No. 242A23 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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NORTH CAROLINA DEPARTMENT OF REVENUE, Petitioner-Appellee	)	
	)	From Wake County
v.	)	
PHILIP MORRIS USA, INC, Respondent-Appellant	)	

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Philip Morris USA, Inc.'s Appellant's Brief

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INTRODUCTION

Appellee North Carolina Department of Revenue seeks to increase the franchise tax liability of Appellant Philip Morris USA, Inc., in a manner that an administrative law judge correctly determined to be unconstitutional, in violation of the Dormant Commerce Clause of the United States Constitution. Instead of facing that issue before the trial court, the Department argued that the trial court could not hear the merits of the as-applied constitutional

challenge for jurisdictional reasons, notwithstanding the Department's failure to argue to the administrative law judge that she lacked jurisdiction over as-applied constitutional challenges and the Department's subsequent appeal of the administrative decision to the trial court. Relying on N.C.G.S. § 105-241.17, the trial court incorrectly adopted the Department's new position and remanded the case back to the administrative law judge with instructions to dismiss pursuant to § 105-241.17, which provides for the dismissed case to then be brought immediately back to the same trial court. Even though the trial court concluded it lacked authority to reach the constitutional issue, it still made a substantive ruling characterizing the as-applied constitutional challenge at issue as a facial challenge, despite all indications that it was an as-applied challenge outside of the purview of the procedural steps set forth in § 105-241.17. The trial court's decision contravenes the principles of judicial restraint. Seeking to escape this procedural maze of the Department's creation, Philip Morris USA, Inc., appeals to this Court for resolution of these procedural and substantive issues.

ISSUES PRESENTED

1. Does N.C.G.S. § 105-241.17 deprive the Office of Administrative Hearings ("OAH") of jurisdiction over *any* type of constitutional challenge to a tax statute, including an as-applied challenge?

2. Did the trial court err in issuing an advisory opinion on whether the constitutional challenge brought by Philip Morris USA, Inc. ("Philip Morris") was a facial or as-applied challenge, after the trial court determined it lacked subject matter jurisdiction?

3. Did the trial court err in determining that Philip Morris brought a facial constitutional challenge to N.C.G.S. § 105-122, even though the relief requested by Philip Morris was limited to only the franchise tax liability assessed against it?

4. Did the trial court err in ruling on a matter that OAH never ruled on or even considered, which was the Department's new theory, presented only to the trial court, that N.C.G.S. § 105-241.17(3) should be interpreted to preclude OAH from exercising authority over any type of constitutional challenge to a tax statute?

5. Does the Department's application of N.C.G.S. § 105-122(b) against Philip Morris violate the Dormant Commerce Clause because it discriminates against interstate commerce?

STATEMENT OF THE CASE

The North Carolina Department of Revenue audited the franchise tax returns of Philip Morris for the years 2012, 2013, and 2014. (R pp 108-33). The Department concluded that Philip Morris underreported its franchise tax liability by reducing its affiliated indebtedness for purposes of determining its capital stock base, which is the foundation for establishing franchise tax liability.

Under the version of N.C.G.S. § 105-122 applicable between 2012 and 2014, Philip Morris was required to calculate its "Capital Base," defined as "the total amount of its issued and outstanding capital stock, surplus, and undivided profits" (collectively, the "capital stock base"). N.C.G.S. § 105-122 (2012)[1] [App. 1-5]. The last paragraph of § 105-122(b) required certain indebtedness owed to a parent, subsidiary, or affiliated company to be added to the capital stock base. Franchise tax then is owed by Philip Morris on the share of capital stock base apportioned to North Carolina.

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[1] Section 105-122 has since been amended. All references to the statute in this Brief are to the version in effect during the relevant 2012-2014 time period. The 2012 version included in Appendix was in effect from June 26, 2012, to August 22, 2013. Session Law 2013-414 amended § 105-122 applicable to the time period of August 23, 2013, to June 30, 2015, but these minor amendments do not impact the issue before the Court.

After its audit, the Department concluded that Philip Morris had underpaid its franchise tax obligation by underreporting its capital stock base, specifically with respect to its calculation of affiliated indebtedness under § 105-122(b). Section 105-122(b) stipulates that the capital stock base must include *all* payables from Philip Morris (the debtor corporation) to its affiliates (the creditor corporations), the addition of which increases the capital stock base (R pp 69, ¶ 53, 117, 121-23). The Department also applied Section 105-122(b) to allow receivables to Philip Morris (the creditor corporation) from its affiliates (the debtor corporations) to be deducted, thereby reducing the ultimate calculation of affiliated indebtedness included in the capital stock base. Philip Morris deducted receivables owed to it from affiliates in calculating the ultimate amount of affiliated indebtedness for the capital stock base, and the Department determined that Philip Morris had improperly excluded an amount of affiliated indebtedness. The Department determined that receivables owed to Philip Morris from affiliates could be deducted *only if* the affiliated debtor filed a North Carolina franchise tax return. (*Id.* ; R p 69, ¶ 54).

Philip Morris timely requested review under N.C.G.S. § 105-241.11. (R p 68, ¶ 43). Philip Morris argued that it should be allowed to deduct loans made to *any* affiliate, even if the affiliate does not do business in North Carolina and does not file a North Carolina franchise tax return. (*Id.*). The Department rejected Philip Morris' argument. On 31 August 2020, the Department issued a Notice of Final Determination sustaining the proposed assessment and requiring Philip Morris to pay additional franchise tax, penalties, and interest. (R pp 75-81).

On 27 October 2020, Philip Morris timely petitioned the Office of Administrative Hearings for a contested case hearing, (R pp 63-133), and later moved for summary judgment, (R pp 182-84). In September 2021, the administrative law judge ("ALJ") held a hearing on Philip Morris' motion, and in November 2021, the parties filed supplemental briefs. (R p 24, ¶¶ 9-10, pp 229-60).

On 30 December 2021, the ALJ issued a final decision, granting Philip Morris' motion. (R pp 21-35). The ALJ determined that the Department's franchise tax assessment was unconstitutional as applied to

Philip Morris and rescinded the Department's Notice of Final Determination. (R p 33).

On 28 January 2022, the Department petitioned for judicial review. (R pp 3-19). Following a hearing, on 3 May 2023, the trial court entered an order reversing the ALJ's final decision and remanding the matter to OAH with instructions to dismiss the case for lack of subject matter jurisdiction. (R pp 494-518).

On 2 June 2023, Philip Morris timely filed and served its notice of appeal to this Court. (R pp 519-21).

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The trial court's 3 May 2023 order reversing the final agency decision issued by OAH is a final, appealable order. *Quad Graphics, Inc. v. Dep't of Revenue*, 383 N.C. 356, 361, 881 S.E.2d 810, 815 (2022). This Court has appellate jurisdiction under N.C.G.S. § 7A-27(a)(2).

STATEMENT OF THE FACTS

Philip Morris is a C corporation headquartered in Richmond, Virginia, which conducts business in North Carolina. (R p 64). It is wholly owned by Altria Group, Inc. ("Altria Group"). (R p 75). From 2012 through 2014, Philip Morris engaged in lending and borrowing

transactions with affiliated corporations within the Altria Group. (R pp 121-23). Only some of these Altria Group-affiliated companies conduct business in North Carolina and file North Carolina franchise tax returns. (*Id.*).

