

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: Department of Revenue

RULE CITATION: 17 NCAC 07B .1202

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:

Staff recommends objection to this rule but notes that it is a particularly close question.

Note that because staff believed this rule was objectionable for fundamentally the same necessity issue as previously objected to rules, staff included this rule in a draft opinion rather than formal requests for changes. The agency's response raised legislative history unique to this rule, which necessitated a separate opinion.

G.S. 150B-21.9(a)(3) charges the Commission with determining whether a rule: "is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed."

The department is implementing G.S. 105-164.4(a)(1), which states in relevant part: "The general rate of tax applies to the following items sold at retail: . . . The sales price of each article of tangible personal property that is not subject to tax under another subdivision in this section. A sale of a freestanding appliance is a retail sale of tangible personal property."

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

It is the duty of the Secretary to interpret all laws administered by the Secretary. The Secretary's interpretation of these laws shall be consistent with the applicable rules.

Seth Ascher
Commission Counsel

An interpretation by the Secretary is prima facie correct. When the Secretary interprets a law by adopting a rule or publishing a bulletin or directive on the law, the interpretation is a protection to the officers and taxpayers affected by the interpretation, and taxpayers are entitled to rely upon the interpretation. If the Secretary changes an interpretation, a taxpayer who relied on it before it was changed is not liable for any penalty or additional assessment on any tax that accrued before the interpretation was changed and was not paid by reason of reliance upon the interpretation.

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

To the extent that this rule is interpreting statutory language, it appears to be stating that items purchased by an accommodation provider are "tangible personal property." This interpretation appears plain on the face of the statute as currently enacted.

The agency, however, has pointed to a session law and codified language suggesting that the General Assembly believed such a rule was necessary. To summarize: S.L. 2017-204 enacted G.S. 105-244.4, which provided a mechanism for relief from tax penalty for accommodation providers who failed to pay the appropriate tax on these purchases prior to January 1, 2018. The bill analysis noted that even with a Department bulletin in place, "some members of the vacation rental industry have incorrectly interpreted or applied the law with respect to the rental of linens as part of a vacation rental and have been assessed by the Department. This section would permit the Department to reduce an assessment by 90% under [certain] circumstances."

Assuming, arguendo, that it is proper to rely on such a bill analysis to determine legislative meaning, it appears that the legislature determined that an ambiguity existed regarding the "rental of linens as part of a vacation rental." However, the legislature did not appear to clarify the statute or rulemaking authority to address this.

Ultimately, staff recommends objection but notes that the necessity of this rule appears to be a close question. On the one hand, action by the General Assembly suggests that it believed a certain degree of ambiguity existed. On the other hand, the text of the statute currently in force seems clear in the area covered by the rule. Staff believes that the General Assembly's identification of a possible ambiguity in this case is not enough to justify the necessity of a rule, as opposed to clarification by other means available.

1 17 NCAC 07B .1202 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 .1202 SUPPLIES AND EQUIPMENT FOR AN ACCOMMODATION**

5 ~~Sales to hotels, motels, inns, tourist camps, and tourist cabins and other places in which rooms, lodgings or~~
6 ~~accommodations are furnished for a consideration;~~ A hotel, motel, inn, tourist camp, tourist cabin, or other
7 accommodation provider making purchases of any supplies, equipment, or fixtures including linens, but not limited
8 to beds, bedding, bathroom supplies, cleaning supplies, and furniture are subject to shall pay the applicable
9 statutory state general State, and applicable local and transit rates of sales or use tax. Local tax rates by county,
10 including any transit tax can be found on the Department's website at www.ncdor.gov.

