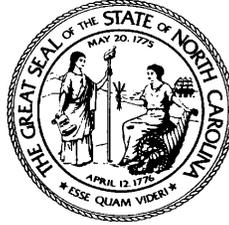

North Carolina Department of Revenue



DIRECTIVE

Subject: Retail Trade
Tax: Sales and Use Tax
Law: N.C. Gen. Stat. § 105-164.3(34a)
Issued By: Sales and Use Tax Division
Date: February 5, 2016
Number: SD-16-1

This directive is issued under the authority granted the Secretary of Revenue pursuant to N.C. Gen. Stat. § 105-264 to address the application of the retail trade definition for sales and use taxes and applies to sales occurring on or after March 1, 2016.

Effective March 1, 2016, a person in “retail trade,” as defined in N.C. Gen. Stat. § 105-164.3(34a), is a retailer and must treat transactions with consumers as retail sales on or after such date, no matter that such person met the definition of a real property contractor for any transactions prior to March 1, 2016. A person that meets the definition of “retail trade,” is a retailer liable for the applicable rate of sales and use tax on retail sales, unless the retailer maintains proper records to establish a sale is exempt. A person properly classified in the NAICS – Retail Trade Sector 44-45, who is engaged in business in the State, is presumed to meet the definition of “retail trade.” However, for income tax purposes, a taxpayer identifies and reports a single NAICS code, business activity code, or professional activity code to represent its primary activity for a single business entity; and such may not properly represent the taxpayer’s activities in the State for purposes of “retail trade,” as discussed herein.

The following or similar transaction by a retailer in “retail trade” with a consumer is a retail sale: a contract or transaction to perform construction, reconstruction, installation, repair, or any other service with respect to real property; and to furnish tangible personal property to be installed or applied to real property in connection with the contract or transaction; and the labor to install or apply the tangible personal property that becomes part of real property. The retailer is liable for sales tax on the total sales price of the contract or transaction sold at retail.

A person, who meets the definition of “retail trade,” cannot operate as a “real property contractor.” A person who meets the definition of “retail trade” cannot operate as a “retailer-contractor.”

Definitions

Effective March 1, 2016, N.C. Gen. Stat. § 105-164.3(34a) defines “**retail trade**” as “[a] trade in which the majority of revenue is from retailing tangible personal property, digital property, or services to consumers. The term includes activities of a person properly classified in NAICS

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sector 44-45, buying goods for resale, and rendering services incidental to the sale of merchandise. The term typically includes maintaining an inventory and may include the provision of repair, maintenance, and installation services. Not all activities provided in this subdivision are required for a trade to be considered retail trade.”

Effective March 1, 2016, N.C. Gen. Stat. § 105-164.3(35) is amended and defines “**retailer**,” in part as “[a] person engaged in business of delivering, erecting, installing, or applying tangible personal property for use in this State . . . unless the person is one or more of the following:

1. A person that *solely* [emphasis added] operates as a real property contractor.
2. A person whose *only* [emphasis added] business activity is providing repair, maintenance, and installation services where the person's activities do not otherwise meet the definition of a retail trade.”

Effective March 1, 2016, N.C. Gen. Stat. § 105-164.3(33d) is amended and defines “**real property contractor**,” in part, as “[t]he term does not include a person engaged in retail trade.”

N.C. Gen. Stat. § 105-164.3(5) defines “**consumer**” as “[a] person who stores, uses, or otherwise consumes in this State tangible personal property, digital property, or a service purchased or received from a retailer or supplier either within or without this State.”

N.C. Gen. Stat. § 105-164.3(12) defines “**gross sales**” as “[t]he sum total of the sales price of all retail sales of tangible personal property, digital property, and services.”

N.C. Gen. Stat. § 105-164.3(24) defines “**net taxable sales**” as “[t]he gross sales of the business of a retailer taxed under [the North Carolina Sales and Use Tax Act (the “Sales and Use Tax Act”)] after deducting exempt sales and nontaxable sales.”