A. The Department applied N.C.G.S. § 105-122(b) to increase Philip Morris' franchise tax liability based on whether the affiliated indebtedness was owed from an affiliate conducting business in North Carolina.

Section 105-122 imposed an annual franchise tax on corporations doing business in North Carolina. From 2012 through 2014, Philip Morris calculated its franchise tax on a "capital stock base." (R p 5).

Section 105-122(b) dictated how Philip Morris calculated its capital stock base. First, Philip Morris would calculate the amount of its "issued and outstanding capital stock, surplus, and undivided profits." Then, Philip Morris would calculate its affiliated indebtedness to add to this number. All of the payables that it owed to its Altria Group affiliates would be added to the calculation, but receivables owed to Philip Morris from these affiliates would then reduce that calculation. This yielded a net amount of affiliated indebtedness to include in the capital stock base. *Id.* [App. 2].

In determining the amount of receivables that reduce the affiliated indebtedness component of the capital stock base, the Department applied § 105-122(b) to allow this deduction for receivables *only* "to the extent that the debt [was] included in the tax base of the parent, subsidiary, or affiliated debtor corporation reporting for taxation under the provisions of this section." Thus, in its application of § 105-122(b) against Philip Morris, the Department calculated the "affiliated indebtedness" component of the franchise tax base to require the addition of Philip Morris' intercompany *payables* to all affiliates, whether or not the affiliates filed North Carolina franchise tax returns. But it permitted a deduction for Philip Morris' intercompany *receivables* from its affiliates only if the affiliates were doing business in North Carolina and filing North Carolina franchise tax returns.

Philip Morris challenged the Department's application of § 105-122. In its Final Determination, the Department held that it had correctly increased Philip Morris' franchise tax base by "adding back affiliated indebtedness." (R p 78). Though Philip Morris had protested

that the statute's application was unconstitutional, the Department determined that it had no authority to determine whether § 105-122(b) was "unconstitutional as applied to affiliated indebtedness." (R p 79).

B. The ALJ determined that OAH had jurisdiction to resolve Philip Morris' as-applied constitutional challenge to § 105-122(b) and held that the statute violated the Dormant Commerce Clause as applied to Philip Morris.

Before OAH, Philip Morris asked the ALJ to determine that the Department's Final Determination was contrary to law because § 105-122 was unconstitutional as applied to Philip Morris. (R p 71; *see also* R p 199 ("[t]his case involves an 'as applied' constitutional challenge to the Department's calculation of the North Carolina franchise tax"), R p 377 ("This is an as-applied challenge under the case law")).

The Department responded by asking the ALJ to dismiss Philip Morris' contested case petition because Philip Morris had "failed to comply" with § 105-241.17. The Department disputed Philip Morris' characterization of its challenge, arguing that Philip Morris had not challenged application of § 105-122 to it, but had instead made a "facial constitutional challenge." (R p 215). The Department's position was

contrary to clear and repeated statements made by Philip Morris that it had made an "as applied" challenge.

Section 105-241.17(3) governs facial constitutional challenges to tax statutes. *See* N.C.G.S. § 105-241.17 (2007) [App. 7]. It says that a taxpayer may challenge a tax statute as unconstitutional only if OAH has "dismissed the contested case petition for lack of jurisdiction because the sole issue is the constitutionality of a statute and not the application of a statute."

Despite claiming that Philip Morris' challenge was facial, the Department also acknowledged that § 105-241.17(3) would not apply to an as-applied challenge: "*If it is facial*, then the taxpayer is required to follow § 105-241.17, which sets out the requirements *for filing a facial claim*") (emphasis added). (R pp 369). In fact, the Department repeatedly conceded that § 105-241.17 did not govern as-applied challenges. (*See* R p 222 ("Philip Morris only attempts to frame this issue as an applied challenge, so as to avoid the statutory requirements of N.C. Gen. Stat. § 105-241.17."); R p 375 ("if you're making a facial challenge … the jurisdiction is with Superior Court"); R p 375 (paraphrasing § 105-

241.17 (3) as stating that "[t]he Office of Administrative Hearings has dismissed the contested case petition for lack of jurisdiction *because it's a facial challenge*") (emphasis added); R p 379 (under § 105-241.17(3), OAH dismisses a contested tax case for lack of jurisdiction "because the sole issue is a facial issue").

The ALJ ultimately ruled for Philip Morris. First, the ALJ determined that Philip Morris' challenge was as-applied and, thus, OAH had jurisdiction to hear it. (R p 28). Then, the ALJ determined that § 105-122(b) was unconstitutional as applied to Philip Morris. In particular, the ALJ reasoned that the Department's application of § 105-122(b) violated the Dormant Commerce Clause of the United States Constitution by its differential treatment of intrastate and interstate business. (R pp 31-32). The ALJ explained that § 105-122(b)

> . . . burdens [Philip Morris] by denying [it] deductions to reduce its tax liability which are allowed all corporations not doing interstate affiliate lending. That is enough to support a holding that, as applied to [Philip Morris], the denial of the Affiliate Receivables deduction is a violation of the dormant Commerce Clause.

(R pp 32-33). The ALJ concluded, "When calculating [Philip Morris'] capital stock base for Franchise Tax liability purposes," the Department

"may not apply the second half of the final sentence of Section 105-122(b)," which allows the deduction for indebtedness only if the affiliated debtor filed North Carolina franchise tax returns. (R p 33).

The ALJ then entered a Final Decision, granting Philip Morris the requested relief. (R p 33).

C. The Department petitioned for judicial review on the basis of a statutory interpretation of § 105-241.17 that it had failed to raise before OAH.

Seeking to improve its chances on appeal, the Department switched its legal theory before the trial court. The Department argued in its petition for judicial review that, under § 105-241.17, OAH lacked jurisdiction to hear *any* constitutional challenge to a tax statute, not just facial challenges. (R p 7, ¶ 9). It took exception to the ALJ's distinction between facial and as-applied challenges and OAH's jurisdiction to decide as-applied challenges, despite the Department's explicit recognition of these legal principles when appearing before OAH.[2] (R pp 11-13).

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[2] Notably, the Department did not contest the ALJ's determination in its Final Decision that it had not "raised an objection to this tribunal's jurisdiction over as-applied challenges." (R pp 10-15, 28).

In its brief to the trial court, the Department focused almost exclusively on its new interpretation of § 105-241.17. For example, it contended that OAH "incorrectly invoked subject matter jurisdiction based on an improper reading of N.C. Gen. Stat. § 105-241.17." (R p 292). The Department argued that the ALJ had wrongly interpreted § 105-241.17(3) to create a "distinction between facial and as-applied [constitutional] challenges" when that distinction "is not found anywhere in the statute." (R p 299). The Department also criticized the ALJ for "never consider[ing]" *Central Telephone Co. v. Tolson*, 174 N.C. App. 554, 621 S.E.2d 186 (2005), which, it claimed, prohibited agencies from hearing as-applied constitutional challenges.[3] (R pp 294-95). To further support its interpretation of § 105-241.17, the Department focused on N.C.G.S. § 1-267.1(b1) and argued that the General Assembly could use "facial challenge" in a statute when it wanted to but had not done so in § 105-241.17. (R p 300).