11
12 *History Note: Authority G.S. 105-164.3; 105-164.4; 105-164.6; 105-262; 105-264; [Chapter 105, Articles 39, 40,*
13 *42, 43, and 46;] Article 39; Article 40; Article 42; Article 43; 105-467; 105-468; 105-469; 105-*
14 *483; 105-498; 105-507.2; 105-509.1; 105-510.1; 105-511.3; 105-537; 105-538;*
15 *Article 44; Article 46;*
16 *Eff. February 1, 1976;*
17 *Amended Eff. May 1, 2009; October 1, 1993; October 1, ~~1991~~-1991;*
18 *Readopted Eff. January 1, 2024.*
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AGENCY: Department of Revenue

RULE CITATION: 17 NCAC 07B .1601, .1605, .1705, .2204, .4109

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:

Staff recommends objection to these five rules for substantially the same reasons as 17 NCAC 07B .0115, .3101, and .3107. The Commission objected to those rules at its September 21, 2023, meeting. This memo summarizes those reasons and the distinctions between each rule.

Note that because staff believes these rules are objectionable for fundamentally the same necessity issue as previously objected to rules, staff provided the agency with a draft of this opinion rather than formal requests for changes. The agency provided a written response which did not change staff's recommendation.

G.S. 150B-21.9(a)(3) charges the Commission with determining whether a rule: "is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed."

The department is implementing G.S. 105-164.4(a)(1), which states in relevant part: "The general rate of tax applies to the following items sold at retail: . . . The sales price of each article of tangible personal property that is not subject to tax under another subdivision in this section. A sale of a freestanding appliance is a retail sale of tangible personal property."

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

Seth Ascher
Commission Counsel

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

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

To the extent that these rules are interpreting statutory language, they appear to be stating that particular objects are "tangible personal property" or that particular categories of sales are retail sales. These interpretations are plain on the face of the statute. As a result, the rule is unnecessary.

Put another way, if these rules were repealed, it appears that nothing would change about the actual sales tax implementation in this State. Given such an effect, it could not be said that this rule is "necessary to implement or interpret" an enactment of the General Assembly.

In considering the cumulative effect of rules proposed for this purpose, staff estimates that of the ninety rules currently pending from the Department of Revenue, at least half raise a similar necessity problem.

The rules appear to make the following "interpretations":

.1601: Purchases of items by nonprofit entities are subject to tax, unless purchased for retail. Note that G.S. 105-164.13(5) provides an explicit statutory exception for items purchased for resale and that G.S. 105-164.14(b) provides for the refund of certain sales and use taxes paid by nonprofit entities.

.1605: Nonprofit entities that make retail sales are retailers and such sales are subject to taxes.

.1705: Sales to housing authorities are taxable sales and housing authorities are not entitled to refunds under G.S. 105-164.14. Note that G.S. 105-164.14(c) states that it "applies only to the following governmental entities" before providing a list. Housing authorities are not on that list.

.2204: Retail sales of food by transportation companies within this state are retail sales subject to tax.

.4109: Sales of blueprints, photographs, and other items to architectural or engineering firms are retail sales of tangible personal property, unless purchased for resale. Note that G.S. 105-164.13(5) provides an explicit statutory exception for items purchased for resale.

1 17 NCAC 07B .1601 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 .1600 – SALES TO OR PURCHASES BY HOSPITALS; EDUCATIONAL; CHARITABLE OR**
5 **RELIGIOUS INSTITUTIONS; ETCNONPROFIT ENTITIES; SALES BY NONPROFIT ENTITIES; AND**
6 **REFUNDS THERETOTO NONPROFIT ENTITIES**

7
8 **17 NCAC 07B .1601 SALES TO OR PURCHASES BY NONPROFIT ENTITIES**

9 (a) For purposes of this Rule, a nonprofit entity is an organization that is exempt from taxation under Section 501(c)(3)
10 of the Internal Revenue Code and includes entities such as hospitals not operated for profit, educational institutions
11 not operated for profit, churches, and civic groups such as chambers of commerce, fraternities, sororities, clubs, lodges,
12 parent and teacher associations, scout councils, and similar organizations.

