



North Carolina Department of Revenue

Roy Cooper
Governor

Ronald G. Penny
Secretary

August 20, 2020

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Re: [REDACTED]
Private Letter Ruling Request
Account ID: [REDACTED]
Taxpayer's FEIN: [REDACTED]

Dear [REDACTED]:

The Department has completed its review of your request for a written determination on behalf of your client, [REDACTED]. ("Taxpayer"). In making this written determination, the Department has considered the facts presented in your initial request as well as any supplemental information provided to the Department.

This private letter ruling is a written determination issued under N.C. Gen. Stat. § 105-264.2 and applies the tax law to a specific set of existing facts furnished by you on behalf of Taxpayer. This written determination is applicable only to Taxpayer and as such has no precedential value except to Taxpayer.

Overview and Relevant Facts

You advise that "[Taxpayer] is a distributor of electrical, communications and data networking products to customers in a variety of industries [REDACTED]. [Taxpayer] wishes to confirm the applicability of North Carolina sales tax on purchases made by construction contractors to fulfill their real property construction contracts with the federal government and its agencies.

"The construction contractors ('contractors') place purchase orders with [Taxpayer] for the delivery of the supplies and materials necessary to fulfill real property construction projects. The purchase orders may or may not reference the specific contract number(s) and/or the governmental agency (or agencies) for which the supplies and materials were purchased. However, [Taxpayer] does have sufficient information to facilitate the delivery of goods to the designated governmental agency ship[]to address(es). Title passes directly to the contractors who make functional use of the property prior to passage of title to the federal government or its

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agencies. The contractors are paid a fee by the federal government and/or its agencies. The contracts may be performed on either a lump sum or cost-plus basis.

"[Taxpayer currently collects and remits North Carolina sales tax on all applicable sales to contractors. Some of the federal construction contractors assert they are permitted to purchase 'tax free' materials and supplies to fulfill their federal government construction contracts.]"

Issue

Are North Carolina sales and use taxes applicable to Taxpayer's retail sale of items to real property contractors?

Applicable Statutes and References

Under Article 5 ("Article") of the North Carolina Revenue Act ("Act")¹, N.C. Gen. Stat. § 105-164.1 *et. seq.*, Subchapter VIII: Local Government Sales and Use Tax, and Chapter 1096 of the 1967 Session Laws, State, local, and applicable transit sales and use taxes are imposed on a retailer engaged in business in the State on the retailer's net taxable sales or gross receipts of tangible personal property, certain digital property, and certain services at the percentage rates listed in subdivision N.C. Gen. Stat. § 105-164.4(a) and the applicable local and applicable transit rates of sales and use tax. N.C. Gen. Stat. §§ 105-164.3(23), 105-164.3(65), 105-164.3(77), 105-164.3(123), 105-164.3(195), 105-164.3(223), 105-164.4, 105-164.6, 105-467, 105-468, 105-483, 105-498, 105-507.2, 105-509.1, and 105-537.

N.C. Gen. Stat. § 105-164.4H provides, in part, that "[a] real property contractor is the consumer of the tangible personal property or certain digital property that the real property contractor purchases, installs, or applies for others to fulfill a real property contract and that becomes part of real property or used to fulfill the contract. A retailer engaged in business in the State shall collect tax on the sales price of an item sold at retail to a real property contractor unless a statutory exemption in G.S. 105-164.13 or G.S. 105-164.13E applies."

N.C. Gen. Stat. § 105-164.3 (23), defines the term "certain digital property" as "[s]pecified digital products and additional goods. The term does not include an information service or an educational service."

N.C. Gen. Stat. § 105-164.3 (91), defines the term "item" as "[t]angible personal property, certain digital property, or a service, unless the context requires otherwise."

N.C. Gen. Stat. § 105-164.3 (175), defines the term "real property contractor" as "[a] person that contracts to perform a real property contract in accordance with [N.C. Gen. Stat. §] 105-164.4H. The term includes a general contractor, a subcontractor, or a builder for purposes of this Article."

N.C. Gen. Stat. § 105-164.3(193), defines the term "retail sale or sale at retail" as "[t]he sale, lease, or rental for any purpose other than for resale, sublease, or subrent."

¹ References to the Act and North Carolina General Statutes are based on the laws in effect as of the date of issuance of this private letter ruling except as otherwise noted herein.

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N.C. Gen. Stat. § 105-164.3(201), defines the term “sale or selling,” in part, as “[t]he transfer for consideration of title, license to use or consume, or possession of tangible personal property or certain digital property or the performance for consideration of a service. The transfer or performance may be conditional or in any manner or by any means.”

N.C. Gen. Stat. § 105-164.3(223), defines the term “tangible personal property” as “[p]ersonal 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.”

N.C. Gen. Stat. § 105-164.3(233) defines the term “use” as “[t]he exercise of any right, power, or dominion whatsoever over an item by the purchaser of the item. The term includes withdrawal from storage, distribution, installation, affixation to real or personal property, and exhaustion or consumption of the property or service by the owner or purchaser. The term does not include a sale of an item in the regular course of business.”

Sales and Use Tax Bulletin 36-3A provides “[g]enerally, sales of items to contractors for use in performing contracts with the United States Government or its agencies or instrumentalities are subject to the general State, applicable local and applicable transit rates of sales and use tax. The Federal Government is entitled to an annual refund of the general State, applicable local and applicable transit rates of sales and use tax paid by its contractors on purchases of building materials, supplies, fixtures, and equipment that become a part of or are annexed to any building or structure that is owned or leased by the governmental entity and is being erected, altered or repaired for use by the governmental entity.”

For the purpose of the proper administration of the Article and to prevent evasion of the retail sales tax, it is presumed “[t]hat all gross receipts of wholesale merchants and retailers are subject to the retail sales tax until the contrary is established by proper records as required in [the] Article.” N.C. Gen. Stat. § 105-164.26(1).

Pursuant to N.C. Gen. Stat. § 105-264, “[i]t is the duty of the Secretary to interpret all laws administered by the Secretary. . . . An interpretation by the Secretary is prima facie correct.”

Ruling

A real property contractor is the user or consumer of the tangible personal property or certain digital property that the real property contractor purchases and uses to fulfill the real property contract. A retailer engaged in business in North Carolina should collect sales tax on the sales price of the items sold to a real property contractor unless a statutory exemption applies. Based on the facts submitted to the Department for consideration, Taxpayer’s retail sales of items to real property contractors are subject to North Carolina sales and use tax..

This ruling is based solely on the facts submitted to the Department for consideration of the transactions described. If the facts and circumstances given are not accurate, or if they change, then the taxpayer requesting this ruling may not rely on it. If a taxpayer relies on this letter ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material aspect from the facts and circumstances given in this letter ruling, the letter ruling

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will not afford the taxpayer any protection. It should be noted that this letter ruling is not to be cited as precedent and that a change in statute, a regulation, or case law could void this ruling.

Issued on behalf of the Secretary of Revenue
By the Sales and Use Tax Division