



North Carolina Department of Revenue

Pat McCroy
Governor

Lyons Gray
Secretary

March 1, 2013

Account ID: [REDACTED]
FEIN: [REDACTED]

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

Re: [REDACTED].

Dear Mr. [REDACTED]

We are in receipt of your letter dated January 23, 2012 requesting a private letter ruling on behalf of [REDACTED], [REDACTED] ("[REDACTED]" regarding the application of North Carolina sales and use taxes to items purchased by your client. At the time of your request, you advised that "[y]our client [REDACTED] [was] not under audit by North Carolina; however, they are under audit by [REDACTED] who has indicated that they are requiring an official position by the Department related to certain use tax provisions in order to properly complete their examination." We understand that your client is currently under audit by the Department's Examination Division.

It is our understanding that [REDACTED] "has its headquarters and distribution facilities in North Carolina (but store locations in a number of states), which results in a number of items for its store locations being sold and shipped to North Carolina. The items in question are not inventory type items, rather [y]our request involves items which will ultimately be shipped to store locations both inside and outside of the state such as registers, scanners, back office computers and other similar items." On behalf of your client, you request "that the Department provide guidance on several topics related to the application of North Carolina's use tax and any exclusions provided from use tax for items initially delivered to North Carolina but subsequently repackaged and used in other states."

Statutory Authority

N. C. Gen. Stat. § 105-164.3(14) defines "in this (the) State" as "[w]ithin the exterior limits of the State of North Carolina, including all territory within these limits owned by or ceded to the United States of America."

N.C. Gen. Stat. § 105-164.3(34) defines "retail sale or sale at retail" as "[t]he sale, lease, or rental for any purpose other than for resale, sublease, or subrent."

N.C. Gen. Stat. § 105-164.3(35) defines "retailer" in part as "[a] person engaged in the business of . . . [m]aking sales at retail, offering to make sales at retail, or soliciting sales at retail of

tangible personal property, digital property, or services for storage, use, or consumption in this State. . . . Delivering, erecting, installing, or applying tangible personal property for use in this State. . . . Making a remote sale, if one of the conditions listed in [N.C. Gen. Stat. § 105-164.8(b)] is met.”

N.C. Gen. Stat. § 105-164.3(44) defines “storage” as “[t]he keeping or retention in this State for any purpose, except sale in the regular course of business, of tangible personal property or digital property purchased from a retailer. The term does not include a purchaser’s storage of tangible personal property or digital property in any of the following circumstances:

- a. When the purchaser acquires the property for the purchaser’s use outside the State and subsequently takes it outside the State and uses it solely outside the State.
- b. When the purchaser acquires the property to process, fabricate, manufacture, or otherwise incorporate it into or attach it to other property for the purchaser’s use outside the State and, after incorporating or attaching the purchased property, the purchaser subsequently takes the other property outside the State and uses it solely outside the State.”

N.C. Gen. Stat. § 105-164.3(49) defines “use” as “[t]he exercise of any right, power, or dominion whatsoever over tangible personal property, digital property, or a service by the purchaser of the property or service . . . [t]he term does not include . . . [a] purchaser’s use of tangible personal property or digital property in any of the circumstances that would exclude the storage of the property from the definition of “storage” in subdivision (44) of [N.C. Gen. Stat. § 105-164.3].”

N.C. Gen. Stat. § 105-164.4 provides “[a] privilege tax is imposed on a . . . retailer’s net taxable sales or gross receipts. . . .” N.C. Gen. Stat. § 105-164.3(24) defines “net taxable sales” as “[t]he gross retail sales of the business of a retailer taxed under [Article 5] after deducting exempt sales and nontaxable sales.”

N.C. Gen. Stat. § 105-164.6 imposes a “use tax” on tangible personal property, digital property, or services sourced to this State purchased, leased or rented, inside or outside this State for storage, use or consumption in this State.

N.C. Gen. Stat. § 105-164.8(a) provides “[a] retailer is required to collect the tax imposed by [Article 5] notwithstanding any of the following:

- (1) That the purchaser’s order for the contract of sale is delivered, mailed, or otherwise transmitted by the purchaser to the retailer at a point outside this State as a result of solicitation by the retailer through the medium of a catalogue or other written advertisement.
- (2) That the purchaser’s order or the contract of sale is made or closed by acceptance or approval outside this State, or before any tangible personal property or digital property that is part of the order or contract enters this State.
- (3) That the purchaser’s order or the contract of sale provides that the property shall be or is in fact procured or manufactured at a point outside this State and shipped directly to the purchaser from the point of origin.
- (4) That the property is mailed to the purchaser in this State or a point outside this State or delivered to a carrier outside this State f.o.b. or otherwise and directed to the purchaser in this State regardless of whether the cost of transportation is paid by the retailer or by the purchaser.
- (5) That the property is delivered directly to the purchaser at a point outside this State.

