

VIII. GENERAL ADMINISTRATION

(Article 9)

A. Statute of Limitations; Assessment Procedure; Appeals Process (G.S. 105-241.6 – G.S. 105-241.23)

Substantial changes were made to the statutes governing the assessments, refunds and appeals processes. The revised processes were generally effective January 1, 2008. The information in this section addresses the revised processes. For information on the processes effective through December 31, 2007, please see the Rules and Bulletins publication for 2005 – 2006 and the 2006 Supplement to the Rules and Bulletins.

1. Statute of Limitations for Refunds (G.S. 105-241.6)

The statute of limitations for filing a claim for refund of overpayment of taxes is three years from the statutory due date of the applicable return or two years from the date of overpayment whichever is later. These exceptions apply:

- If a taxpayer files a timely return reflecting a federal determination, the period for requesting a refund is the later of one year after the return reflecting the federal determination is filed or three years after the original return was filed or due to be filed.
- A taxpayer's waiver of the statute of limitations for making a proposed assessment extends the period in which the taxpayer can obtain a refund to the end of the period extended by the waiver. If a taxpayer's right to receive a refund had expired under the prior six-month statute of limitations, the new two-year statute of limitations does not reopen the taxpayer right to a refund.

2. Procedure for Obtaining a Refund (G.S. 105-241.7)

The Department must refund an overpayment it discovers if the statute of limitations has not expired. A taxpayer may request a refund of an overpayment by filing within the statute of limitations an amended return reflecting the overpayment or filing a claim for refund (form NC-19) that identifies the taxpayer, the type and amount of tax overpaid, the applicable tax period, and the basis for the claim. Identifying the basis for the claim does not limit the taxpayer from changing the basis.

Within six months of receiving the amended return or demand for return the Department must either

- refund the amount requested
- adjust the amount requested, refund the adjusted amount, and provide the taxpayer with a reason for the adjustment. If the refund is less than requested, the adjusted refund is considered a notice of denial for the amount of the requested refund that was not refunded.
- deny the refund in its entirety and send the taxpayer a notice of proposed denial, or
- request additional information concerning the request for refund. If a taxpayer fails to respond to a request for information, the Department must take one of

the actions listed above within the later of 1) the remainder of the six-month period; 2) thirty (30) days after receiving the information; 3) a time period mutually agreed upon by the Department and the taxpayer.

If the Department fails to take one of these actions within the required time, the inaction is considered to be a proposed denial of the requested refund. A notice of proposed denial must contain the basis for the proposed denial and the circumstance under which the proposed denial will become final. A proposed denial of a refund by the Secretary is presumed to be correct. A refund does not absolve a taxpayer of a tax liability that may in fact exist. The Secretary may propose an assessment for any deficiency as provided by law.

The Department cannot issue a refund of 1) an amount paid before the final return for the tax year is filed, 2) an overpayment setoff under Chapter 105A or under another setoff debt collection program authorized by law, 3) an income tax overpayment the taxpayer has elected to apply to another purpose as provided by law, or 4) an overpayment of less than three dollars (\$3.00) unless the taxpayer files a written claim for the refund.

3. Statute of Limitations for Assessments (G.S. 105-241.8)

If a return is filed and no fraud is involved, the statute of limitations for an assessment is three years from the date the return was filed or the date the return was due to have been filed, whichever is later.

Any tax or additional tax due from the taxpayer may be assessed at any time if 1) no proper application for a license or no return has been filed, 2) a false or fraudulent application or return has been filed, or 3) there has been an attempt in any manner to fraudulently defeat or evade tax.

If a taxpayer files a return reflecting a federal determination and the return is filed within the statutory time for filing the return, the period for proposing an assessment of any tax due is the later of one year after the return is filed or three years after the original return was filed or due to be filed.

If there is a federal determination and the taxpayer fails to file the return within the required time, the period for proposing an assessment of any tax due is three years after the date the Secretary received the final report of the federal determination.

