



North Carolina Department of Revenue

Roy Cooper  
Governor

Ronald G. Penny  
Secretary

April 1, 2021

[Redacted]

Re: Private Letter Ruling Request

Taxpayer: [Redacted]

Account ID: [Redacted]

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 the taxpayer addressed herein and as such has no precedential value except to the taxpayer to whom the determination is issued.

**Overview and Relevant Facts**

Taxpayer "is a third-party food service provider and has entered into various operating agreements with employers, each owning a cafeteria or similar facility, [Redacted]

[Redacted] Taxpayer charges sales tax on the sales of meals and drinks served to its employer-client's employees as well as on the subsidies it receives from the employers for costs associated with operating each employer's cafeteria in North Carolina." [Redacted]

[Redacted]

[Redacted]

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[REDACTED] This difference paid to the Taxpayer is referred to as the employer subsidy.”

The subsidy paid by the employer “is not paid at the time of the food and drink purchase. Only after the end of the accounting period is the amount of the subsidy calculated to comply with the terms of the agreement on the amount that the employer is required to pay the Taxpayer. [REDACTED]

### Issue

Are the subsidies paid by Client to Taxpayer in accordance with the contractual agreement to maintain and operate the Client’s cafeteria subject to North Carolina sales and use tax?

### 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, applicable local, and applicable transit rates of sales and use taxes are imposed on a retailer’s net taxable sales or gross receipts, as applicable, of tangible personal property, certain digital property, and certain services at the percentage rates listed in N.C. Gen. Stat. § 105-164.4(a). N.C. Gen. Stat. §§ 105-164.4, 105-467, 105-468, 105-483, 105-498, 105-507.2, 105-509.1, and 105-537.

N.C. Gen. Stat. § 105-164.4(a)(1) provides, in part, “[t]he general rate of tax applies to the sales price of each article of tangible personal property that is not subject to tax under another subdivision. . . .”

N.C. Gen. Stat. § 105-164.3(89) defines the term “food” as “[s]ubstances that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. The substances may be in liquid, concentrated, solid, frozen, dried, or dehydrated form. The term does not include an alcoholic beverage, as defined in G.S. 105-113.68, or a tobacco product, as defined in G.S. 105-113.4.”

N.C. Gen. Stat. § 105-164.13B(a) provides, in part, that “[f]ood is exempt from the [State] taxes imposed by [Article 5 of Chapter 105 of the North Carolina General Statutes] unless the food is included in one of the subdivisions in [N.C. Gen. Stat. § 105-164.13B(a)].” N.C. Gen. Stat. § 105-

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<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.

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164.13B(a)(4) provides, in part, the food items that are subject to the State tax rate include “[p]repared food, other than bakery items sold without eating utensils by an artisan bakery.”

N.C. Gen. Stat. § 105-164.3(179) defines the term “prepared food” as “[f]ood that meets at least one of the conditions of this subdivision. Prepared food does not include food the retailer sliced, repackaged, or pasteurized but did not heat, mix, or sell with eating utensils.

- a. It is sold in a heated state or it is heated by the retailer.
- b. It consists of two or more foods mixed or combined by the retailer for sale as a single item. This sub-subdivision does not include foods containing raw eggs, fish, meat, or poultry that require cooking by the consumer as recommended by the Food and Drug Administration to prevent food borne illnesses.
- c. It is sold with eating utensils provided by the retailer, such as plates, knives, forks, spoons, glasses, cups, napkins, and straws. A plate does not include a container or packaging used to transport the food.”

N.C. Gen. Stat. § 105-164.3(235) defines the term “sale or selling” 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. The term applies to the following:

- a. Fabrication of tangible personal property for consumers by persons engaged in business who furnish either directly or indirectly the materials used in the fabrication work.
- b. Furnishing or preparing tangible personal property consumed on the premises of the person furnishing or preparing the property or consumed at the place at which the property is furnished or prepared.
- c. A transaction in which the possession of the tangible personal property or certain digital property is transferred but the seller retains title or security for the payment of the consideration.
- d. A lease or rental.
- e. Transfer of a digital code.
- f. An accommodation.
- g. A service contract.
- h. Any other item subject to tax under [Article 5 of Chapter 105 of the North Carolina General Statutes].”

N.C. Gen. Stat. § 105-164.3(237) defines the term “sales price,” in part, as “[t]he total amount or consideration for which an item is sold, leased, or rented. The consideration may be in the form of cash, credit, property, or services. The sales price must be valued in money, regardless of whether it is received in money.

- a. The term includes all of the following:
  1. The retailer's cost of the item sold.
  2. The cost of materials used, labor or service costs, interest, losses, all costs of transportation to the retailer, all taxes imposed on the retailer, and any other expense of the retailer.
  3. Charges by the retailer for any services necessary to complete the sale.
  4. Delivery charges.
  5. Installation charges.

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7. Credit for trade-in. The amount of any credit for trade-in is not a reduction of the sales price.
8. The amount of any discounts that are reimbursable by a third party and can be determined at the time of sale through any of the following:
  - I. Presentation by the consumer of a coupon or other documentation.
  - II. Identification of the consumer as a member of a group eligible for a discount.
  - III. The invoice the retailer gives the consumer.
- b. The term does not include any of the following:
  1. Discounts that are not reimbursable by a third party, are allowed by the retailer, and are taken by a consumer on a sale.
  2. Interest, financing, and carrying charges from credit extended on the sale, if the amount is separately stated on the invoice, bill of sale, or a similar document given to the consumer.
  3. Any taxes imposed directly on the consumer that are separately stated on the invoice, bill of sale, or similar document given to the consumer. “

### **Ruling**

Based on the information provided, the Taxpayer receives a subsidy from the employer-client if the gross receipts from the sales in the client's cafeteria are less than Cost of Operations. According to the contractual agreement, the client pays the subsidy, if applicable, to Taxpayer at the end of the accounting period. The subsidy is not based on individual sales of food and drink. Further, whether a subsidy is paid, and the amount of the subsidy, cannot be determined at the time of the sale. The subsidy is not included in the sales price of food and drink items sold by the Taxpayer to employees of the client in the cafeteria. Since the subsidy is not included as part of the sales price of food and drink items, the subsidy is not subject to the general State (4.75%), applicable local (2.00% or 2.25%), and applicable transit (0.50%) rates of sales and use tax in North Carolina.

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 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