

## 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 .1303, .1404, .2001, .2002

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:

*Staff recommends objection to these four rules as written, but notes that resolving the clarity issues discussed in the omnibus staff opinions could also resolve the necessity issues.*

*Note that because staff believed that 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 suggested that a rule on this subject matter may be necessary. However, it is staff's opinion that the rule as written is not necessary.*

*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."*

*As written, these rules appear to be examples of taxable items which are already covered by the plain language of G.S. 105-164.4(a)(1). However, in communication with staff regarding each of these four rules, the department has identified terms defined in G.S. 105-164.3 which may be*

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*ambiguous under the circumstances described by these rules, thus supporting the necessity of interpretation by the department.*

*To summarize the four rules:*

*.1303: As written, the rule indicates that purchases of items to be given away by or at the direction of the purchaser are retail sales of tangible personal property. Staff believes that this, by itself, is unnecessary for reasons stated in the other staff opinions issued on 17 NCAC 07B .0115 and similar rules.*

*However, the department's response indicates that the rule is necessary to interpret how the terms "sales price" and "purchase price" apply to items which are given away by a retailer at the direction of a purchaser. Staff believes that a clear statement of the interpretation being made would likely resolve the necessity issue in this rule.*

*.1404: As written, the rule indicates that purchases of medical supplies, instruments, and equipment by "physicians, dentists, hospitals, and other consumers of medical supplies" are retail sales of tangible personal property. Staff believes that this, by itself, is unnecessary for reasons stated in the other staff opinions issued on 17 NCAC 07B .0115 and similar rules.*

*However, the department's response indicates that the rule is necessary to interpret that "physicians, dentists, and hospitals" are "consumers" of medical supplies and not "retailers" of medical supplies. Staff believes that a clear statement of the interpretation being made would likely resolve the necessity issue in this rule.*

*.2001: As written, the rule indicates that retail sales to an employee of the seller are retail sales. Staff believes that this, by itself, is unnecessary for reasons stated in the other staff opinions issued on 17 NCAC 07B .0115 and similar rules.*

*However, the department's response indicates that the rule is necessary to interpret that an employer who is not in business as a retailer, is a retailer if they make sales to employees. Further, such sales are not covered by the "occasional and isolated sales exception" in rule 17 NCAC 07B .0112. Staff believes that a clear statement of the interpretation being made would likely resolve the necessity issue in this rule.*

*.2002: As written, the rule indicates that purchases by an employer of items to provide as gifts or compensation are retail sales of tangible personal property. Staff believes that this, by itself, is unnecessary for reasons stated in the other staff opinions issued on 17 NCAC 07B .0115 and similar rules.*

*However, the department's response indicates that the rule is necessary to interpret that a business that purchases an item as a gift or compensation is a "consumer" of the item. Further, that a manufacturer that ordinarily does not collect sales tax on items sold for resale must pay sales tax if those items are given away as gifts or compensation. Staff believes that a clear statement of the interpretation being made would likely resolve the necessity issue in this rule.*

1 17 NCAC 07B .1303 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 .1303 ~~DELIVERIES-GIFTS TO DONEES~~**

5 (a) A donee is a person to whom the buyer of tangible personal property gives the property that receives an item, as  
6 the term item is defined in G.S. 105-164.3, from a purchaser without charge. Retailers making sales of items sourced  
7 to this State shall collect and remit the applicable rates of tax due on the sales price of the item, even if the item is  
8 given away by the purchaser to a donee or delivered directly to a donee.

9 (b) The purchaser of items used or consumed in this State is liable for the applicable rates of tax due on the purchase  
10 price of the items, even if the items are given away by the purchaser to a donee or delivered directly to a donee, unless  
11 the tax is paid to the retailer at the time of purchase. When a North Carolina retailer sells tangible personal property  
12 to a buyer and the retailer, at the direction of the buyer, delivers the property to the buyer's donee instead of to the  
13 buyer, the sale by the retailer is subject to applicable statutory State and local sales tax only if the delivery to the donee  
14 is made inside the State. If the delivery to the donee is made outside the State, no State or local sales or use tax applies.