If a taxpayer forfeits a tax credit or tax benefit pursuant to forfeiture provisions in Chapter 105 the period for proposing an assessment of any tax due resulting from the forfeiture is three years after the date of the forfeiture.

If a taxpayer elects under section 1033(a)(2)(A) of the Code not to recognize gain from involuntary conversion of property into money, the period for proposing an assessment of any tax due as a result of the conversion or election is the applicable period provided under section 1033(a)(2)(C) or section 1033(a)(2)(D) of the Code.

4. Procedure for Proposing an Assessment (G.S. 105-241.9)

The Secretary and his agents have the power to examine the books, records, and other relevant data to determine the taxes owed by a corporation. Where it is impossible to obtain accurate and reliable information, an assessment may be made from the best information available and is considered to be correct.

The Secretary must propose an assessment within the statute of limitations for proposed assessments unless the taxpayer waives the limitations period in writing. A taxpayer may waive the limitations period for either a definite or an indefinite time. If the taxpayer waives the limitations period, the Secretary may propose an assessment at any time within the time extended by the waiver.

The Department must give a taxpayer a written notice of a proposed assessment. The notice must contain 1) the basis for the proposed assessment, 2) the amount of tax, interest, and penalties, stated separately, and 3) the circumstances under which the proposed assessment will become final and collectible. The statement of the basis does not limit the Department from changing the basis.

5. Limit on Refunds and Assessments After a Federal Determination (G.S. 105-241.10) (effective for taxable years beginning on or after January 1, 2007)

When a taxpayer files a timely return reflecting a federal determination that affects the amount of State tax payable and the general statute of limitations for requesting a refund or proposing an assessment of the State tax has expired, the taxpayer is entitled to a refund or is liable for additional tax only if the refund or additional tax is the result of adjustments related to the federal determination. A federal determination is a correction or final determination by the federal government of the amount of a federal tax due.

6. Requesting Review of Proposed Denial of Refund or Proposed Assessment (G.S. 105-241.11)

Any taxpayer who objects to a proposed assessment or proposed denial of refund may request the Department to review the proposed action. The request for review must be filed within forty-five (45) days after 1) the date the notice of the proposed assessment or the proposed denial of refund was mailed to the taxpayer, if delivered by mail, 2) the date the notice of the proposed assessment or the proposed denial of refund was delivered to the taxpayer, if delivered in person; or 3) the date that inaction by the Department on a request for refund was considered a proposed denial of the refund. A request for review is considered filed on the date the request is delivered if delivered in person or on the date received by the Department if not delivered in person. A taxpayer requests a review by submitting form NC-242. An assessment for tax shown due on the return but not paid or the application of a refund against debt owed to State or local agency or to the Internal Revenue Service are not subject to review.

7. Result When Taxpayer Does Not Request a Review (G.S. 105-241.12)

A proposed denial of a refund becomes final and is not subject to further administrative review if the taxpayer does not file a timely request for Departmental review of the proposed denial. If the proposed denial becomes final, a taxpayer may not file another amended return or refund claim to obtain the denied refund.

A proposed assessment becomes final and is not subject to further administrative or judicial review if the taxpayer fails to file a timely request for Departmental review. After paying the tax, the taxpayer may request a refund of the tax paid. If a proposed assessment becomes final because the taxpayer does not file a timely request for review, the Department must send the taxpayer a notice of collection before it attempts to collect the tax. The notice must include a statement that the proposed assessment is final and collectible, the amount of tax, interest and penalties due, an explanation of the collection options available to the Department if the taxpayer does not pay the liability reflected on the notice and any remedies available to the taxpayer concerning these collection options.

8. Action on Request for Review (G.S. 105-241.13)

The Department, when it receives a timely request for a review of a proposed assessment or proposed denial of a refund, must conduct a review of the proposed action and either grant the refund or remove the assessment, schedule a conference with the taxpayer, or request additional information from the taxpayer concerning the requested refund or proposed assessment.