[3] *Central Telephone* was decided before the adoption of Session Law 2007-491 [App. 9-45] setting forth the specific procedure for taxpayer challenges through § 105-241.17 and § 105-241.19 that are at issue in this case.

The Department never raised these arguments in OAH. When the trial court questioned the Department about its changed position, (T pp 11-12 [App. 47-48]),[4] the Department confirmed that it was "not backing away" from its new interpretation of § 105-241.17. (T p 14 [App. 49]).[5] The Department acknowledged it had changed positions.

D. The trial court held that OAH had no subject matter jurisdiction to resolve any type of constitutional challenge to § 105-122(b) and that, in any event, Philip Morris' challenge was facial and not as applied.

The trial court reversed the ALJ's decision, concluding that OAH lacked subject matter jurisdiction over Philip Morris' contested case petition.

According to the trial court, the "immediate question" before it was "whether OAH was the proper forum to decide a constitutional

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[4] *See* T pp 11-12 (Trial court: "Well, below, it would appear that the Department argued that this was a facial challenge to constitutionality, and therefore, under , the OAH couldn't hear. In your briefing to this Court, you appear to be arguing that it isn't constitutional—the challenge is constitutional no matter what you call it, facial or as-applied; in neither circumstance can the OAH hear the matter. Which position are you taking today?") [App. 47-48].

[5] Even while advocating for its new interpretation, the Department admitted that it had previously "operated with the understanding" that "certain types of as-applied challenges…may be within the purview of the OAH because the OAH rules contemplate consideration of constitutional principles." (T p 19 [App. 50]).

challenge to Section 105-122(b)." (R p 501). The court concluded that OAH lacked jurisdiction to decide *any* constitutional challenge to a tax statute—whether facial or as-applied. It relied on § 105-241.17(3)'s statement that OAH must dismiss a contested case petition for lack of jurisdiction when the "sole issue is the constitutionality of a statute and not the application of a statute." According to the trial court, that provision gave OAH jurisdiction over "misapplication challenges," not constitutional ones, regardless of whether the challenge is facial or as-applied. (R p 504, ¶ 26).

The trial court supported its interpretation of § 105-241.17 by resorting to canons of construction. (R p 505, ¶¶ 27-28). The court concluded that Philip Morris' interpretation of § 105-241.17(3) violated "basic tenets" of statutory construction. (R pp 505-06, ¶¶ 29-30). The trial court's use of canons of construction suggests that the court determined that § 105.241.17 was ambiguous. *See, e.g.*, *JVC Enters. v. City of Concord*, 376 N.C. 782, 786, 855 S.E.2d 158, 161 (2021).

Despite suggesting that § 105-241.17 was ambiguous, the trial court disregarded other evidence informing the General Assembly's intent. For instance, Philip Morris submitted the General Assembly's 2007 Finance Law Changes, a contemporaneous legislative publication prepared by legal staff after the 2007 legislative session concluded. (R pp 342, 381-89). This publication explained that the phrase "application of a statute" means a "constitutional challenge to the application of a statute" *and* that OAH has authority to hear those challenges. (R pp 388-89). The publication likewise confirms that, when the sole issue is instead a facial challenge, § 105-241.17(3) requires OAH to dismiss the case for lack of jurisdiction. (R p 389).

The trial court's statutory construction also discounted the Department's and OAH's previous interpretations of § 105-241.17 as *allowing* OAH to resolve as-applied challenges to tax statutes. (R p 512, n.11; R pp 343-46; R pp 411-56).

Based on its conclusion that OAH did not have jurisdiction to hear any type of constitutional challenge under § 105-241.17, the trial court reversed the ALJ's final decision and remanded to OAH to

dismiss the action for lack of subject matter jurisdiction. (R p 518, ¶ 53).

Despite concluding that OAH lacked jurisdiction and that it, therefore, lacked authority to rule on the merits of Philip Morris' as-applied constitutional challenge, the trial court then determined that Philip Morris' challenge was facial, not as-applied. (R p 514, ¶ 43). In particular, the court reasoned that because the ALJ had ordered the Department not to apply § 105-122(b)'s final clause to Philip Morris, the Department could no longer administer the tax statute to *any* taxpayer, rendering the challenge facial. (R p 514, ¶ 45).

ARGUMENT

I. The standard of review is de novo.

Philip Morris challenges the trial court's interpretation of § 105-241.17. This Court reviews questions of statutory interpretation de novo. *Matter of Executive Office Park of Durham Ass'n*, 382 N.C. 360, 362, 879 S.E.2d 169, 171 (2022). Philip Morris also challenges the trial court's determination that OAH did not have subject matter jurisdiction to issue its final decision. Whether a tribunal possesses

subject matter jurisdiction is a question of law that is reviewed de novo. *In re A.L.L.*, 376 N.C. 99, 101, 852 S.E.2d 1, 4 (2020).

II. The trial court erred in interpreting § 105-241.17 to deprive OAH of jurisdiction over as-applied constitutional challenges to tax statutes.

The trial court concluded that OAH lacked jurisdiction to hear Philip Morris' as-applied challenge to § 105-122(b), ruling that OAH lacked jurisdiction over *any* type of constitutional challenge. But the trial court's construction of § 105-241.17 is wrong. The trial court failed to give the statute its plain meaning. Moreover, while the trial court turned to canons of construction to support its interpretation of the statute, it misapplied the canons it cited and selectively omitted others that commanded a different result. (R p 504-06, ¶¶ 27-29).

A. The plain meaning of § 105-241.17 gives OAH jurisdiction over as-applied constitutional challenges to tax statutes.

Section 105-241.17 is not ambiguous. The trial court failed to properly construe the statute's plain meaning.

When a statute's language is clear and unambiguous, "there is no room for judicial construction[.]" *C Invs. 2, LLC v. Auger*, 383 N.C. 1, 8, 881 S.E.2d 270, 276 (2022) (quotation omitted). Instead, "courts

must give [the statute] its plain and definite meaning," and they "are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Id.* Ordinary rules of grammar apply, and the meaning must be construed according to the "context and approved usage of the language." *Dunn v. Pacific Employers Ins. Co.*, 332 N.C. 129, 134, 418 S.E.2d 645, 648 (1992).

Courts should "give every word of the statute effect, presuming that the legislature carefully chose each word used." *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009). After all, this Court presumes that the General Assembly "know[s] the existing law" and "legislate[s] with reference to it." *State v. S. Ry. Co.*, 145 N.C. 495, 59 S.E. 570, 587 (1907).

The trial court's construction of § 105-241.17 disregards these well-established principles.

First, § 105-241.17's first sentence explains that the statute applies only to facial constitutional challenges. That sentence says that this statute deals with a taxpayer claiming "that a tax statute *is* unconstitutional." § 105-241.17 (emphasis added) [App. 7].

