NCDOR | NORTH CAROLINA DEPARTMENT OF REVENUE

Roy Cooper
Governor

Ronald G. Penny
Secretary

October 8, 2024

[redacted]

Re: [redacted]
Private Letter Ruling
[redacted]

Dear [redacted]:

The Department has completed its review of your request for an expedited private letter ruling 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[1]

Taxpayer

"[Taxpayer] is classified by the Internal Revenue Service as a 501(c)(3) public charity. . . . [Taxpayer] is classified under the National Taxonomy of Exempt Entities as [redacted]"

"[Taxpayer] is organized and operated for various nonprofit purposes, including, but not limited to [redacted] [Taxpayer] formed [a limited liability corporation ('NC, LLC')]. NC, LLC is engaged in the development and construction of new affordable housing communities."

[1] Unless specifically noted, the overview and facts are based on your letters, responses, documents, and other representations to the Department.

The Project
Taxpayer is involved in the development and eventual operation of an affordable housing complex in North Carolina (the "Project"). Low-income housing tax credits ("LIHTC"), bonds, and loans will finance the Project.

The Parties
Taxpayer described numerous entities and their relationship to the Project. After the initial request, Taxpayer updated the entities and relationships in a letter dated September 5, 2024. As described in the September 5, 2024, letter and attachments, the entities and relationships are as follows:

[redacted] ["Partnership"] - a [redacted] partnership that will hold title to the Project. The Partnership has [redacted] partners.

[redacted] ["General Partner"] – the general partner of the Partnership. General Partner has a [redacted] interest in the Partnership. General Partner has [redacted] managing members [redacted].

[redacted] ["Partner 2"] – a [redacted] partner in Partnership. Partner 2 has a [redacted] interest in the Partnership. Partner 2 is managed by [redacted]

[redacted] ["Partner 3"] – a [redacted] partner in the Partnership. Partner 3 has a [redacted] interest in the Partnership. Partner 3 will acquire its interest in exchange for [redacted]

[redacted] ["Managing Member 1"] – a managing member of General Partner. Managing Member 1 owns [redacted] General Partner. Managing Member 1 is wholly owned by NC LLC (described below).

[redacted] ["Managing Member 2"] – a managing member of General Partner. Managing Member 2 owns [redacted] of General Partner. Managing Member 2 is managed by [redacted]

[redacted] ["NC, LLC"] – [redacted] member of Managing Member 1. Taxpayer is NC LLC's [redacted] member.

Person 1- A [redacted]

Person 2 – A [redacted]

Taxpayer holds options that could apply at the end of [redacted]. [redacted]

"Construction of the Project will proceed using one or more general contractors . . . under one or more real property contracts between [Partnership] and a general contractor(s). [Partnership] intends to indirectly purchase all building materials, supplies, fixtures, and equipment that become a part of or annexed to the Project (referred to herein collectively as 'building materials') by reimbursing the general contractor(s) for all such purchases pursuant to the real property contract(s), or will purchase all such building materials directly pursuant to the real property contract(s) and provide them to the general contractor for use in constructing the buildings and structures at the Project."

The Contract

Taxpayer provided an unsigned construction contract. The contract was entered into between the Partnership and a construction company. [redacted]

The contract does not obligate Taxpayer, Managing Member 1, or NC, LLC, to make any payments.

The Financing

Funding for the project will be provided by numerous sources. [redacted]

See table below for the breakdown of the funding sources.

Source		Type	Funding
[redacted]		Equity	[redacted]
[redacted]		Loan	[redacted]
[redacted]		Loan	[redacted]
[redacted]		Loan	[redacted]
[redacted]		Loan	[redacted]
		TOTAL	[redacted]

Issue

Is Taxpayer entitled to a refund for sales and use taxes on purchases of building materials and supplies that are part of real property contracts for the Project and will become a part of or annexed to the buildings and structures of the Project?

Applicable Statutes and References

North Carolina imposes State, local, and transit rates of sales and use tax on a retailer engaged in business in the State based on the retailer's net taxable sales of, or gross receipts derived from, tangible personal property, certain digital property, and taxable services. N.C. Gen. Stat. §§ 105-164.4, 105-164.4H, 105-164.6, 105-467, 105-468, 105-483, 105-498, 105-507.2, 105-509.1, 105-537 and Chapter 1096 of the 1967 Session Laws.

North Carolina imposes a complementary use tax, in part, on items of tangible personal property purchased for storage, use, or consumption in this State. N.C. Gen. Stat. § 105-164.6. Generally, 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. N.C. Gen. Stat. § 105-164.6(b).

N.C. Gen. Stat. § 105-164.14(b) provides, in part, that a qualifying "nonprofit entity is allowed a semiannual refund of sales and use taxes paid by it under . . . Article [5 of Chapter 105 of the North Carolina General Statutes] on direct purchases of items for use in carrying on the work of the nonprofit entity. . . . Sales and use tax liability indirectly incurred by a nonprofit entity on building materials, supplies, fixtures, and equipment that become a part of or annexed to any building or structure that is owned or leased by the nonprofit entity and is being erected, altered, or repaired for use by the nonprofit entity for carrying on its nonprofit activities is considered a sales or use tax liability incurred on direct purchases by the nonprofit entity. The refund allowed under this subsection does not apply to purchases of electricity, telecommunications service, ancillary service, piped natural gas, video programming, or a prepaid meal plan... . The aggregate annual refund amount allowed an entity under this subsection for the State's fiscal year may not exceed thirty-one million seven hundred thousand dollars ($31,700,000)."