If the Department's review of a proposed assessment or proposed denial of a refund does not result in granting the refund requested or removing the assessment, the Department must schedule a conference which can be either face-to-face or by telephone. The Department must give the taxpayer 30 days notice of the time and place set for the conference unless the Department and the taxpayer agree to a conference in less than thirty (30) days. The purpose of the conference is for the parties to attempt to informally resolve the case. At the conference no testimony under oath will be taken, the rules of evidence do not apply and the taxpayer may present any objections to the proposed action. The taxpayer may designate a representative to act on the taxpayer's behalf at the conference.

9. Final Determination after Department Review (G.S. 105-241.14)

If the Department and the taxpayer are unable to resolve the taxpayer's objection to a proposed denial of refund, the Department must issue a notice of final determination that includes the basis for the final determination and the procedure for the taxpayer to follow for contesting the determination.

If the Department and the taxpayer are unable to resolve the taxpayer's objection to a proposed assessment, the Department must issue a notice of final determination that includes the amount of the tax, interest and penalties due, the procedure the taxpayer must follow to contest the final determination, a statement that the amount due stated on the notice is collectible if the taxpayer does not contest the final determination, and

an explanation of the collection options available to the Department if the taxpayer fails to pay the liability reflected on the notice and the remedies available to the taxpayer concerning these collection options. The basis for the determination may be stated on the notice or in a separate document and does not limit the Department from changing the basis.

The Department must conclude its review of the proposed assessment or proposed denial of a refund and issue a final determination within nine months of the date the taxpayer filed the request for review. The Department and the taxpayer may mutually agree to extend the time limit. If the Department fails to issue a final determination within nine months, the validity of the proposed assessment is not affected.

Timely protests of proposed assessments or denials of refunds filed before January 1, 2008 and pending as of that date will be considered requests for review under the new law without the taxpayer having to submit a new request. The Department has nine months from January 1, 2008 to conclude its review of the proposed assessment or proposed denial of a refund and issue a final determination if needed.

10. Contested Case Hearing on Final Determination (G.S. 105-241.15)

A taxpayer who disagrees with a notice of final determination issued by the Department may petition for a contested case hearing before an administrative law judge at the Office of Administrative Hearings pursuant to Article 3 of Chapter 105B of the General Statutes. A taxpayer may not petition for a contested case hearing until the Department has issued a notice of final determination. Pursuant to G.S. 150B-23(f), the petition for a contested case hearing must be filed within sixty (60) days of the date the Department mails or personally delivers the notice of final determination. The taxpayer does not have to pay the additional tax due prior to the contested case hearing.

For information about the contested tax case hearings process, please consult the Office of Administrative Hearings web page at www.ncoah.com.

11. Judicial Review of Decision After Contested Case Hearing (G.S. 105-241.16)

A taxpayer who receives an unfavorable decision in a contested case hearing may appeal the decision by filing a petition for judicial review with the Superior Court of Wake County and a Notice of Designation to designate the case as a mandatory complex business case to be heard by the Business Court. The appeal must be filed within thirty (30) days after the receipt of the final decision for the contested case hearing. The taxpayer must pay the tax liability set forth in the final decision to appeal.

12. Civil Action Challenging Statute as Unconstitutional (G.S. 105-241.17)

A taxpayer who claims that a tax statute is unconstitutional may bring a civil action with the Superior Court of Wake County to determine the taxpayer's liability under that statute and file a Notice of Designation to designate the case as a mandatory complex business case to be heard by the Business Court. To bring a civil action, the

taxpayer must have exhausted the prehearing remedy by receiving a notice of final determination from the Department, commenced a contested case at the Office of Administrative Hearings, received a dismissal notice from the Office of Administrative Hearings, paid the tax, penalties and interest due pursuant to the Department's notice of final determination and filed the civil action within two years of the dismissal.

