

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 .1601, .1605, .1705, .2204

RECOMMENDATION DATE: December 11, 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:

The Commission objected to these rules at its October meeting on the grounds of authority, clarity, and necessity through several overlapping staff opinions. The agency's revisions have resolved the authority and clarity issues. The agency's revisions have not resolved the necessity issue. Therefore, I recommend that the Commission continue its October objection to these rules.

For the Commission's convenience the relevant text of the October staff opinion is reproduced below:

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."

Seth Ascher
Commission Counsel

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. 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.