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(36) defines “**sale or selling**,” in part, as “[t]he transfer for consideration of title, license to use or consume, or possession of tangible personal property or digital property or the performance for consideration of a service. The transfer or performance may be conditional or in any manner or by any means.”

N.C. Gen. Stat. § 105-164.3(35a) defines “**retailer-contractor**” as “[a] person that acts as a retailer when it sells tangible personal property at retail and as a real property contractor when it performs real property contracts.”

N.C. Gen. Stat. § 105-228.90(b)(4b) defines “**NAICS**” as “[t]he North American Industry Classification System adopted by the United States Office of Management and Budget as of December 31, 2007.”

N.C. Gen. Stat. § 105-228.90(b)(5) defines “**person**,” in part, as “[a]n individual, a fiduciary, a firm, an association, a partnership, a limited liability company, a corporation, a unit of government, or another group acting as a unit.”

2007 NAICS Sector 44-45 – Retail Trade Sector

The definition of “retail trade” provides “the term includes activities of a person *properly* classified in NAICS sector 44-45.” NAICS Sector 44-45 is “Retail Trade” (“Retail Trade

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Sector”). Information published by the United States Census Bureau (“USCB”) for the [Retail Trade Sector](#) provides the sector includes establishments engaged in retailing merchandise and providing after-sales service. Additionally, the published information provides that, “[t]he retailing process is the final step in the distribution of merchandise; retailers are, therefore, organized to sell merchandise in small quantities to the general public. This sector comprises two main types of retailers: store and nonstore retailers.” The activities for store retailers and nonstore retailers are from the information published by the USCB.

Store retailers’ activities may include the following:

- Operate fixed point-of-sale locations, located and designed to attract a high volume of walk-in customers.
- Have displays of merchandise.
- Sell merchandise to the general public for personal or household consumption, but some also serve business and institutional clients.
- Catalog showrooms.
- Engage in the provision of after-sales services, such as repair and installation.
- Process activities incidental to retailing.

Nonstore retailers’ activities may include the following:

- Organize to serve the general public.
- Retailing methods differ from store retailers.
- Reach customers by methods such as infomercials, the publishing of paper and electronic catalogs, door-to-door solicitation, in-home demonstration, selling from portable stalls and distribution through vending machines.

Following is a partial list of stores, centers, and dealers included in the Retail Trade Sector published by the USCB. Persons in the Retail Trade Sector in the State may engage in sales transactions or contracts with consumers where tangible personal property is to be installed to or become a part of real property and shall be treated as retail sales by the retailer, provided the person meets the definition of “retail trade.” The following is not an all-inclusive list.

- Building Material and Supplies Dealers
- Electronic and Appliance Stores
- Floor Covering Stores
- Hardware Stores
- Home Centers
- Household Appliance Stores
- Lawn and Garden Equipment and Supplies Stores
- Nursery, Garden Center, and Farm Supply Stores
- Other Building Material Dealers
- Paint and Wallpaper Stores
- Window Treatment Stores

Example: A person’s business activity is the operation of a single hardware store in North Carolina with a Retail Trade Sector NAICS code of 44413, Hardware Stores. The sales transactions for the three months prior to March 2016 were \$16,000 comprised of the following: \$10,000 retail sales across the counter to and taken from the store by customers; \$2,000 sales for resale; and \$4,000 sales of wooden fencing to be installed at customers’ homes. Based on the NAICS code, the person is in retail trade. The sales and installation of wooden fencing, on

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or after March 1, 2016, are retail sales by the person in addition to the retail sales across the counter.

Business Activity Code or Professional Activity Code

A person, who operates as a partnership, sole proprietor, or other type of entity where the income tax return filed with the State does not request a NAICS code, may utilize the business activity code or professional activity code identified on the person's federal income tax return for income tax purposes, in lieu of a NAICS code. The business and professional activity codes are based on NAICS classifications. A person with a principal business or professional activity code that begins with "44" or "45" is in the Retail Trade Sector.