Claiming that a statute "*is* unconstitutional" amounts to a facial challenge. Arguing that a statute "*is* unconstitutional" means that the statute, in and of itself, violates constitutional principles. The word "is" carries the present tense, third-person singular form of the verb "to be," which is defined as being "equal in meaning," "having the same connotation as," or having a "specified qualification or characterization." *See* "Be." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/be. (September 25, 2023). Consistent with that definition, an argument that a statute "*is* unconstitutional" contends that the statute itself has the quality or character of being unconstitutional.

That definition is consistent with this Court's definition of a facial challenge. "A facial challenge maintains that no constitutional applications of [a] statute exist, prohibiting its enforcement in any context." *State v. Packingham*, 368 N.C. 380, 383, 777 S.E.2d 738, 743 (2015), *rev'd on other grounds*, 137 S. Ct. 1730 (2017). A facial challenge thus attacks a statute's quality or character—that is, its very

being. *See Cmty. Success Initiative v. Moore*, 384 N.C. 194, 213, 886 S.E.2d 16, 32-33 (2023).

As a result, the first sentence of § 105-241.17 explains that the statute and its entire procedure deal solely with facial constitutional challenges. When a claim is brought that "a tax statute is unconstitutional," the claimant is attacking the very nature of the statute itself. Based on this first sentence alone, the plain language of § 105-241.17 shows how a taxpayer must bring facial challenges only, and the trial court erred in saying that § 105-241.17 requires OAH to dismiss *all* constitutional challenges, including Philip Morris' as-applied challenge.

Second, even if that first sentence were not dispositive, § 105-241.17(3)'s plain language confirms that OAH may consider as-applied constitutional challenges. That provision requires OAH to dismiss a contested case petition for lack of jurisdiction when "the [petition's] sole issue is the constitutionality of a statute and not the application of a statute." § 105-241.17(3) [App. 7].

The legislature used the "sole issue" language to distinguish a stand-alone, facial constitutional challenge from any other type of challenge. Under § 105-241.17, if there are multiple issues in a case, including a facial constitutional challenge, OAH should resolve the petition. Likewise, if a contested case petition raises an as-applied constitutional challenge, OAH should resolve the petition. Only if the petition raises a single facial constitutional challenge should OAH dismiss the petition under § 105-241.17.

The trial court incorrectly read the statute's "sole issue" language to exclude both facial and as-applied constitutional challenges from OAH's jurisdiction. Focusing on § 105-241.17(3)'s suggestion that OAH has jurisdiction when a contested case petition challenges "the application of a statute," the trial court reasoned that OAH had jurisdiction to hear only those contested case petitions where the petitioner's "sole issue" was the "technical misapplication" of a statute. (R p 504, ¶ 26).

But that interpretation of § 105-241.17 creates unnecessary surplusage. A neighboring statute confirms that OAH can resolve

questions of statutory interpretation. *See* N.C.G.S. § 105-241.15 [App. 6]. Thus, if § 105-241.15 gives OAH the power to interpret tax statutes, § 105-241.17 must do something more or else it would be superfluous. To avoid superfluity, § 105-241.17 must give OAH the authority to decide as-applied constitutional challenges, just not facial challenges.

Third, the trial court likewise erred in interpreting § 105-241.17(3) when it read the phrase "and not the application of a statute" contrary to its logical and contextual meaning. The first sentence of § 105-241.17 establishes the statute's purpose—to set out the "conditions" for filing a civil action where a taxpayer claims that "a tax statute is unconstitutional." In keeping with that purpose, subsection (3) provides the classic dichotomy between the well-recognized types of constitutional challenges: facial and as-applied. Where the sole issue is a facial challenge ("the constitutionality of a statute"), OAH must dismiss the taxpayer's petition for lack of jurisdiction, and the taxpayer has then satisfied its administrative requirements. Where the sole issue is an as-applied challenge ("the [constitutional] application of a statute"), OAH resolves the case before the taxpayer may proceed to

court. Thus, this subsection explains which constitutional challenges require an OAH hearing and which do not. Subsection (3) of § 105-241.17 is abundantly clear that this statute does not preclude OAH consideration of as-applied constitutional challenges, which are to be considered in the normal course of taxpayer challenges before OAH.

The trial court's interpretation that "application of a statute" does not refer to the *constitutional* application of a statute disregards the context of the statute's clear focus on *constitutional* challenges. If the legislature intended for § 105-241.17's OAH-dismissal-and-refiling-in-Superior-Court framework to refer to *all* constitutional challenges (facial and as-applied), it would not have needed to include the language "and not the application of a statute" in subsection (3) at all. It would have, as the third condition, simply directed OAH to dismiss the contested case petition when any type of constitutional challenge is brought. The phrase "and not the application of a statute" has a logical meaning only if it refers to an as-applied challenge, as distinguished from a facial challenge.

Fourth, the trial court ignored the statute's specific words. This Court should presume that when it enacted § 105-241.17, the legislature knew the difference between facial and as-applied constitutional challenges. Likewise, the Court should infer that the legislature knew that, in general, courts refer to as-applied constitutional challenges as challenges to the "application of a statute." *See, e.g., United States v. Raines*, 362 U.S. 17, 21 (1960) (referring to as-applied constitutional challenge as "application of a statute"); *Richmond Med. Ctr. V. Herring*, 570 F.3d 165, 172 (4th Cir. 2009) (en banc) (an as-applied challenge is based on "the application of a statute to a specific person"). The trial court's interpretation of "application of a statute" to mean the "technical misapplication" of a statute, outside of any constitutional challenge, is contrary to the legislature's presumed use of that phrase to mean an as-applied challenge. Neither the Department nor the trial court identified a single case in support of this interpretation.

In contrast, Philip Morris' interpretation is supported by the text and the long-established application of these plain words. There is no ambiguity, and these words should be given their plain meaning.

B. The trial court erred by either misapplying or failing to apply canons of statutory construction.

Even if § 105-241.17 were ambiguous, which it is not, the trial court selectively misapplied canons of construction to incorrectly conclude that the statute deprived OAH of jurisdiction to hear any constitutional challenge. (R p 504-06, ¶¶ 27-29).[6] The trial court's conclusion suffers from at least two problems. First, the canons the trial court applied do not support its conclusion. And second, the trial court ignored other canons that supported the contrary result—that the legislature intended OAH to have jurisdiction over as-applied challenges.

[6] The trial court never stated that 105-241.17 was ambiguous. If the trial court believed the statute to be unambiguous, as the parties did, it should not have resorted to canons of construction. *JVC Enters. v. City of Concord*, 376 N.C. 782, 786, 855 S.E.2d 158, 161 (2021).