N.C. Gen. Stat. § 105-164.14(b)(2) and (2b) provides that nonprofits that qualify for a refund include the following:

- An organization that is exempt from income tax under section 501(c)(3) of the Code, other than an organization that is properly classified in any of the following major group areas of the National Taxonomy of Exempt Entities:
  a. Community Improvement and Capacity Building
  b. Public and Societal Benefit
  c. Mutual and Membership Benefit
- An organization that is a single member LLC that is disregarded for income tax purposes and satisfies all of the following conditions:
  a. The owner of the LLC is an organization that is exempt from income tax under section 501(c)(3) of the Code.
  b. The LLC is a nonprofit entity that would be eligible for an exemption under 501(c)(3) of the Code if it were not disregarded for income tax purposes.
  c. The LLC is not an organization that would be properly classified in any of the major group areas of the National Taxonomy of Exempt Entities listed in [N.C. Gen. Stat. § 105-164.14(b)(2)].

N.C. Gen. Stat. § 105-164.3(209) defines, in part, a "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. § 105-164.3(207) defines a "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(205) defines "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(31)a. defines "capital improvement," in part, as "[n]ew construction, reconstruction, or remodeling."

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. 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 [N.C. Gen. Stat. §] 105-164.13 or [N.C. Gen. Stat. §] 105-164.13E applies. Where a real property contractor purchases tangible 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. . . ."

Ruling

Based on the information furnished, Taxpayer does not meet the requirements to qualify for a sales and use tax refund on the building materials and supplies that are part of real property contracts for the Project.

To be eligible for a refund on building materials and supplies purchased by a third party, the Taxpayer must meet multiple requirements. First, Taxpayer must be an eligible nonprofit entity identified in N.C. Gen. Stat. § 105-164.14(b)(1)-(5). Second, sales and use tax liability must be "indirectly incurred by [Taxpayer] on building materials, supplies, fixtures, and equipment that become a part of or annexed to any building or structure." Third, "the building or structure must be owned or leased by [Taxpayer] and is being erected, altered, or repaired for use by [Taxpayer] for carrying on its nonprofit activities."

Taxpayer provides that it is exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code as a nonprofit entity and is classified with a [redacted], under the National Taxonomy of Exempt Entities system. Taxpayer does not provide any facts that disqualify it from qualifying for sales and use tax refunds. As a result, Taxpayer is a nonprofit entity that qualifies for sales and use tax refunds on eligible purchases.

However, Taxpayer does not indirectly incur the sales and use tax liability on the purchases of building materials and supplies for the Project. Instead, contractors and third parties will purchase the materials. The contractors and third parties will then be paid by the Partnership, not Taxpayer. Further, Partnership will use funds derived from [redacted] to pay for the Project. As a result, it is Partnership and not Taxpayer that is indirectly incurring the sales and use tax liability on these purchases.

In addition to not indirectly incurring the sales and use tax liability, Taxpayer does not own or lease the Project's building or structures. Instead, the building and structures are owned by Partnership.

Taxpayer contends it 'owns' the building pursuant to *In re Blue Ride Housing of Bakersville LLC,* 226 N.C. App. 42, 738 S.E.2d 802 (2013) ("*Blue Ridge Housing*"). After review of the case, the Department finds both the facts and the law distinguishable.

First, the broader definition of ownership found in *Blue Ridge Housing* has never been applied to the Sales and Use Tax Act[2]. In reviewing N.C. Gen. Stat. § 105-164.14(b), the statute specifies ownership structures that allow nonprofit eligibility to flow between related entities. *See* N.C. Gen. Stat. § 105-164.14(b)(2b) and (5). In each case, the expansion was narrow and limited to single member LLCs.

For example, certain university affiliated nonprofits that construct or provide buildings for a constituent institution of The University of North Carolina may qualify for nonprofit refunds pursuant to N.C. Gen. Stat. § 105-164.14(b) based on affiliation. In such cases, the nonprofit includes disregarded entities. In addition, certain nonprofits that are disregarded for federal income tax purposes qualify for nonprofit refunds pursuant to N.C. Gen. Stat. § 105-164.14(b), but it must be a single member LLC. These provisions show the very narrow scope of the nonprofit refund provision. These provisions show the legislature was specific where it sought to allow refunds for organizations involving more than one legal entity. In light of these statutory provisions, Taxpayer does not own the Project for purposes of N.C. Gen. Stat. § 105-164.14(b).

Second, the facts of the Project are different than the facts in *Blue Ridge Housing*. In that case, the Court of Appeals found a nonprofit entity owned a property for purposes of a local property tax exemption when it did not directly hold legal title. In that case, the nonprofit entity was the sole managing member of the entity that held legal title. In addition, the nonprofit only partnered with another party to finance the project with LIHTCs.

In contrast, the Partnership is not solely managed by Taxpayer. In addition, parties other than the LIHTC entity are involved with the Partnership. Specifically, [redacted] share control of the Partnership. In addition, [redacted] an additional indirect interest in the Partnership [redacted]

As to the actual involvement in the Partnership, the construction contract identifies [redacted] as the representative of the Partnership. The construction contract also identifies [redacted] as the person who will sign the contract on behalf of the Partnership. In both cases, the contract identifies [redacted] as a [redacted] of the Partnership. Furthermore, [redacted] have significant experience and expertise developing these types of projects. These facts show significant involvement in the Partnership by individuals other Taxpayer. This type of third-party involvement was not present in *Blue Ridge Housing*. As a result, the Department determines Taxpayer would not 'own' the project if the *Blue Ridge Housing* definition were to apply.

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 the 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

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[2] The broad interpretation of the word 'owner' would impact not just this refund, but also broaden the persons liable for use tax under N.C. Gen. Stat. § 105-164.6. *See* N.C. Gen. Stat. § 105-164.6 (holding the owner of real property joint and severally liable for certain unpaid use tax).