13. Declaratory Judgments, Injunctions, and Other Actions Prohibited (G.S. 105-241.19)

The remedies provided in G.S. 105-241.11 through G.S. 105-241.17 are the exclusive remedies for disputing the denial of a requested refund, the taxpayer's liability for the tax, or the constitutionality of a tax statute. All other actions, including a declaratory judgment and an injunction to prevent the collection of a tax, are barred.

14. Delivery of Notices to the Taxpayer (G.S. 105-241.20)

A notice of proposed denial of a refund, notice of proposed assessment, notice of collection, and notice of final determination mailed to a taxpayer are presumed to have been received by the taxpayer unless the taxpayer makes an affidavit to the contrary within ninety (90) days after the notice was mailed. If the taxpayer makes an affidavit, the notice is considered delivered on the date of the affidavit.

15. Interest on Taxes (G.S. 105-241.21)

The interest rate set by the Secretary applies to interest that accrues on overpayments and assessments of tax. The law requires the interest rate to be determined on or before June 1, for the following six-month period beginning on July 1 and on or before December 1 for the following six-month period beginning January 1. The current rate of interest may be obtained by contacting the Department of Revenue.

Interest accrues on tax not paid by the original due date from the original due date until the date paid even though a taxpayer may have an extension of time for filing the return.

Interest on overpayments of franchise, income and gross premiums taxes accrues beginning forty-five (45) days after the latest of (1) the date the final return was filed, (2) the date the final return was due to be filed, or (3) the date of the overpayment. Interest on overpayments of all other types of taxes begins ninety (90) days after the date the tax was paid.

16. Collection of Taxes (G.S. 105-241.22)

The Department can collect a tax when 1) a taxpayer files a return showing tax due on the return and does not pay the amount shown due, 2) the Department sends a notice of collection after the taxpayer does not file a timely request for a review of a proposed assessment, 3) the taxpayer and the Department agree on a settlement concerning the amount of tax due. 4) the Department issues a notice of final determination with respect to a proposed assessment and the taxpayer does not file a timely petition for a contested case hearing, 5) a final decision is issued on a proposed assessment of tax after a contested case hearing, or 6) the Office of Administrative Hearings

dismisses a petition for a contested case for lack of jurisdiction because the issue is the constitutionality of a statute.

17. Jeopardy Assessment and Collection (G.S. 105-241.23)

The Department can, within the statute of limitations, immediately assess and collect any tax found to be due if the Department determines that collection of the tax is in jeopardy and immediate assessment and collection are necessary to protect the State's interest. In making a jeopardy collection, the Secretary may use any of the collections in G.S. 105-242 and is not required to wait any period of time before using these remedies. Within thirty (30) days after initiating a jeopardy collection, the Secretary must give the taxpayer the notice of proposed assessment.

Within five days after issuing a jeopardy assessment that is not the result of a criminal investigation or was not for a liability for the unauthorized substance tax, the Department is required to give the taxpayer a written statement of the basis for the jeopardy action. Within thirty (30) days after receipt of this written statement or, if the statement is received, within thirty (30) days after the statement was due, the taxpayer may request the Secretary to review the action taken. After receipt of this request, the Secretary must determine whether initiating the jeopardy collection was reasonable under all the circumstances and whether the amount assessed and collected was reasonable under all the circumstances. The Secretary must give the taxpayer written notice of this determination within thirty (30) days after the request.

Within ninety (90) days after the earlier of the date a taxpayer received or should have received a determination of the Secretary concerning a jeopardy collection under subsection (b) of this section, the taxpayer may bring a civil action seeking review of the jeopardy collection. The taxpayer may bring the action in the Superior Court of Wake County or in the county in North Carolina in which the taxpayer resides. Within twenty (20) days after the action is filed, the court must determine whether the initiation of the jeopardy collection was reasonable under the circumstances. If the court determines that an action of the Secretary was unreasonable or inappropriate, the court may order the Secretary to take any action the court finds appropriate. If the taxpayer shows reasonable grounds why the twenty-day limit on the court should be extended, the court may grant an extension of not more than forty (40) additional days.