

§ 105-164.4H. Real property contract.

(a) **Applicability.** – 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 G.S. 105-164.13 or G.S. 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 G.S. 105-164.6 apply except as provided in subsection (b) of this section.

(a1) **Substantiation.** – Generally, services to real property are retail sales of or the gross receipts derived from repair, maintenance, and installation services and subject to tax in accordance with G.S. 105-164.4(a)(16), unless a person substantiates that a transaction is subject to tax as a real property contract in accordance with subsection (a) of this section, subject to tax as a mixed transaction in accordance with subsection (d) of this section, or the transaction is not subject to tax. A person may substantiate that a transaction is a real property contract or a mixed transaction by records that establish the transaction is a real property contract or by receipt of an affidavit of capital improvement. The receipt of an affidavit of capital improvement, absent fraud or other egregious activities, establishes that the subcontractor or other person receiving the affidavit should treat the transaction as a capital improvement, and the transaction is subject to tax in accordance with subsection (a) of this section. A person that issues an affidavit of capital improvement is liable for any additional tax due on the transaction, in excess of tax paid on related purchases under subsection (a) of this section, if it is determined that the transaction is not a capital improvement but rather the transaction is subject to tax as a retail sale. A person who receives an affidavit of capital improvement from another person, absent fraud or other egregious activities, is not liable for any additional tax on the gross receipts from the transaction if it is determined that the transaction is not a capital improvement.

The Secretary may establish guidelines for transactions where an affidavit of capital improvement is not required, but rather a person may establish by records that such transactions are subject to tax in accordance with subsection (a) of this section.

(b) **Retailer-Contractor.** – This section applies to a retailer-contractor as follows:

- (1) **Acting as a real property contractor.** – A retailer-contractor acts as a real property contractor when it contracts to perform a real property contract. A retailer-contractor that purchases tangible personal property or certain digital property to be installed or applied to real property to fulfill the contract may purchase those items exempt from tax under a certificate of exemption pursuant to G.S. 105-164.28 provided the retailer-contractor also purchases inventory or services from the seller for resale. When the property is withdrawn from inventory and installed or applied to real property, use tax must be accrued and paid on the retailer-contractor's purchase price of the property. Property that the retailer-contractor withdraws from inventory for use that does not become part of real property is also subject to the tax imposed by this Article.
- (2) **Acting as a retailer.** – A retailer-contractor is acting as a retailer when it makes a sale at retail.

(b1) Repealed by Session Laws 2017-204, s. 2.4(a). For effective date and applicability, see Editor's note.

(c) **Erroneous Collection if Separately Stated.** – An invoice or other documentation issued to a person by a real property contractor shall not separately state any amount for tax for a real property contract. Any amount for tax separately stated on an invoice or other documentation

given to a person by a real property contractor is an erroneous collection and must be remitted to the Secretary.

- (d) **Mixed Transaction Contract.** – A mixed transaction contract is taxable as follows:
- (1) If the allocated sales price of the taxable repair, maintenance, and installation services included in the contract is less than or equal to twenty-five percent (25%) of the contract price, then the repair, maintenance, and installation services portion of the contract, and the items used to perform those services, are taxable as a real property contract in accordance with this section.
 - (2) If the allocated sales price of the taxable repair, maintenance, and installation services included in the contract is greater than twenty-five percent (25%) of the contract price, then sales and use tax applies to the sales price of or the gross receipts derived from the taxable repair, maintenance, and installation services portion of the contract. The person must determine an allocated price for the taxable repair, maintenance, and installation services in the contract based on a reasonable allocation of revenue that is supported by the person's business records kept in the ordinary course of business. Any purchase of tangible personal property or certain digital property to fulfill the real property contract is taxed in accordance with this section.

(e) Repealed by Session Laws 2017-204, s. 2.4(a). For effective date and applicability, see Editor's note. (2014-3, s. 7.1(c); 2015-6, s. 2.1(b); 2016-5, s. 3.5; 2016-94, s. 38.5(c), (g); 2016-123, ss. 11.2, 11.3(b), 11.4(a), 11.5; 2017-204, s. 2.4(a), (b); 2018-5, s. 38.5(s); 2019-169, s. 3.3(d).)