15 (c) A retailer who, at the direction of a buyer, delivers property to the ~~buyer's purchaser's~~ donee at a point outside the  
16 State ~~must have~~ shall maintain acceptable proof of delivery in accordance with 17 NCAC 07B .1301.

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18 *History Note: Authority G.S. 105-164.3; 105-164.4; 105-164.4B; 105-164.6; 105-262; 105-264; [Chapter 105,*  
19 *Articles 39, 40, 42, 43, and 46;] Article 39; Article 40; Article 42; Article 43; Article 44;*  
20 *Eff. February 1, 1976; 105-467; 105-468; 105-469; 105-483; 105-498; 105-507.2; 105-509.1; 105-*  
21 *510.1; 105-511.3; 105-537; 105-538;*  
22 *Amended Eff. April 1, 2006; July 18, 2002; July 1, 1999; October 1, 1993; October 1, 1991; March*  
23 *1, 1984; January 3, ~~1984~~1984;*  
24 *Readopted Eff. January 1, 2024.*

1 17 NCAC 07B .1404 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 .1404      ~~MEDICAL SUPPLIES~~ SUPPLIES, INSTRUMENTS, AND EQUIPMENT**

5 Sales to physicians, dentists, hospitals, or other ~~users or~~ consumers of medical supplies, instruments ~~medical~~  
6 instruments, medical equipment, and laboratory equipment used to diagnose, prevent, treat, or cure disease are subject  
7 to ~~applicable state~~ the general State, and applicable local and transit rates of sales or and use tax ~~tax~~, pursuant to G.S.  
8 105-164.4, unless exempt by statute. Local tax rates by county, including any transit tax can be found on the  
9 Department's website at www.ncdor.gov. ~~Sales of medical equipment and medical supplies are also subject to~~  
10 ~~applicable state and local sales or use tax, unless their sale is exempt under G.S. 105-164.13(12)d. That statute exempts~~  
11 ~~from tax durable medical equipment and related medical supplies that are covered under the Medicare or Medicaid~~  
12 ~~program and are sold on either a certificate of medical necessity or a written prescription. Items listed below are~~  
13 ~~subject to tax, unless their sale is exempt under G.S. 105-164.13(12)d. Items not included in the list may also be~~  
14 Examples of medical supplies, instruments, and equipment subject to ~~tax~~ sales and use tax include the following:

- 15           (1)     ~~Adhesive~~ adhesive tape;
- 16           (2)     ~~Alcohol;~~ alcohol;
- 17           (3)     ~~Bandages;~~ bandages;
- 18           (4)     ~~Battery~~ battery chargers;
- 19           (5)     ~~Bed~~ bed pans;
- 20           (6)     ~~Betadine~~ betadine solution;
- 21           (7)     ~~Blood~~ blood glucose monitors;
- 22           (8)     ~~Blood~~ blood glucose test/reagent strips;
- 23           (9)     ~~Blood~~ blood or urine control strips;
- 24           ~~(10) — breast pumps;~~
- 25           (10) ~~(11)~~ (10)     ~~Breathing~~ breathing circuits;
- 26           (11) ~~(12)~~ (11)     ~~CO2~~ carbon dioxide (CO2) saturation monitors and accessories;
- 27           ~~(13)~~ (12)     ~~cold packs and hot packs;~~
- 28           ~~(14)~~ (13)     ~~collection bags;~~
- 29           (12) ~~(15)~~ (14)     ~~Cotton;~~ cotton;
- 30           (13) ~~(16)~~ (15)     ~~Crutch~~ crutch and cane holders;
- 31           (14) ~~(17)~~ (16)     ~~Cylinder~~ cylinder tank carriers;
- 32           ~~(18)~~ (17)     ~~denture adhesive;~~
- 33           (15) ~~(19)~~ (18)     ~~Dial-a-dose~~ dial-a-does insulin delivery devices;
- 34           (16) ~~(20)~~ (19)     ~~Dressings;~~ dressings;
- 35           (17) ~~(21)~~ (20)     ~~Exam~~ exam and surgical gloves;
- 36           (18) ~~(22)~~ (21)     ~~Gauze;~~ gauze;
- 37           ~~(23)~~ (22)     ~~glucose for insulin reactions;~~

