



North Carolina Department of Revenue

Roy Cooper
Governor

Ronald G. Penny
Secretary

January 24, 2018

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

Re: Private Letter Ruling

Taxpayer: [REDACTED]

Taxpayer FEIN: [REDACTED]

Account ID: [REDACTED]

Dear [REDACTED]:

The Department has completed its review of your request for a written determination on behalf of your company, [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 current tax law to a specific set of existing facts furnished by you on behalf of Taxpayer. This written determination is applicable only to the taxpayer addressed herein and as such has no precedential value except to the taxpayer to whom the written determination is issued on behalf of the Department.

Overview and Relevant Facts

You advise that Taxpayer sells installation packages for pine straw for their customers ("Installation Packages"). Taxpayer quotes the jobs as a complete package price while retaining the right to control the means, the method, and the manner of accomplishing the desired result. You state "[t]he price of the installation package is not dependent on how many bales of pine straw are utilized, but rather on how much redefining of natural areas must be done, how much recycling of natural materials is required, and the specifics of each job site. Individual items cannot be separated out from the total package price because we have agreed to furnish the necessary materials, labor, and expertise to accomplish the job."

You also state that "[a]ll pine straw that we buy is purchased directly from the producer. These producers lease tracts of land in their names (or company names) and we usually provide a trailer

on site for the producers to load. Nothing is done to the product to enhance it either before or after installation.”

You further state that Taxpayer was “recently audited by the NC Department of Revenue . . . [and it was] affirmed that we were correctly billing these installation packages and that sales tax did not need to be collected on them.”

Issue

Is Taxpayer required to charge and collect sales tax from its customers for the sale of Installation Packages?

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(1k), 105-164.3(2c), 105-164.3(9), 105-164.3(14), 105-164.3(16e), 105-164.3(24), 105-164.3(33d), 105-164.3(33e), 105-164.3(33f), 105-164.3(35), 105-164.3(46), 105-164.4, 105-164.8, 105-467, 105-468, 105-483, 105-498, 105-507.2, 105-509.1, and 105-537.

N.C. Gen. Stat. § 105-164.3(16e) provides the term “landscaping” is defined, in part, as “[a] service that modifies the living elements of an area of land. Examples include the installation of trees, shrubs, or flowers on land; tree trimming; mowing; and the application of seed, mulch, *pine straw* [emphasis added], or fertilizer to an area of land.”

Pursuant to N.C. Gen. Stat. § 105-164.3(33e), the term “real property contract” is defined as “[a] contract between a real property contractor and another person to perform a *capital improvement* [emphasis added] to real property.”

N.C. Gen. Stat. § 105-164.3(2c)(j) provides the definition of the term “capital improvement” includes the term “landscaping.”

As provided in N.C. Gen. Stat. § 105-164.3(33f), the term “real property contractor” is defined, in part, as “[a] person that contracts to perform a real property contract in accordance with G.S. 105-164.4H.”

N.C. Gen. Stat. § 105-164.4(a)(16) provides “[t]he general rate applies to the sales price of or the gross receipts derived from repair, maintenance, and installation services and generally includes any tangible personal property or digital property that becomes a part of or is applied to a purchaser’s property. A mixed transaction contract and a real property contract are taxed in accordance with G.S. 105-164.4H.”

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.

N.C. Gen. Stat. § 105-164.4H(a) provides “[a] real property contractor is the consumer of tangible personal 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 the tangible personal property . . . 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.”

The term “tangible personal property” is defined, in part, in N.C. Gen. Stat. § 105-164.3(46) as “[p]ersonal property that may be seen, weighed, measured, felt, or touched or is in any other manner perceptible to the senses.”

N.C. Gen. Stat. § 105-164.13(3) provides an exemption from sales and use tax for the sale at retail and the use, storage, or consumption in this State of “[p]roducts of forests and mines in their original or unmanufactured state when such sales are made by the producer in the capacity of producer.”

N.C. Gen. Stat. § 105-164.(6) provides “[a]n excise tax at the applicable rate set in G.S. 105-164.4 is imposed on . . . tangible personal property . . . purchased inside or outside this State for storage, use, or consumption in this State.”

RULING

Based on the information provided, Taxpayer is a real property contractor and is the consumer of the pine straw that Taxpayer installs for its customers in its Installation Packages. Such Installation Packages, as described herein, fall within the definition of “landscaping” as defined in N.C. Gen. Stat. § 105-164.3(16e). “Landscaping” is a capital improvement under N.C. Gen. Stat. § 105-164.3(2c)(j) and is subject to tax as a “real property contract” in accordance with N.C. Gen. Stat. §§ 105-164.4H and 105-164.4(a)(16).

N.C. Gen. Stat. § 105-164.4H(a), provides, in part, that “[a] real property contractor is the consumer of the tangible personal property or 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 the tangible personal property, digital property, or service 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. Where a real property contractor purchases tangible personal property or 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 G.S. 105-164.6 apply” with some exceptions.

Pursuant to N.C. Gen. Stat. § 105-164.4H(c), “[a]n invoice or other documentation issued to a consumer at the time of the sale by a real property contractor *shall not separately state any amount for tax* [emphasis added]. Any amount for tax separately stated on an invoice or other documentation given to a person by a real property contractor is an erroneous collection and must be remitted to the Secretary.” Thus, Taxpayer is not liable for sales or use tax on the gross receipts derived from Installation Packages. Rather, Taxpayer is liable for sales or use tax on the purchase price of tangible personal property that Taxpayer purchases, installs, or applies to for others to fulfill Installation Packages and that becomes part of real property or used to fulfill the Installation Packages.

The Department is unable to advise whether the seller of the pine straw makes sales of pine straw as “the producer in the capacity of producer” as required under the exemption in N.C. Gen. Stat.

§ 105-164.13(3). Thus, this response does not express whether the pine straw purchases are exempt from or subject to sales and use tax. Rather, the Department would advise Taxpayer to contact the seller of the pine straw and determine if the pine straw sales by the seller to Taxpayer are made by the producer in the capacity of the producer pursuant to the requirement for the exemption in N.C. Gen. Stat. § 105-164.13(3).

The complementary use tax is an excise tax imposed under N.C. Gen. Stat. § 105-164.6 on tangible personal property purchased for storage, use, or consumption in this State. The applicable rate is the rate and maximum tax, if any, that would apply to the sale of the product. A product is subject to use tax *only if it is subject to tax under N.C. Gen. Stat. § 105-164.4*. Provided Taxpayer's purchases of pine straw are directly from a producer acting in the capacity of a producer, such purchases would be exempt from tax under N.C. Gen. Stat. § 105-164.13(3) and use tax would not be due on the purchase price of the pine straw used to fulfill a real property contract. If such purchases are not from the producer acting in the capacity of a producer, such purchases of pine straw are subject to sales and 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 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 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