Determination of Majority of Revenue

Revenue from sales, receipts, or income producing activities with consumers from an establishment or other location within the State, or sourced to the State from an establishment or other location outside the State, shall be considered when making a determination of whether the majority of revenue is from retailing tangible personal property, digital property, or services to consumers for purposes of the definition of "retail trade" in the State.

A person who is not in the Retail Trade Sector but in another NAICS sector may meet the definition of "retail trade" for purposes of the Sales and Use Tax Act, provided the majority of the revenue is from retailing tangible personal property, digital property, or services to consumers in the State.

Example: For the 2015 calendar year, the records of a North Carolina business with a NAICS code of 238330 – Flooring Contractor, indicate total revenue of \$100,000 from transactions within the State. Of the \$100,000 in total revenue, \$70,000 was from retail sales of carpet where the business did not install or arrange to have carpet installed for customers as part of the sales transaction. The remaining \$30,000 in revenue was derived from real property contracts where the business provided and installed wall-to-wall carpet in real property owned by customers. Based on the 2015 calendar year, the business' revenue is comprised 70% ($\$70,000/\$100,000 = 70\%$) from retailing carpet. Effective March 1, 2016, the person is deemed to be in "retail trade;" therefore, the person is a retailer and must treat all transactions with consumers as retail sales, no matter that prior to March 1, 2016, the business was permitted to operate as a retailer-contractor based on the laws in effect at such time.

A person that meets the definition of a "retailer-contractor" prior to March 1, 2016, must consider the definition of "retail trade" effective March 1, 2016 and determine whether the majority of the revenue in the State is derived from retail sales or from real property contracts for purposes of the Sales and Use Tax Act for sales transactions on or after March 1, 2016 in the State.

Example: For the 2015 calendar year, a person who sells septic tank components at retail locations solely in the State and installs septic tank systems in real property solely in the State received total revenue of \$5,000,000. Of the \$5,000,000 in total revenue, \$4,000,000 was from the retail sale of septic tank components in the State and \$1,000,000 was from installation of septic tank systems. Based on the 2015 calendar year, the person's revenue is comprised 80% ($\$4,000,000/\$5,000,000 = 80\%$) from retail sales of component parts. Effective March 1, 2016, the person is deemed to be in "retail trade;" therefore, the person is a retailer and must treat all sales transactions as retail sales on or after March 1, 2016, no matter that prior to March 1, 2016, the business was permitted to operate as a retailer-contractor. The total sales price of

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installed septic tanks on or after March 1, 2016 are subject to sales tax in the same manner as the sales price of any components sold at retail.

Example: For the past three tax years, a person engaged in business in North Carolina sold kitchen cabinets at retail in the State to consumers and also performed kitchen remodeling contracts that primarily included the removal of existing cabinets, site preparation, installing new cabinets, plumbing, fixtures, and countertops at customers' locations in the State. The cumulative revenue for the three years from sales in the State totaled \$2,000,000; consisting of \$1,500,000 from kitchen remodeling contracts and \$500,000 from retail sales of kitchen cabinets. Based on the three prior tax years, the person received 75% of its revenue from remodeling contracts for real property. This person does not meet the definition of "retail trade" since only 25% of its revenue is from the retail sales of kitchen cabinets. This person is a "retailer-contractor" since the majority of the revenue is from remodeling contracts.

NC Retail Revenue and Total NC Revenue from All Sources

Revenue from the following shall be considered as part of "NC Retail Revenue" from retailing and as "Total NC Revenue from All Sources" for purposes of any calculation to determine whether the majority of revenue is from retailing tangible personal property, digital property, or services to consumers. **A person's look-back period and prior treatment of tangible personal property that becomes a part of or is affixed to real property may determine whether to include receipts from such in NC Retail Revenue or only to include in the Total NC Revenue From All Sources.** The following should be included in NC Retail Revenue and Total NC Revenue from All Sources and is not an all-inclusive list.

