



## North Carolina Department of Revenue

Roy Cooper  
Governor

Ronald G. Penny  
Secretary

January 31, 2020

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

Re: [REDACTED]  
Private Letter Ruling Request  
Account ID: [REDACTED]  
Taxpayer's FEIN: [REDACTED]

Dear [REDACTED]:

The Department has completed its review of your request for a written determination 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**

You advise that "[Taxpayer] is a corporation organized under the laws of [REDACTED]. [Taxpayer] is the owner of a datacenter located in [REDACTED] North Carolina [REDACTED] [REDACTED] which began operations on [REDACTED]. [Taxpayer] received a Written Determination of [Planned] Investment [for Eligible Internet Datacenter] ('the Certification') from the North Carolina Department of Commerce ("Commerce") on [REDACTED], certifying that the [REDACTED] Datacenter meets the definition of a[n] ["eligible Internet datacenter"]. The full legal name of the applicant taxpayer on the Certification was [REDACTED] LLC."

"For nontax business reasons, [Taxpayer] is considering a legal entity conversion to a limited liability company ["Taxpayer LLC"] that will be disregarded as a separate entity from its single member owner, [REDACTED]. For sales and use tax purposes, Taxpayer LLC will continue to file North Carolina sales and use tax returns on a separate legal entity basis under its new name.

[REDACTED]  
 Re: [REDACTED]  
 January 31, 2020  
 Page 2

Taxpayer LLC will remain the sole owner of the [REDACTED] Datacenter, which will continue to satisfy the requirements to meet the definition of a[n] [eligible Internet datacenter].”

Taxpayer also provided a copy of the Certification with its request for a written determination.

Initially, Taxpayer requested a written determination from the Department as to whether the exemption from sales and use tax on electricity and datacenter support equipment located and used at an eligible internet datacenter would be valid subsequent to Taxpayer's conversion from a corporation to a limited liability company. On November 7, 2018, the request for a written determination was amended to request a ruling to determine if “. . . Taxpayer’s mere change in legal entity form from a corporation to a limited liability company would have no effect on the determination of the datacenter owned by [Taxpayer] as an internet datacenter, as long as the use of the datacenter facility remains the same.” You further clarified “[t]he use of the datacenter will be the exact same post change in legal entity form as it is prior to the change in legal entity form. The datacenter received the . . . determination [from] the Department of Commerce in [REDACTED]. [Taxpayer’s] private letter ruling request was meant to clarify the determination of the internet datacenter in the event of the owner’s change in legal entity form.”

### Issue

Would Taxpayer’s conversion to a limited liability company, all else being equal, affect the surviving entity’s eligibility for the sales and use tax exemption as provided by N.C. Gen. Stat. § 105-164.13(55)?

### Applicable Statutes and References

Under Article 5 (“Article”) of the North Carolina Revenue Act (“Act”)<sup>1</sup>, 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(23), 105-164.3(65), 105-164.3(77), 105-164.3(123), 105-164.3(195), 105-164.3(223), 105-164.4, 105-164.6, 105-467, 105-468, 105-483, 105-498, 105-507.2, 105-509.1, and 105-537.

If an item is subject to tax under N.C. Gen. Stat. § 105-164.4, it is also subject to the excise tax imposed under N.C. Gen. Stat. § 105-164.6 which imposes tax, at the applicable rate and maximum tax, if any, set in N.C. Gen. Stat. § 105-164.4 on:

- (1) Tangible personal property purchased, leased, or rented inside or outside this State for storage, use, or consumption in this State. This subdivision includes tangible personal property that becomes part of a building or another structure.

---

<sup>1</sup> 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.

Re: [REDACTED]  
January 31, 2020  
Page 3

- (2) Certain digital property purchased inside or outside this State for storage, use, or consumption in this State.
- (3) Services sourced to this State.

“The tax imposed . . . is payable by the person who purchases, leases, or rents the item. . . .”  
N.C. Gen. Stat. § 105-164.6(b).

N.C. Gen. Stat. § 105-164.3(201), defines the term “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 certain 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(223), defines the term “tangible personal property” as “[p]ersonal property that may be seen, weighed, measured, felt, or touched or is in any other manner perceptible to the senses. The term includes electricity, water, gas, steam, and prewritten computer software.”

N.C. Gen. Stat. § 105-164.3(233) defines the term “use” as “[t]he exercise of any right, power, or dominion whatsoever over an item by the purchaser of the item. The term includes withdrawal from storage, distribution, installation, affixation to real or personal property, and exhaustion or consumption of the property or service by the owner or purchaser. The term does not include a sale of an item in the regular course of business.”

