



North Carolina Department of Revenue

Roy Cooper
Governor

Ronald G. Penny
Secretary

February 15, 2021

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

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

Dear [REDACTED]:

The Department has completed its review of your request for a written determination on behalf of [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 addressed herein and as such has no precedential value except to Taxpayer.

Overview and Relevant Facts

You state Taxpayer "is engaged in the retail sales and leasing of commercial modular buildings. [Taxpayer] purchase[s] the buildings from a manufacturer and sell[s] them to [Taxpayer's] customers. [Taxpayer] collect[s] and remit[s] sales tax on the sales and leasing of these buildings as required by the State of North Carolina. [Taxpayer is] required to have a general contractor's license. . . . [Taxpayer] also conduct[s] business as a general contractor - i.e. [Taxpayer] build[s] residential houses and perform[s] renovations and additions to residential and commercial property, among other things. [Taxpayer] hire[s] subcontractors to perform electrical, plumbing, transport, setup and many other services."

You provided an example of a sale Taxpayer would make under contract for a commercial modular building. The sale includes the building, delivery of the building to the customer's site, foundation materials, foundation labor, concrete walkways, walkway covering, block/level/set/tie down unit, underpinning unit, electrical work, wooden decks and porches, special equipment that is installed as part of the building, a generator, installed as part of the building, and water/sewer/plumbing work.

February 15, 2021
Page: 2

You advised that “[t]he following assumptions are made . . . :

- [Taxpayer is] purchasing the new modular building from a commercial modular building manufacturer and [is], therefore, not required to pay sales tax on the purchase
- Subcontractors will be hired to perform all work
- Subcontractors paid sales tax on materials when purchased for use on this job
- The customer owns the land
- The building will be affixed to real property and will not be ‘moved around’
- The building will be used for [commercial] purposes only. No one will be living in the building.”

Issue

Is the sale of the commercial modular building by Taxpayer as provided in the example above a capital improvement to real property?

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, applicable local and transit rates of sales and use taxes are imposed on a retailer’s net taxable sales or gross receipts, as applicable, of tangible personal property, certain digital property, and certain services at the percentage rates listed in N.C. Gen. Stat. § 105-164.4(a). N.C. Gen. Stat. §§ 105-164.4, 105-467, 105-483, 105-498, 105-507.2, 105-509.1, and 105-537.

N.C. Gen. Stat. § 105-164.3(31) defines the term “capital improvement” as “[o]ne or more of the following:

- a. New construction, reconstruction, or remodeling.
- b. Performance of work that requires the issuance of a permit under the State Building Code, other than repair or replacement of electrical components, gas logs, water heater, and similar individual items that are not part of new construction, reconstruction, or remodeling.
- c. Installation of a transmission, distribution, or other network asset on land owned by a service provider or on a right-of-way or easement in favor of a service provider, notwithstanding that any separately stated charges billed to a customer for repair, maintenance, and installation services or a contribution in aid of construction are included in the gross receipts derived from services subject to the combined general rate under [N.C. Gen. Stat. §] 105-164.4. For purposes of this sub-subdivision, the term ‘service provider’ means a person, including a governmental entity, who provides any of the services listed in this sub-subdivision, and the term ‘governmental entity’ means a State agency, the federal government, or a governmental entity listed in [N.C. Gen. Stat. §] 105-164.14(c). The services are:
 1. Telecommunications service or ancillary service.
 2. Video programming.
 3. Electricity or piped natural gas.
 4. Water or sewer service.

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.

February 15, 2021
Page: 3

- d. Installation of equipment or a fixture that is attached to real property and that meets one or more of the following conditions:
 - 1. Is capitalized and depreciated under Generally Accepted Accounting Principles or International Financial Reporting Standards.
 - 2. Is depreciated under the Code.
 - 3. Is expensed under Section 179 of the Code.
- e. Painting or wallpapering of real property, except where painting or wallpapering is incidental to the repair, maintenance, and installation services.
- f. Replacement or installation of a septic tank system, siding, roof, plumbing, electrical, commercial refrigeration, irrigation, sprinkler, or other similar system. The term does not include the repair, replacement, or installation of electrical or plumbing components, water heaters, gutters, and similar individual items that are not part of new construction, reconstruction, or remodeling.
- g. Replacement or installation of a heating or air conditioning unit or a heating, ventilation, or air conditioning system. The term does not include the repair, replacement, or installation of gas logs, water heaters, pool heaters, and similar individual items that are not part of new construction, reconstruction, or remodeling.
- h. Replacement or installation of roads, driveways, parking lots, patios, decks, and sidewalks.
- i. Services performed to resolve an issue that was part of a real property contract if the services are performed within six months of completion of the real property contract, or, for new construction, within 12 months of the new structure being occupied for the first time.
- j. Landscaping.
- k. An addition or alteration to real property that is permanently affixed or installed to real property and is not an activity listed in subdivision (225) of this section as repair, maintenance, and installation services.”

N.C. Gen. Stat. § 105-164.3(205) defines the term “real property” as “[a]ny one or more of the following:

- a. Land.
- b. Building or structure on land.
- c. Permanent fixture on land.
- d. A manufactured home or a modular home on land.”