13 ~~(a)(b) Sales to nonprofits. -- Sales To Nonprofits — Nonprofit entities are not exempt from paying sales and use tax.~~
14 ~~Sales Retail sales of taxable tangible personal property items, as the term item is defined in G.S. 105-164.3, to a~~
15 ~~nonprofit entity for use or consumption by that entity are subject to the applicable rates of sales or and use tax. [tax,]tax,~~
16 ~~pursuant to G.S. 105-164.4, unless acquired by the nonprofit entity for the purpose of resale. A retailer is liable for~~
17 ~~collecting and remitting sales and use tax on a sale to a nonprofit entity, unless the nonprofit provides the retailer a~~
18 ~~Certificate of Exemption in accordance with 17 NCAC 07B .0106. Nonprofit entities include hospitals not operated~~
19 ~~for profit, educational institutions not operated for profit, churches, and civic groups such as chambers of commerce,~~
20 ~~fraternities, sororities, and scout clubs. Sales of building materials, supplies, fixtures, and equipment to contractors~~
21 ~~for use in the performance of contracts with a nonprofit entity are also subject to sales or use tax.~~

22 (c) Purchases by nonprofits:

23 (1) Purchases for Use or Consumption. -- Nonprofit entities are not exempt from paying sales and use
24 tax. Purchases of taxable items by nonprofit entities for use or consumption are subject to the
25 applicable rates of sales and use tax. Any nonprofit entity making taxable purchases from a seller
26 that does not collect North Carolina sales and use tax is required to register with the Department and
27 file returns in accordance with 17 NCAC 07B .0104, and pay the use tax due on such purchases. A
28 nonprofit entity must pay sales tax charged on its purchases and is liable for use tax on its purchases
29 when no sales tax is collected. A nonprofit entity that owes use tax must file a return in accordance
30 with 17 NCAC 7B .0104.

31 (2) Purchases for Resale. -- Nonprofit entities that make purchases of items for the purpose of resale
32 may purchase such items exempt from sales and use tax in accordance with 17 NCAC 07B .0106.

33 (c) Real property contracts with nonprofits:

34 (1) Retail sales of building materials, supplies, fixtures, and equipment to contractors or other persons
35 for use in the performance of real property contracts with a nonprofit entity are subject to sales and
36 use [tax,]tax, pursuant to G.S. 105-164.4H.

1 (2) Purchases of building materials, supplies, fixtures, and equipment by real property contractors or
2 other persons for use in the performance of real property contracts with a nonprofit entity are subject
3 to sale and use [tax.]tax, pursuant to G.S. 105-164.4H.

4 ~~(b) Sales By Nonprofits. Sales by nonprofit entities are subject to sales or use tax unless a specific~~
5 ~~exemption applies to the sale. A nonprofit entity that makes taxable retail sales must register with the~~
6 ~~Department and file sales and use tax returns. A nonprofit entity that is registered with the Department may~~
7 ~~execute a Streamlined Sales Tax Agreement Certificate of Exemption, form E 595E. The certificate shall~~
8 ~~not be used for items the nonprofit entity intends to use or consume.~~

9
10 History Note: Authority G.S. 105-164.3; 105-164.4; 105-164.4H; 105-164.6; 105-164.13; 105-164.28; 105-
11 164.29; 105-262; 105-264; [Chapter 105, Articles 39, 40, 42, 43, and 46;] Article 39; Article 40;
12 Article 42; Article 43; Article 44; ; 105-467; 105-468; 105-469; 105-483; 105-498; 105-507.2; 105-
13 509.1; 105-510.1; 105-511.3; 105-537; 105-538;
14 Eff. February 1, 1976;
15 Amended Eff. April 1, 2006; July 1, 2000; October 1, 1993; October 1, 1991; January 1, 1982; July
16 5, ~~1980~~1980;
17 Readopted Eff. January 1, 2024.

