-538;  
30 Eff. February 1, 1976;  
31 Amended Eff. October 1, 2009; October 1, 1993; October 1, 1991, 1991;  
32 Readopted Eff. January 1, 2024.  
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