N.C. Gen. Stat. § 105-164.3(207) defines the term “real property contract” as “[a] contract between a real property contractor and another person to perform a capital improvement to real property.”

N.C. Gen. Stat. § 105-164.3(209) 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 [Article 5 of Chapter 105 of the North Carolina General Statutes].”

N.C. Gen. Stat. § 105-164.4H(a) provides, in part, “[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. . . . Where a real property contractor purchases tangible

February 15, 2021
Page: 4

personal property or certain digital property for storage, use, or consumption in this State, or a service sourced to this State and the tax due is not paid at the time of purchase, the provisions of [N.C. Gen. Stat. §] 105-164.6 apply. . . .”

N.C. Gen. Stat. § 105-164.6 provides, in part, that “[a]n excise tax at the applicable rate and maximum tax, if any, set in [N.C. Gen. Stat. §] 105-164.4 is imposed on . . . items if the item is subject to tax under [N.C. Gen. Stat. §] 105-164.4. . . . The tax imposed. . . is payable by the person who purchases, leases, or rents the items If an item purchased becomes a part of real property in the State, the real property contractor, the retailer-contractor, the subcontractor, the lessee, and the owner are jointly and severally liable for the tax, except as provided in [N.C. Gen. Stat. §] 105-164.4H(a1) regarding receipt of an affidavit of capital improvement. The liability of a real property contractor, a retailer-contractor, a subcontractor, a lessee, or an owner who did not purchase the item is satisfied by receipt of an affidavit from the purchaser certifying that the tax has been paid.”

N.C. Gen. Stat. § 105-164.3(195) defines the term “purchase price” as “[t]he term has the same meaning as the term ‘sales price’ when applied to an item subject to use tax.”

N.C. Gen. Stat. § 105-164.3(237)a. defines the term “sales price,” in part, as “[t]he total amount or consideration for which an item is sold, leased, or rented. The consideration may be in the form of cash, credit, property, or services. The sales price must be valued in money, regardless of whether it is received in money. The term includes all of the following:

1. The retailer's cost of the item sold.
2. The cost of materials used, labor or service costs, interest, losses, all costs of transportation to the retailer, all taxes imposed on the retailer, and any other expense of the retailer.
3. Charges by the retailer for any services necessary to complete the sale.
4. Delivery charges.
5. Installation charges. . . .”

Ruling

Although Taxpayer may enter into contracts with details that differ from the example provided in this letter, the Department, for the purposes of this private letter ruling, is only issuing a ruling based on the information provided. Other contracts or scenarios entered into by Taxpayer are not addressed in this ruling.

Based on the information provided, Taxpayer installs commercial modular buildings for its customers. These buildings become attached to real property upon installation. The example provided by Taxpayer includes the construction of a foundation, sidewalks, and significant plumbing and electrical work. Based on all of the facts, Taxpayer is performing a capital improvement to the real property. The contract for Taxpayer to perform the capital improvement is a real property contract. In addition, Taxpayer is a real property contractor because it contracts to perform a real property contract.

February 15, 2021
Page: 5

Taxpayer is not liable for collecting and remitting the general State, applicable local and transit rates of sales and use tax on the gross receipts earned from the real property contract. Taxpayer should not charge the customer sales and use tax for the real property contract. See Sales and Use Tax Bulletin 72-3 A.

Taxpayer is liable for paying or accruing the applicable sales and use tax due on the purchase of tangible personal property and certain digital property Taxpayer purchases, installs or applies to fulfill the real property contract and that becomes part of the real property. In addition, taxpayer is liable for paying or accruing applicable sales and use tax on tangible personal property or certain digital property it uses to fulfill the contract. These taxable purchases include the purchase price of the commercial modular building.

Based on the details included in the example provided in your letter, Taxpayer hires subcontractors to perform some of the work. Taxpayer states that subcontractors pay sales tax² on purchases of materials needed to fulfill the real property contract.

When Taxpayer hires a subcontractor to perform a portion of the overall contract, Taxpayer should complete the form E-589CI, Affidavit of Capital Improvement. See Sales and Use Tax Directive SD-18-1. The receipt of an affidavit of capital improvement, absent fraud or other egregious activities, establishes that the subcontractor or other person receiving the affidavit should treat the transaction as a capital improvement, and the transaction is subject to tax in accordance with subsection (a) of N.C. Gen. Stat. § 105-164.4H.

This ruling is based solely on the facts submitted to the Department of Revenue for consideration of the transactions described. If the facts and circumstances given are not accurate, or if they change, then Taxpayer may not rely on it. If Taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of Taxpayer is different in any material aspect from the facts and circumstances given in this ruling, then the ruling will not afford Taxpayer any protection. It should be noted that this document 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

² While Taxpayer's request assumes tax is paid on items purchased by subcontractors, Taxpayer should receive an affidavit from the purchaser certifying that tax has been paid. See N.C. Gen. Stat. § 105-164.6(b). Taxpayer should maintain these records with all other records required to be retained by the Revenue Laws.