1. The canons of statutory construction on which the trial court relied do not support its interpretation.

The trial court applied two tools of statutory construction: portions of the same statute dealing with the same subject matter are to be considered as a whole; and statutes dealing with the same subject matter must be construed *in pari material*. (R p 505, ¶¶ 27-28). The trial court reasoned that if OAH had jurisdiction to decide as-applied challenges, the legislature would have made that distinction clear in the title and other provisions of § 105-241.17. (R pp 505-06, ¶ 29). Likewise, the trial court concluded that the legislature "would have excluded 'as applied' challenges from its mandate in N.C.G.S. § 7A-45.4(b)(1) that the North Carolina Business Court decide all constitutional challenges to tax statutes." (R p 506, ¶ 30).[7]

But these principles of statutory construction are not determinative, in that they swing just as easily to favor Philip Morris' construction. Section 105-241.17's title and language show that its sole

[7] Of course, the fact that a legislature "declined to enact a statute with specific language does not indicate the legislature intended the exact opposite." *N.C. Dep't of Corr.,* 363 N.C. at 202, 675 S.E.2d at 650.

purpose is to establish the conditions under which a taxpayer may challenge a tax statute "as unconstitutional" or may claim a tax statute "is unconstitutional." Both the title and first sentence show that the legislature is addressing attacks on the statutes themselves, namely facial challenges. Moving down to subsection (3) of § 105-241.17, it would not be in keeping with the rest of the statute to interpret subsection (3) as distinguishing between a constitutional challenge and a non-constitutional one. Rather, to harmonize subsection (3) with the other provisions, it must be interpreted as resolving what type of constitutional challenge requires an OAH hearing before a taxpayer may proceed to court, which is answering whether it is a facial or as-applied challenge.

Moreover, the language of § 7A-45.4(b)(1), which provides that actions under § 105-241.17 shall be designated as mandatory complex business cases, does not need to distinguish between facial and as-applied challenges because that distinction is already contained in § 105-241.17(3). To repeat it in § 7A-45.4 would be redundant. It also would be unnecessary, in that the Business Court eventually hears all

constitutional challenges to tax statutes—facial challenges after OAH dismisses for lack of jurisdiction and as-applied challenges after OAH first hears the dispute. This redundancy is shown in the practical outcome of the trial court's ruling here. The trial court believes Philip Morris' challenge should come right back to it, only through a different gate. There is no reason for § 7A-45.4 to make any distinction here.

2. The trial court improperly refused to apply canons of statutory construction indicating a contrary result.

On the other hand, the tools to determine legislative intent that the trial court refused to apply weigh heavily in favor of Philip Morris' position. These include § 105-241.17(3)'s legislative history, especially the 2007 Finance Law Changes, and OAH's long-standing practice of hearing as-applied challenges, which two North Carolina opinions have at least tacitly approved.

a. The 2007 Finance Law Changes publication is a significant indication of the legislature's intent that "application to a statute" refers to as-applied constitutional challenges.

The trial court's opinion does not even reference the 2007 Finance Law Changes, (R pp 381-89), a significant piece of § 105-

241.17's legislative history. It was prepared by the General Assembly's legal staff to explain the significant reforms to tax appeal procedures enacted in 2007, including § 105-241.17.[8] This contemporaneous publication confirms that the legislature intended "application of a statute" in § 105-241.17(3) to mean a "constitutional challenge to the application of a statute" and intended for OAH to have authority to hear those challenges. (R pp 388-89).

One purpose of the new act was to require taxpayers to exhaust administrative remedies, even for a constitutional challenge. As the publication explains, the act "does not allow a taxpayer to bypass the Departmental review process or OAH altogether"; rather, if the taxpayer raises an as-applied challenge, OAH "serves as the fact-finding body and establishes the record in the case." (R p 389). This preserves judicial resources by allowing the record to be "developed at

[8] The publication's Overview establishes the substantial nature of the reforms, stating that Session Law 2007-491 "substantially revises the process for the review of disputed tax matters to provide taxpayers with the opportunity for an independent hearing outside the Department prior to paying the tax. These revisions include administrative review by the Office of Administrative Hearings, the elimination of the Tax Review Board, and the referral of tax cases to Business Court." (R p 382).

a lower level." (R p 387). The ALJ "makes a decision regarding the application of the statute based on the facts elicited at the hearing" and the taxpayer may then seek review of an adverse decision with the Business Court. (R p 389).

This legislative publication leaves no doubt that the trial court's interpretation of § 105-241.17 is contrary to legislative intent.[9] At the hearing, the trial court incorrectly decided that it could not consider the publication based on the "law that says I'm not at liberty to accept the understanding of any individual as to legislative intent." (T p 33 [App. 51]). To the contrary, this Court has recognized that contemporaneous statements from those involved in the legislative process are helpful to interpret the legislation. *See N.C. Corp. Comm'n v. Southern Ry. Co.*, 185 N.C. 435, 117 S.E. 563, 577 (1923) ("[T]he propriety of referring to statements made by a committee member in charge of a bill, of course, is well recognized."); *State ex rel. Edmisten v. J.C. Penney Co., Inc.*, 292 N.C. 311, 317-18, 233 S.E.2d 895, 899

[9] Two contemporaneous articles published in the North Carolina State Bar Journal by practicing tax attorneys likewise adopt this interpretation of the then newly-enacted statute. *See* R pp 391-404. The trial court ignored this understanding of legislative intent as well.

(1977) (looking to a "contemporaneous article" written by the Attorney General as to "his views on the effect of the statute" as legislative history); *C Invs. 2,* 383 N.C. 1 at 27, 881 S.E.2d at 288 (Newby, J., dissenting) ("Though one senator's statement does not establish the General Assembly's intent in adding [the statutory subsection at issue], it certainly is instructive when deciding between two clashing meanings of an ambiguous statute."). The trial court erred in failing to consider this important indication of legislative intent as a tool of statutory construction.

b. OAH's regulation authorizing review of constitutional principles and its practice of hearing as-applied challenges, at least tacitly approved of by North Carolina courts, indicate the legislature's intent to permit OAH to exercise jurisdiction over as-applied challenges under § 105-241.17.

A court should construe a statute as consistent with prior administrative decisions or practice unless the legislature clearly voices its disapproval of that practice. *See Midrex Techns., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 263, 794 S.E.2d 785, 795 (2016) (adopting a statutory interpretation that was "fully consistent with

both the literal language [of the statute] and long-standing administrative practice"); *cf. I.N.S. v. Stevic*, 467 U.S. 407, 425 (1984) (assuming that a statute incorporated the standard previously used by the Board of Immigration Appeals and the courts where it found no "legislative intent to alter the pre-existing practice"); *Rastelli v. Warden, Metropolitan Corr. Ctr.*, 782 F.2d 17, 24 (2d Cir. 1986) ("Congress' failure to condemn an existing regulation [in subsequent legislation] provides an inference that it acquiesced in the regulation").

Here, the trial court failed to consider OAH's established practice of hearing as-applied challenges and the North Carolina courts' consistent acceptance of that practice. *First*, the trial court disregarded OAH's 1986 regulation authorizing ALJs to apply "constitutional principles" in their decisions. *See* 26 N.C.A.C. § 03.0127(c) ("An administrative law judge's decision shall fully dispose of all issues required to resolve the case and shall contain … (6) conclusions of law based on the findings of fact and *applicable constitutional principles*, statutes, rules, or federal regulations") (emphasis added).