- (6) Any combination in whole or in part of any two or more of the foregoing statements of fact, if it is intended that the property purchased be brought to this State for storage, use, or consumption in this State.”

N.C. Gen. Stat. § 105-164.8(b) provides “[a] retailer who makes a remote sale is engaged in business in this State and is subject to the tax levied under [Article 5] if at least one of the following conditions is met:

- (1) The retailer is a corporation engaged in business under the laws of this State or a person domiciled in, a resident of, or a citizen of, this State.
- (2) The retailer maintains retail establishments or offices in this State, whether the remote sales thus subject to taxation by this State result from or are related in any other way to the activities of the establishments or offices.
- (3) The retailer solicits or transacts business in this State by employees, independent contractors, agents, or other representatives, whether the remote sales thus subject to taxation by this State result from or are related in any other way to the solicitation or transaction of business. . . .”

N.C. Gen. Stat. § 105-164.8(c) provides “[a] retailer who is required to collect the tax imposed by [Article 5] must collect a local use tax on a transaction if a local sales tax does not apply to the transaction. The sourcing principles in G.S. 105-164.4B determine whether a local sales tax or a local use tax applies to a transaction. . . .”

Ruling Requested: Issues

Issue # 1: Does the exemption afforded for consumer’s use tax under North Carolina statutes for items temporarily stored in North Carolina also extend to North Carolina sales tax charged by a vendor?

Answer: N.C. Gen. Stat. § 105-164.4 imposes a privilege tax on retailers. Pursuant to N.C. Gen. Stat. § 105-164.7, a “retailer must collect the tax due on an item when the item is sold at retail.” While numerous exemptions and exclusions apply to the tax levied under N.C. Gen. Stat. §105-164.4, there is no exemption or exclusion for items subject to sales tax related to the mere “storage,” as defined in N. C. Gen. Stat. § 105-164.3(44), of such items.

Issue # 2: For items shipped from outside of North Carolina which are delivered to a [REDACTED] location within North Carolina where the [retailer] collects tax – is this tax considered a sales tax and would therefore fall under the same sales tax provisions as Question #1, or a seller’s use tax and be considered under the Department’s response for Question #3?

Answer: Based on the analysis included on page two of your letter, your question specifically relates to “[w]hether the obligation to pay North Carolina sales tax applies to sales made from a [retailer] who ships items from outside the state into the state” to the [REDACTED] headquarters and distribution facilities and whether tax imposed on such transactions is “sales tax” or “use tax.” For purposes of our response, we assume that your use of the word “ships” does not include delivery on the retailer’s motor vehicle but rather delivery by common carrier, United States Postal Service, or by other similar means by entities engaged in the business of making shipments in interstate commerce for hire.

Transactions in which a sale is made by a retailer’s in-state representative or location are subject to the general State and applicable local sales taxes, notwithstanding that the items may be

supplied from a retailer's out-of-state location or drop-shipped by a third party for delivery to [REDACTED] on behalf of the retailer. Pursuant to N.C. Gen. Stat. §105-164.7, a "retailer must collect the tax due on an item when the item is sold at retail."

Transactions in which a sales order is placed with a retailer's representative or location outside of North Carolina and items are shipped to [REDACTED] from outside the State, provided the vendor is engaged in business in North Carolina, pursuant to N.C. Gen. Stat. § 105-164.8(b)(2), such vendor is required to charge the tax imposed under Article 5. Such transactions are subject to the general State and applicable local use taxes.

Issue # 3: Does the exemption afforded for use tax under North Carolina statutes for items temporarily stored in North Carolina apply to seller's use tax charged by a [retailer] or only to consumer's use tax?