- Total sales exempt from the Sales and Use Tax Act pursuant to N.C. Gen. Stat. §§ 105-164.13, 105-164.13B, 105-164.13E, and 105-164.4I.
- Total sales in excess of the amount subject to tax, due to a maximum tax set in N.C. Gen. Stat. § 105-164.4(a) for an item.
- Gross receipts subject to or exempt from the 7.00% combined general rate of sales and use tax reported on Form E-500E.
- Total sales or gross receipts of services at retail for which there is no imposition in the Sales and Use Tax Act. (Examples may include: information service, remote access to software, Internet access, etc.)
- Interest, financing, and carrying charges from credit extended on retail sales.
- Miscellaneous revenue incidental to or related to retail sales.

Non-NC Retail Revenue and Total Non-NC Revenue from All Sources

Revenue from the following shall not be included in either "NC Retail Revenue" or in "Total NC Revenue from All Sources" in making a determination of whether the majority of revenue is from retailing tangible personal property, digital property, or services to consumers. The following is not an all-inclusive list.

- Receipts derived from an establishment or location outside the State and sourced outside the State.
- Sales for resale from an establishment or location inside or outside the State whether sourced inside or outside the State.

Example: For March, April, and May 2016, a person who operates an HVAC business receives total revenue of \$10,000,000. Of the \$10,000,000 in total revenue, \$4,000,000 is from real property contracts to install HVAC systems in the State, \$3,000,000 is from real property

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contracts to install HVAC systems outside the State, \$900,000 is from one-time repair charges of HVAC systems inside the State, \$700,000 is from one-time repair charges of HVAC systems outside the State, \$800,000 is for annual service contracts for repair and maintenance of HVAC's compressors in the State, and \$600,000 is for annual service contracts for repair and maintenance of HVAC's compressors outside the State. Prior to March 1, 2016, the person operates solely as a real property contractor. The NC Retail Revenue is \$800,000 from annual service contracts in the State and the Total NC Revenue from All Sources is \$5,700,000; therefore 14% of the revenue is from retailing in the State. The person does not meet the definition of "retail trade."

Effective March 1, 2016, the person is a retailer-contractor even without a revenue computation due to the changes in the Sales and Use Tax Act for a service contract for tangible personal property, no matter that the tangible personal property covered in the service contract becomes a part of or is affixed to real property. The HVAC business' sales of annual service contracts on or after March 1, 2016 are retail sales subject to tax. [See Important Notice: Sale or Renewal of a Service Contract for Tangible Personal Property Changes](#) for additional information.

Exceptions from Retailer - Thus Retail Trade

The definition of "retailer," as amended effective March 1, 2016, provides that a person who solely operates as a real property contractor is not a retailer.

Example: A person engaged in business in North Carolina enters into contracts with North Carolina consumers to install wall-to-wall carpet. This person agrees to provide the carpet, padding, and other tangible property and the labor to complete the required work per the contracts. The person does not sell carpet at retail from any location or establishment inside or outside the State. Rather, the person purchases the necessary carpet, padding, and other tangible property on an as needed basis from sellers and pays tax at the time of purchase on such items. This person does not meet the definition of "retail trade" since the person is solely operating as a real property contractor.

The definition of "retailer," as amended effective March 1, 2016, also provides that a person whose only business activity is providing repair, maintenance, and installation services where the person's activities do not otherwise meet the definition of "retail trade" is not a retailer.

Example: A person engaged in business in North Carolina operates as a carpet installer and does not receive income from any other source. The person only installs carpet purchased by others and the person does not ever provide the carpet or other tangible personal property to complete an install. As the only business income is from providing installation services, the person does not meet the definition of "retail trade" and is not a retailer required to collect tax on the installation charges to the customer.

Assistance

General questions regarding this notice should be directed to the Taxpayer Assistance and Collection Center at telephone number 1-877-252-3052 (toll-free).

To the extent that there is any change in statute or regulation, or new case law subsequent to this directive, the provisions in this directive may be superseded or voided. To the extent that any provisions in any other notice, directive, technical bulletin, or published guidance regarding sales and use tax issued prior to the date of this directive conflicts with this directive, the provisions contained in this directive supersede.