Second, the trial court failed to consider OAH's decisions, prior to § 105-241.17's enactment, exercising its jurisdiction to resolve as-applied challenges. *See, e.g., Mooresville Hosp. Mgmt. Assocs., Inc. v. N.C. Dep't of Health and Human Servs.*, 2002 WL 32002727 at p 17, ¶ 26 (N.C.O.A.H. Nov. 26, 2002) (determining that agency action rendered statute unconstitutional as applied to the petitioner) (R pp 425-46); *Paul Watkins, DDS v. N.C. Dep't of Health and Human Servs.*, 2007 WL 4385665, at ¶ 6 (N.C.O.A.H. Aug. 7, 2007) (determining that there was no constitutional violation "as applied to the Petitioner") (R pp 447-48).[10]

Third, the trial court ignored the Department's own 2011 interpretation of § 105-241.17 in *FirstCity Funding L.P. v. N.C. Dep't of Revenue*, OAH No. 09 REV 5669 (April 21, 2011) (R pp 406-09). There, the Department, relying on § 105-241.17, stated that OAH was "not prohibited from hearing evidence and adjudicating issues involving constitutional principles in the context of the application of a

[10] In its trial court brief, Philip Morris also cited to a number of OAH decisions after the enactment of § 105-241.17, which continue its practice of hearing as-applied challenges, consistent with the language of that statute. (R pp 315-17).

statute." *Id.* at p 12, ¶ 3E. (R p 408). The trial court rejected *FirstCity* on the grounds that the Department cannot determine OAH's jurisdiction. (R p 508 n. 10). That is not the point. Philip Morris cited it not for that principle but as a useful tool of statutory construction—to show how the Department, whose job it is to administer the statute, interpreted its language. (R pp 343-44). *See Applications for Reassignment of Pupils*, 247 N.C. 413, 420, 101 S.E.2d 359, 365 (1958) ("the interpretation given to proposed legislation by the department . . . responsible for its administration, is helpful to a court when it is called upon to interpret legislative language").

Finally, the trial court failed to acknowledge that two North Carolina decisions indicate at least tacit approval of OAH's long-standing practice and policy of resolving as-applied challenges. In *Quad Graphics, Inc. v. N.C. Dep't of Revenue*, 19 REV 00334, ¶ 13 (June 24, 2020) [Add. 1-10],[11] the ALJ stated that while OAH was barred from determining the constitutionality of the sales tax statutes

[11] The copy of this decision included in the record on judicial review is incomplete. (*See* R pp 411-414). A full and complete copy is included in Philip Morris' Addendum. [Add. 1-10].

at issue, it could "analyze constitutional principles as applied to Petitioner [taxpayer]." (R p 413). The constitutional issue involved was whether the taxpayer had sufficient nexus in North Carolina under the Commerce Clause for the Department to impose sales tax on the sales in question. The ALJ found this to be an as-applied challenge and concluded that there was a sufficient constitutional nexus for the Department's assessment. *Id.* at ¶¶ 13-18 [Add. 6-7].

On appeal, the Business Court noted the ALJ's acknowledgement that it was barred from ruling on a taxpayer's facial constitutional challenges and agreed that this challenge was as-applied. *Quad Graphics, Inc. v. N.C. Dep't of Revenue*, 2021 NCBC 37, ¶¶ 6, 38, 2021 WL 2584282, at *2, 8 (N.C. Super. Ct. June 23, 2021) [Add. 12, 16-17], *rev'd*, 383 N.C. 356, 881 S.E.2d 810 (2022). The court merely added a footnote that administrative agencies do not have jurisdiction to resolve "constitutional questions" and, importantly, cited for support a decision of this Court involving a *facial* challenge. 2021 NCBC 37, ¶ 6 n.6, 2021 WL 2584282, at *2 n.6 (citing *In re Redmond*, 369 N.C. 490, 493, 797 S.E.2d 275, 277 (2017)) [Add. 12, 24]. The Business Court

reversed OAH, finding an insufficient constitutional nexus for the Department's assessment.

Following appeal to this Court, this Court cited, without comment, to OAH's acknowledgement that it did not have jurisdiction to determine "'the constitutionality of legislative enactments,'" a quote from *In re Redmond*, 369 N.C. at 493, 797 S.E.2d at 277, in addressing a *facial* challenge. *Quad Graphics, Inc. v. N.C. Dep't of Revenue*, 383 N.C. 356, 360, 881 S.E.2d 810, 814 (2022). Without explicitly stating whether the challenge was facial or as-applied, this Court reversed the Business Court, finding the imposition of sales tax "on the transactions at issue" to be constitutional. *Id.* at 382, 881 S.E.2d at 829.[12] This case history indicates that by not disapproving, rejecting, or even commenting negatively on OAH's conduct in hearing and resolving the as-applied constitutional challenge, the Business Court and this Court tacitly approved OAH's practice. Although both courts noted OAH's lack of jurisdiction to hear a facial constitutional challenge, they

[12] The dissenting opinion explicitly stated that the "tax violates the Commerce Clause as applied to Quad Graphics." *Id.* at 386, 881 S.E.2d at 831.

neither objected to nor analyzed OAH's resolution of an as-applied challenge.

Similarly, in *Graybar Electric Co., Inc. v. N.C. Dep't of Revenue*, OAH No. 16 REV 07936, at p 2 (Oct. 16, 2017) (R pp 416-18), the ALJ ruled, in a corporate income tax case, that OAH "has the authority to find that a particular statute or rule is unconstitutional as applied" and agreed with the petitioner's argument that the Department's position created a double taxation in violation of the North Carolina Constitution. The Business Court held that "these applied constitutional challenges" were "properly before the Court for determination," but found that they ultimately failed. *N.C. Dep't of Revenue v. Graybar Electric Co., Inc.*, 2019 NCBC 2, ¶ 43, 2019 WL 148422, at *9 (N.C. Super. Ct. Jan. 9, 2019) [Add. 32]. This Court affirmed per curiam. *N.C. Dep't of Revenue v. Graybar Electric Co., Inc.*, 373 N.C. 382, 838 S.E.2d 627 (2020).

Like *Quad Graphics*, the *Graybar* decision can be seen as an implicit approval of OAH's policy with respect to as-applied challenges to tax statutes. Presumably, if OAH had no jurisdiction to resolve as-

applied constitutional challenges, the courts in these two cases would have objected.[13]

Finally, the trial court cited only *one* decision as direct authority for its determination that "appellate case law" does not give OAH jurisdiction to rule on an as-applied challenge. (R p 508, ¶ 32). In that case, *Cent. Tel. Co. v. Tolson*, 174 N.C. App. 554, 559, 621 S.E.2d 186, 190 (2005), the Court of Appeals held that the former Tax Review Board, "as an administrative tribunal," lacked jurisdiction to hear constitutional challenges regarding the application of a tax statute. The Tax Review Board, a three-member board composed of the State Treasurer, the chairman of the Utilities Commission, and an appointee of the Governor, was dissolved as part of the 2007 tax reform legislation (Session Law 2007-491 [App. 9-45]). (T pp 37-38; R pp 384-

[13] The trial court stated that *Quad Graphics* and *Graybar* are "unpersuasive" as "decided under different circumstances." (R p 509, ¶ 34). But it did not dispute that both cases involved as-applied challenges, and OAH decided these challenges without objection from the reviewing courts. Indeed, the trial court acknowledged that the Business Court "ruled on the constitutionality of the tax statute as applied to Quad Graphics without first requiring OAH to dismiss the case for lack of jurisdiction under Section 105-241.17," as it should have done under the trial court's interpretation. (R p 510-11, ¶ 37). It claimed that this was because the constitutionality of a statute was not the "sole issue" under the language of § 105-241.17. (R p 510-11, ¶ 37). But neither the Business Court nor this Court even mentioned this "sole issue" distinction in their opinions.