N.C. Gen. Stat. § 105-164.3(61) defines the term “eligible Internet datacenter” as “[a] datacenter that satisfies each of the following conditions:

- a. The facility is used primarily or is to be used primarily by a business engaged in software publishing included in industry 511210 of NAICS or an Internet activity included in industry 519130 of NAICS.
- b. The facility is comprised of a structure or series of structures located or to be located on a single parcel of land or on contiguous parcels of land that are commonly owned or owned by affiliation with the operator of that facility.
- c. The facility is located or to be located in a county that was designated, at the time of application for the written determination required under sub-subdivision d. of this subdivision, either an enterprise tier one, two, or three area or a development tier one or two area pursuant to G.S. 105-129.3 or G.S. 143B-437.08, regardless of any subsequent change in county enterprise or development tier status.
- d. The Secretary of Commerce has made a written determination that at least two hundred fifty million dollars (\$250,000,000) in private funds has been or will be invested in real property or eligible business property, or a combination of both, at the facility within five years after the commencement of construction of the facility.”

N.C. Gen. Stat. §105-164.13(55) provides an exemption from the sales and use tax imposed by Article 5 of the Act for the “. . . [s]ales of electricity for use at an eligible Internet datacenter and eligible business property to be located and used at an eligible Internet datacenter.” For purposes

Re: [REDACTED]  
January 31, 2020  
Page 4

of the exemption, “‘eligible business property’ is property that is capitalized for tax purposes under the Code and is used either:

- a. For the provision of a service included in the business of the primary user of the datacenter, including equipment cooling systems for managing the performance of the property.
- b. For the generation, transformation, transmission, distribution, or management of electricity, including exterior substations and other business personal property used for these purposes.
- c. To provide related computer engineering or computer science research.”

“If the level of investment required by [N.C. Gen. Stat. §] 105-164.3(61)d. is not timely made, then the exemption provided under [N.C. Gen. Stat. § 105-164.13(55)] is forfeited. If the level of investment required by [N.C. Gen. Stat. §] 105-164.3(61)d. is timely made but any specific eligible business property is not located and used at an eligible Internet datacenter, then the exemption provided for such eligible business property under [N.C. Gen. Stat. §105-164.13(55)] is forfeited. If the level of investment required by [N.C. Gen. Stat. §] 105-164.3(61)d. is timely made but any portion of the electricity is not used at an eligible Internet datacenter, then the exemption provided for such electricity under [N.C. Gen. Stat. §105-164.13(55)] is forfeited. A taxpayer that forfeits an exemption under [N.C. Gen. Stat. § 105-164.13(55)] is liable for all past taxes avoided as a result of the forfeited exemption, computed from the date the taxes would have been due if the exemption had not been allowed, plus interest at the rate established under [N.C. Gen. Stat. §] 105-241.21. If the forfeiture is triggered due to the lack of a timely investment required by [N.C. Gen. Stat. §] 105-164.3(61)d., then interest is computed from the date the taxes would have been due if the exemption had not been allowed. For all other forfeitures, interest is computed from the time as of which the eligible business property or electricity was put to a disqualifying use. The past taxes and interest are due 30 days after the date the exemption is forfeited. A taxpayer that fails to pay the past taxes and interest by the due date is subject to the provisions of [N.C. Gen. Stat. §] 105-236.”

An exemption from taxation must be strictly construed against the claim of exemption and in favor of the imposition of tax. *Hatteras Yacht Co. v. High*, 265 N.C. 653, 144 S.E.2d 821 (1965). A taxpayer bears the burden of establishing it is eligible for the exemption. *Piedmont Canteen Service, Inc. v. Johnson*, 256 N.C. 155, 123 S.E. 2d 582 (1962) (“One who claims an exemption or exception from tax coverage has the burden of bringing himself within the exemption or exception.”)

Pursuant to N.C. Gen. Stat. § 105-264, “[i]t is the duty of the Secretary to interpret all laws administered by the Secretary. . . . An interpretation by the Secretary is prima facie correct.”

### **Ruling**

This private letter ruling does not offer a determination of Taxpayer’s or Taxpayer LLC’s qualification as an “eligible Internet datacenter” as defined. This letter is issued to address the conversion of Taxpayer to a limited liability company. Any inquiry as to Taxpayer’s or Taxpayer

Re: [REDACTED]  
January 31, 2020  
Page 5

LLC's qualification as an "eligible Internet datacenter" must be addressed as a separate issue pursuant to the Department's written determinations and letters of general applicability policy.

The exemption from sales and use tax as provided by N.C. Gen. Stat. § 105-164.13(55) is a use based exemption. In order for a purchase to qualify for the exemption from North Carolina sales and use tax, the use of the product(s) must comply with the specified use(s) of the product(s) as provided by N.C. Gen. Stat. § 105-164.13(55). In addition, the facility must comply with the statutory requirements of N.C. Gen. Stat. § 105-164.3(61) and N.C. Gen. Stat. § 105-164.13(55). Taxpayer's conversion to a limited liability company, all else being equal, would not change the nature or character of the use of the product(s) by the surviving entity or the facility's qualification for the exemption. Thus, Taxpayer's conversion to a limited liability company, all else being equal, does not affect the surviving entity's qualification for the exemption provided by N.C. Gen. Stat. § 105-164.13(55).

This ruling is based solely on the facts submitted to the Department 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