Answer: To the extent a retailer ships property from an out-of-state location to a firm located in North Carolina where the retailer's out-of-state location received and accepted the sales order, and such shipment occurs via common carrier, on an FOB destination basis to the [REDACTED] headquarters and distribution facilities, [REDACTED] may be entitled to the exclusion from "storage" provided under N.C. Gen. Stat. §105-164.3(44). In such an instance and provided, at the time of purchase, [REDACTED] knows that the provisions of N.C. Gen. Stat §105-164.3(44) will be met, [REDACTED] may advise the seller through issuance of a Certificate of Exemption that the items being purchased will come into North Carolina temporarily, and will subsequently be taken outside of North Carolina and used solely outside of North Carolina by [REDACTED]. To the extent [REDACTED] does not document this information prior to or at the time of purchase, and to the extent [REDACTED] does not advise the seller of such at the time of purchase, the seller must collect the applicable use tax and remit it to the State pursuant to the provisions of N.C. Stat. §105-164.4, 105-164.6, and 105-164.8 and such tax is deemed properly paid by [REDACTED]. Purchases by [REDACTED] of product in bulk from out of state retailers, where such items are stored in North Carolina and distributed to instate and out of state locations on an as needed basis are subject to the general State and applicable uses taxes at the time of purchase and such items are not excluded from "storage," as defined N.C. Gen. Stat. § 105-164.3(44).

Issue # 4: For items where consumer's use tax may be due (no tax has been charged by the vendor) – what type of documentation would be needed to establish that the items were purchased for the original intent of using them outside of the state and therefore qualify for the state's temporary storage exemption?

Answer: Such documentation will likely vary based on the facts and circumstances as well as purchase documents and/or protocol of [REDACTED]. Generally, however, the Department looks to details on purchase orders, exemption certificates provided to vendors at the time of purchase, internal correspondence and/or emails created prior to the date of purchase, and similar documentation to support that items are purchased for use outside of North Carolina by a taxpayer. The Department agrees that suggested types of documentation included in your correspondence are acceptable to support an exclusion from "storage" for purchases with the exception of "[a] spreadsheet or other similar document which computes the number or amount of items that will be used by each store or within each state developed through historical records of previous usage." The Department does not agree that this one exception to your suggested documentation is sufficient to exclude purchases from North Carolina use tax and would hold [REDACTED] liable for the general State and applicable local use tax on the total purchase price of such items, provided the items are delivered to the [REDACTED] headquarters and distribution facilities.

Issue #5: For items where consumer's use tax may be due (no tax has been charged by the vendor) – what type of activities can be performed in North Carolina that would not invalidate the state's temporary storage and use tax exclusion provisions? On page 4 of your letter you further state the issue as “[w]hether sales delivered to North Carolina first, and then shipped out of state are sourced to North Carolina for consumer's use tax purposes based on the first use of the item, or if the Department would consider an item under [REDACTED] fact pattern to be used ‘solely’ outside of the State. [You] request that the Department issue an opinion related to what activities would constitute use under the state's use tax statutes so that [REDACTED] can properly apply use tax to these types of items.” You continue to state “[i]n our current situation, [REDACTED] purchases a number of items that are initially delivered to its North Carolina headquarters or distribution centers that ultimately end up being shipped to, and used in stores in other states. These items include scanners, scales, credit card readers, software for this equipment, back office computers and other similar items. When these items are purchased and delivered to North Carolina, a number of events and activities occur prior to the items being shipped to their store location. They are unboxed, powered up, imaged and configured by [REDACTED] information technology staff. At times specific software is added to the units, and communications links between the units and the company's home office systems and databases are tested and run. . . . In most instances the units are left up and running for twenty-four hours or longer to ensure there are no problems. . . .”

“Once all configuration, testing and imaging of the units is complete, they are repackaged and shipped by common carrier to the store location where they will be installed and used – which may be inside or outside of North Carolina.”

Answer: To the extent items are purchased to be taken outside of North Carolina and used solely for their intended purposes outside of the state by [REDACTED] activities such as testing and configuration within North Carolina are permitted and do not otherwise constitute a taxable use, defined per N.C. Gen. Stat. § 105-164.3(49), to the extent the items are used for their intended ultimate purpose solely outside of North Carolina by [REDACTED]. The Department would expect similar documentation as noted in the Department's response to Issue #4 to support such exclusion from use tax.

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 the taxpayer requesting this ruling may not rely on it. If a taxpayer relies on this 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 ruling, then the ruling will not afford the 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.

Sincerely,

[REDACTED], Director
Sales and Use Tax Division

cc: [REDACTED], Director of Examination Division
[REDACTED], Revenue Field Auditor – Team Leader
[REDACTED], Revenue Field Audit Supervisor