86). This legislation, in a departure from the political-oriented Tax Review Board, established OAH, a quasi-judicial agency, as the "independent forum for the review of contested tax matters." (R p 386); *see also* N.C.G.S. § 7A-750 (creating OAH as an "independent, quasi-judicial agency"). This single decision from the Court of Appeals, issued before the adoption of § 105-241.17, that a defunct administrative board did not have jurisdiction to hear as-applied constitutional challenges is not persuasive authority for a similar finding as to OAH, a quasi-judicial agency with formal hearing procedures conducted by administrative law judges.

In conclusion, OAH had jurisdiction to hear Philip Morris' as-applied constitutional challenge to § 105-122(b). The trial court erred in its construction of § 105-241.17, and its decision should be reversed.

III. The trial court should not have ruled on, and in any event erroneously decided, the issue of whether Philip Morris' constitutional challenge was as-applied or facial.

As a requirement of judicial restraint, the trial court should not have ruled on whether Philip Morris' constitutional challenge was as-applied or facial after it determined that OAH lacked jurisdiction over

this issue and refused to rule on the merits of the Department's appeal. Additionally, even if this issue had been ripe for determination, the trial court erred in determining that the challenge was facial and not as-applied.

A. The trial court should not have issued an advisory opinion as to the type of Philip Morris' constitutional challenge.

It is a fundamental legal premise that a court only may decide the actual controversy before it and no other. This premise is grounded on the exercise of judicial restraint. *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978). Thus, a court cannot "determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions." *Chavez v. McFadden*, 374 N.C. 458, 467, 843 S.E.2d 139, 147 (2020) (quotation omitted); *see also Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 22 S.E.2d 450, 453 (1942) ("It is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution,

to give advisory opinions, or to answer moot questions…") (quotation omitted).

Here, the trial court concluded that OAH did not have jurisdiction to decide *any* type of constitutional challenge to a tax statute, including the one presented by Philip Morris. (R pp 479-80, ¶ 33). The trial court therefore held that the ALJ's Final Decision, in its entirety, was "without legal effect." (*Id.*). Having rendered the ALJ's decision null and void, the question of whether the ALJ properly determined that Philip Morris' constitutional challenge was as-applied became moot. The trial court's opinion on this issue, after determining OAH had no jurisdiction to decide it, is purely advisory. Accordingly, the trial court's opinion on this issue is a nullity, and this Court, in applying 105-241.17(3) properly, should determine as part of its de novo review that Philip Morris brought an as-applied challenge.

B. Philip Morris brought an as-applied challenge to the Department's application of § 105-122 (b) to it.

Despite deciding that OAH lacked jurisdiction and that the merits of the constitutional challenge could not be reached, the trial court nonetheless determined that Philip Morris' challenge here was a

facial challenge. (R p 485, ¶ 43). But the trial court's advisory opinion fails to recognize the distinction between the types of constitutional challenges, and it significantly mischaracterizes the remedy the ALJ ordered.

An as-applied challenge "contests whether the statute can be constitutionally applied to a particular defendant, even if the statute is otherwise generally enforceable." *State v. Packingham*, 368 N.C. 380, 383, 777 S.E.2d 738, 743 (2015), *rev'd on other grounds*, 137 S.Ct. 1730 (2017). Thus, as-applied challenges are the "basic building blocks of constitutional adjudication" in that it is not the court's role "to resolve questions of constitutionality with respect to each potential situation that might develop." *Gonzales v. Carhart*, 550 U.S. 124, 167-68 (2007) (quotation omitted). In contrast, a facial challenge requires a finding that "no constitutional applications of the statute exist, prohibiting its enforcement in any context." *Packingham*, 368 N.C. at 383, 777 S.E.2d at 743; *see also Hart v. State*, 368 N.C. 122, 131, 774 S.E.2d 281, 288 (2015) (the party raising a facial challenge must "meet

the high bar of showing that there are no circumstances under which the statute might be constitutional") (quotation omitted).

The remedies for each type of challenge reflect their differences. The party who prevails in an as-applied claim "may enjoin enforcement of the statute only against himself or herself in the objectionable manner, while a successfully mounted facial attack voids the statute in its entirety and in all applications." *Kelly v. State*, 286 N.C. App. 23, 33, 878 S.E.2d 841, 849 (2022) (quotation omitted). Where a party seeks to "void the statute in its entirety, thereby reaching far beyond their particular circumstances," they are mounting a facial challenge. *Id.*

The trial court disregarded these fundamental differences in finding Philip Morris' challenge to be facial. Philip Morris did not seek relief for a facial challenge in its contested case petition—that § 105-122(b) be declared unconstitutional in all its applications. *See* R p 71.[14]

[14] The trial court did find that, despite Philip Morris' repeated assertion that its challenge was as-applied, one sentence in its OAH summary judgment brief established the opposite—where Philip Morris explained that differential treatment between corporations doing business in North Carolina and those not is the "epitome of the discrimination prohibited by the Commerce Clause." (R p 486, n.13). This general statement of the law cannot reasonably be taken as Philip

Philip Morris argued repeatedly that this was an as-applied challenge. The ALJ determined that she had jurisdiction under § 105-241.17(3) because this was an as-applied constitutional challenge; she recognized she had no jurisdiction over a facial challenge. (R pp 27-31).[15] And the ALJ's "Final Decision" itself granted as-applied relief. The ALJ reversed and rescinded the Department's Notice of Final Determination against Philip Morris to the extent it conflicted with the ALJ's holding. (R p 33). Indeed, the Department understood this relief as limited only to its assessment against Philip Morris in that it asked the trial court on judicial review "to reverse the decision below and to

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Morris' argument that "it would be constitutionally impermissible to apply [§ 105-122] to any corporation," as the trial court wrote. (*Id.*).

[15] The trial court's footnote conclusion that the ALJ, in a footnote, "recognized that the challenge was a facial one" is meritless. (R p 485, n.12). The ALJ merely speculated in her footnote dicta that a facial challenge to § 105-122 "could be sustained in the Superior Court" based on her belief that Philip Morris had not "describe[d] a situation where the complained of provision could be applied constitutionally." (R p 29 n.6). The ALJ was incorrect that Philip Morris had not sufficiently described at least five categories of taxpayer situations where § 105-122(b)'s application would be constitutional. *See* R pp 252-55. Nonetheless, the ALJ specifically rejected the Department's argument that an as-applied challenge is proper only where a petitioner can show that the complained-of statute is otherwise generally enforceable, and she held that Philip Morris could proceed with its as-applied challenge. (R pp 29-31).

reinstate its Final Determination assessing Philip Morris' franchise tax liability." (R p 472, ¶ 19).