1 ~~(24)~~(23) incontinence pads, sheets, and liners;  
2 ~~(19)~~—Knives;  
3 ~~(20)~~~~(25)~~(24) I.V.intravenous (IV) hangers;  
4 ~~(21)~~—I.V. poles;  
5 ~~(26)~~(25) knives;  
6 ~~(22)~~~~(27)~~(26) Lancets;lancets;  
7 ~~(28)~~(27) lubricants;  
8 ~~(23)~~~~(29)~~(28) Microscopes;microscopes;  
9 ~~(24)~~~~(30)~~(29) Mouthpieces;mouthpieces;  
10 ~~(25)~~~~(31)~~(30) Needles;needles and syringes;  
11 ~~(32)~~(31) non-corrective eye lenses;  
12 ~~(33)~~(32) ostomy barrier wipes and powders;  
13 ~~(34)~~(33) ostomy cleansers, deodorants, and adhesive removers;  
14 ~~(26)~~~~(35)~~(34) Peak-peak flow meters;  
15 ~~(27)~~~~(36)~~(35) Percussors;percussors;  
16 ~~(28)~~~~(37)~~(36) Pulse-pulse oximeters;  
17 ~~(29)~~~~(38)~~(37) Rollabout rollabout chairs;  
18 ~~(39)~~(38) soap;  
19 ~~(30)~~~~(40)~~(39) Seissors;scissors;  
20 ~~(31)~~~~(41)~~(40) Sterile-sterile water;  
21 ~~(32)~~—Surgical gloves;  
22 ~~(33)~~—Syringes;  
23 ~~(42)~~(41) tissues;  
24 ~~(34)~~~~(43)~~(42) Tracheal-trachael suction catheters;  
25 ~~(35)~~~~(44)~~(43) Tracheostomy-tracheostomy care kits;  
26 ~~(36)~~~~(45)~~(44) Tracheostomy-tracheostomy cleaning brushes;  
27 ~~(37)~~~~(46)~~(45) Tracheostomy-tracheostomy masks and collars;  
28 ~~(38)~~~~(47)~~(46) Tubing;tubing, sold by the linear foot or otherwise;  
29 ~~(39)~~~~(48)~~(47) Urinals;urinals;  
30 ~~(40)~~~~(49)~~(48) Urine-urine test or reagent strips or ~~tablets; and~~tablets; or  
31 ~~(41)~~~~(50)~~(49) X-rayx-ray machines.

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33 *History Note:* *Authority G.S. 105-164.4; 105-164.6; 105.164.13; 105-262; 105-264; [~~Chapter 105, Articles 39,~~*  
34 *40, 42, 43, and 46;]* 105-467; 105-468; 105-469; 105-483; 105-498; 105-507.2; 105-509.1; 105-  
35 510.1; 105-511.3; 105-537; 105-538;  
36 *Eff. February 1, 1976;*  
37 *Amended Eff. July 1, 2000; August 1, 1998; October 1, 1993; October 1, 1991-1991;*

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Readopted Eff. January 1, 2024.

1 17 NCAC 07B .2001 is readopted with substantive changes pursuant to G.S. 150B-21.3A(c)(2)g without notice  
2 pursuant to G.S. 150B-1(D)(4) as follows:

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4 **SECTION .2000 - SALES AND GIFTS BY EMPLOYERS TO EMPLOYEES ~~OR OTHER USERS~~**

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6 **17 NCAC 07B .2001 SALES TO EMPLOYEES**