1 17 NCAC 07B .1605 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 .1605 ~~CLUBS; ASSOCIATIONS; ETC.~~ SALES BY NONPROFIT ENTITIES**

5 ~~Clubs, lodges, parents and teachers associations, scout councils and similar organizations which~~ Nonprofit entities as
6 defined in 17 NCAC 07B .1601(a) that make regular-retail sales of taxable tangible personal property must shall
7 register with the Department of Revenue and pay the Department and file sales and use tax returns in accordance with
8 17 NCAC 07B .0104, and collect and remit the applicable sales tax on such sales except as provided by G.S.
9 105-164.13(34) and G.S. 105-164.13(35) due, unless specifically exempt by statute.

10
11 *History Note:* Authority G.S. 105-164.4; 105-164.8; 105-164.29; 105-262; 105-264; [Chapter 105, Articles 39,
12 40, 42, 43, and 46;] 105-467; 105-468; 105-469; 105-483; 105-498; 105-507.2; 105-509.1; 105-
13 510.1; 105-511.3; 105-537; 105-538;

14 *Eff. February 1, 1976;*

15 *Amended Eff. January 1, 1982; July 5, ~~1980-1980;~~*

16 *Readopted Eff. January 1, 2024.*

1 17 NCAC 07B .1705 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 .1705 HOUSING AUTHORITIES**

5 Sales of ~~taxable tangible personal property~~ items, as the term item is defined in G.S. 105-164.3, to housing authorities
6 created and existing under Chapter 157 of the North Carolina General Statutes for use in carrying on their activities
7 are subject to the **applicable** statutory ~~state and local sales or use tax~~ rates of sales and use tax and such housing
8 authorities are not entitled to refunds under the provisions of G.S. 105-164.14.

9

10 *History Note:* Authority G.S. 105-164.3; 105-164.4; 105-164.6; 105-262; 105-264; [Chapter 105, Articles 39, 40,
11 42, 43, and 46;] Article 39; Article 40; Article 42; Article 43; Article 44; Article 46; 105-467; 105-
12 468; 105-469; 105-483; 105-498; 105-507.2; 105-509.1; 105-510.1; 105-511.3; 105-537; 105-538;
13 Eff. February 1, 1976;
14 Amended Eff. May 1, 2009; October 1, 1993; October 1, 1991; August 1, 1988; March 1, 1984; 1984;
15 Readopted Eff. January 1, 2024.

1 17 NCAC 07B .2204 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 .2204 ~~MEALS SALES OF FOOD ON TRAINS; PLANES;~~ TRAINS, PLANES, ETC.**

5 ~~Sales~~ Retail sales of food and prepared foods ~~food or meals~~ by railroads, Pullman cars, steamships, ~~airlines~~ ships,
6 airlines, or other transportation ~~company~~ diners, companies while within this ~~state,~~ State, are subject to the applicable
7 ~~statutory state and local~~ rates of sales or ~~and~~ use tax.

8

9 *History Note:* *Authority G.S. 105-164.4; 105-262; 105-264; Article 39; Article 40; Article 42; Article 43; Article*
10 *44; Article 46; [Chapter 105, Articles 39, 40, 42, 43, and 46;] 105-467; 105-468; 105-469; 105-*
11 *483; 105-498; 105-507.2; 105-509.1; 105-510.1; 105-511.3; 105-537; 105-538;*

12

Eff. February 1, 1976;

13

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

14

Readopted Eff. January 1, 2024.

1 17 NCAC 07B .4109 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 .4109 BLUEPRINTS SOLD TO ARCHITECTS**

5 Sales of blueprints, photographs and other ~~tangible personal property~~ items, as the term item is defined in G.S. 105-
6 164.3, to an architectural or engineering firm for use or consumption and not for resale are subject to the general State,
7 and applicable statutory state and local and transit rates of sales or and use tax. Local tax rates by county, including
8 any transit tax can be found on the Department’s website at www.ncdor.gov.

9

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