7 ~~Sales of tangible personal property by any employer, manufacturer, processor, wholesaler, distributor or jobber to his~~  
8 ~~employees or others for use or consumption are subject to the applicable statutory state and local sales or use tax,~~  
9 ~~unless specifically exempt, notwithstanding that such sales are infrequent or comprise only a small fraction of the~~  
10 ~~vendor's total business, and every employer, manufacturer, processor, wholesaler, distributor or jobber making such~~  
11 ~~sales must register with the department and collect and remit the tax due thereon. The fact that any such vendor only~~  
12 ~~makes sales to his employees shall not relieve him of this requirement.~~

13 (a) An employer engaged in business in this State shall collect and remit the sales and use tax due on the retail sale of  
14 an item, as the term item is defined in G.S. 105-164.3, to an employee. The tax due shall be computed at the applicable  
15 State, local, and transit rates of [tax]tax, pursuant to G.S. 105-164.4, on the sales price of the item. Local tax rates by  
16 county, including any transit tax can be found on the Department's website at [www.ncdor.gov](http://www.ncdor.gov). An employer required  
17 to collect sales or use tax shall register with the Department in accordance with 17 NCAC 07B .0104. The fact that an  
18 employer's sales are infrequent, comprise only a small fraction of the total business, or are to employees only, shall  
19 not relieve an employer of these requirements.

20 (b) Employees shall pay the sales or use tax due on the purchase of an item from their employer. The tax due shall be  
21 computed at the [applicable] State, local, and transit rates of tax on the sales price or purchase price of the item. Local  
22 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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24 *History Note: Authority G.S. 105-164.3; 105-164.4; 105-164.6; 105-262; 105-264; [Chapter 105, Articles 39, 40,*  
25 *42, 43, and 46;] Article 39; Article 40; Article 42; Article 43; Article 44; 105-467; 105-468; 105-*  
26 *469; 105-483; 105-498; 105-507.2; 105-509.1; 105-510.1; 105-511.3; 105-537; 105-538;*

27 *Eff. February 1, 1976;*

28 *Amended Eff. April 1, 2006; October 1, 1993; October 1, ~~1991~~, 1991;*

29 *Readopted Eff. January 1, 2024.*

1 17 NCAC 07B .2002 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 .2002      GIFTS AND WAGES TO EMPLOYEES AN EMPLOYEE OR OTHER PERSON**

5 Gifts of tangible personal property by any employer, manufacturer, processor, wholesaler, distributor or jobber to his  
6 employees or other persons are subject to the applicable statutory state and local sales or use tax, unless the donor paid  
7 sales or use tax on the sales or purchase price of the donated property at the time he acquired the same. The tax due  
8 by reason of any such gift shall be paid by the donor and shall be computed on the donor's cost price of the property  
9 donated, irrespective of whether fabricated, produced, manufactured or processed by the donor, or acquired elsewhere.  
10 An employer shall pay the sales or use tax due on the purchase of an item, as the term item is defined in G.S. 105-  
11 164.3, that is provided to an employee or other person as a gift or as compensation. The tax due shall be computed at  
12 the applicable State, local, and transit rates of sales and use ~~tax~~ tax, pursuant to G.S. 105-164.4, on the sales price or  
13 purchase price of the item given away, irrespective of whether the item is fabricated, produced, manufactured, or  
14 processed by the employer, or acquired elsewhere. Local tax rates by county, including any transit tax can be found  
15 on the Department's website at [www.ncdor.gov](http://www.ncdor.gov).

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17 *History Note:*      *Authority G.S. 105-164.3; 105-164.4; 105-164.4B; 105-164.6; 105-262; 105-264; [Chapter 105,*  
18 *Articles 39, 40, 42, 43, and 46;]Article 39; Article 40; Article 42; Article 43; Article 44; 105-467;*  
19 *105-468; 105-469; 105-483; 105-498; 105-507.2; 105-509.1; 105-510.1; 105-511.3; 105-537; 105-*  
20 *538;*  
21 *Eff. February 1, 1976;*  
22 *Amended Eff. April 1, 2006; October 1, 1993; October 1, ~~1991~~-1991;*  
23 *Readopted Eff. January 1, 2024.*  
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