Despite all these indicia pointing squarely to an as-applied challenge, the trial court held it to be facial based solely on the last sentence of the ALJ's opinion, before its "Final Decision," in which the ALJ wrote: "When calculating [Philip Morris'] capital stock base for Franchise Tax liability purposes, therefore, [the Department] may not apply the second half of the final sentence of Section 105-122(b), which reads: 'to the extent that the debt has been included in the tax base of the parent, subsidiary, or affiliated debtor corporation reporting for taxation under the provisions of this section.'" (R p 33). The trial court held this sentence to connote a facial challenge, accepting the Department's contention that the language "prevents it from administering the tax statute." (R p 485, ¶ 45).

But this sentence simply reflects the nature of an as-applied remedy—the court grants relief to the challenging party from the unconstitutional application of a statute to its particular circumstances. The ALJ did not void § 105-122(b) "in its entirety and

in all applications" or reach beyond Philip Morris' "particular circumstances," as it would have done for a facial challenge. *Kelly*, 286 N.C. App. at 33, 878 S.E.2d at 849. Indeed, the trial court admitted that the ALJ ordered that the Department not apply the final clause of § 105-122(b) "to Philip Morris," the hallmark of an as-applied remedy. (R p 485, ¶ 43).

Nor is there any merit to the Department's hyperbolic claim, accepted by the trial court, that this sentence prevents it from administering § 105-122(b) because the ALJ rendered the final clause "inoperable." (R pp 485-86, ¶ 45). Philip Morris refuted this argument by submitting evidence that the Department had, in fact, continued to administer § 105-122 after the ALJ's ruling.[16] The trial court denied the Department's motion to strike this evidence, but otherwise failed to consider it. (R pp 487-88, ¶¶ 48-52). The trial court also ignored that Philip Morris had submitted numerous examples of how § 105-122(b) could be constitutionally applied to other taxpayers and thus was

[16] Philip Morris submitted excerpts from July 2022 franchise tax audit reports of Philip Morris USA and three of its affiliates, which showed that the Department had applied § 105-122 to these taxpayers to deny a deduction on the same basis as the assessment at issue here. (R pp 320-21, 429-52).

generally enforceable. (R pp 252-55). Neither the Department nor the trial court refuted these examples.

But even without this evidence, neither the Department nor the trial court explained how a ruling specifically limited to Philip Morris would prevent the Department from administering a tax statute to other taxpayers. The Department's argument that the ALJ has no authority to order injunctive relief fails for the same reason—the ALJ properly held that the Department could not apply the final clause *to Philip Morris*, not to the universe of taxpayers.

IV. The trial court erred in reviewing an issue—the Department's new theory that § 105-241.17(3) precluded OAH from ruling on *both* facial and as-applied challenges—that OAH never considered or ruled on.

The trial court impermissibly ruled on an argument that OAH never ruled on or even considered—the Department's new theory, presented only to the trial court, that § 105-241.17(3) should be interpreted to preclude OAH from exercising authority over *any* type of constitutional challenge to a tax statute.

A superior court, "sitting as an appellate court over an administrative body's decision, has jurisdiction to review only those

issues decided by the administrative body as its jurisdiction is derivative from the original jurisdiction of the body being reviewed." *Cent. Tel.*, 174 N.C. App. at 560, 621 S.E.2d at 191. Thus, a court examining the propriety of a quasi-judicial determination must conduct review "solely by the grounds invoked by the agency." *Godfrey v. Zoning Bd. of Adjustment of Union County*, 317 N.C. 51, 64, 344 S.E.2d 272, 280 (1986) (quotation omitted).

In a related vein, "issues and theories of a case not raised below will not be considered on appeal." *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001). As the familiar adage goes, "the law does not permit parties to swap horses between courts in order to get a better mount." *Weil v. Herring*, 207 N.C. 6, 175 S.E. 836, 838 (1934); *see also Hughes v. N.C. State Highway Comm'n*, 275 N.C. 121, 129, 165 S.E.2d 321, 326 (1969) (state agency was precluded from maintaining position on appeal that they failed to assert in the special proceeding below).

The fact that the horse-swapping involves different purported *jurisdictional* theories does not absolve the rider, as the Department

contends. For example, in *Grissom v. N.C. Dep't of Revenue*, 34 N.C. App. 381, 383, 238 S.E.2d 311, 312 (1977), the petitioner, a terminated state employee, argued that the trial court had jurisdiction over his challenge to his discharge under the then-applicable statute governing judicial review of administrative termination decisions. The trial court found that the petitioner was not entitled to judicial review under that statute.

On appeal in *Grissom*, the petitioner asserted a new theory of jurisdiction—that the trial court had original subject matter jurisdiction to review his termination under N.C.G.S. § 7A-240. The Court of Appeals affirmed the trial court's decision on the basis that the petitioner failed to raise his new jurisdictional theory before the trial court. As the court reasoned, "[a]n appeal has to follow the theory of the trial, and where a cause is heard on one theory at trial, appellant cannot switch to a different theory on appeal." *Id.* at 383, 238 S.E.2d at 312-13. Accordingly, the petitioner was precluded from contending on appeal that the superior court had jurisdiction under a different theory than the one he asserted in superior court. *See also Crocker v.*

Griffin, 204 N.C. App. 210, 694 S.E.2d 523, 2010 WL 1961258, at *5 (May 18, 2010) (unpublished) (issue was "not properly before" the court where the plaintiffs asserted subject matter jurisdiction based on the Workers' Compensation Act before the trial court but claimed jurisdiction under the State Tort Claims Act on appeal) [Add. 41].

Here, the Department argued at OAH that the ALJ had no "jurisdiction" under § 105-241.17(3) to hear Philip Morris' constitutional challenge, because it was a *facial* challenge. Indeed, it contended in its OAH brief that *as-applied* challenges were not even subject to § 105-241.17. (*See* R p 340 ("*If it is facial*, then the taxpayer is required to follow § 105-241.17, which sets out the requirements *for filing a facial claim*") (emphasis added)); R p 222 (discussing avoidance of the statutory requirements of N.C. Gen. Stat. § 105-241.17 by framing claim as an as-applied challenge)). The ALJ understood the scope of the Department's jurisdictional argument, finding that "Respondent [the Department] has not raised an objection to this tribunal's jurisdiction over as-applied challenges." (R p 28).

After the ALJ determined that she had jurisdiction and authority to proceed because Philip Morris' challenge was as-applied, the Department switched to a new theory at the trial court level for what the Department presumed was a stronger argument—that § 105-241.17 should be interpreted to preclude OAH jurisdiction whether the sole issue was a facial *or* an as-applied constitutional challenge to a tax statute. *See* R p 457 [the Department's Reply Brief] ("[A]ny constitutional claim must be commenced as a civil action in the Superior Court of Wake County, regardless of whether the claim is classified as 'facial' or 'as applied.' Contrary to the plain language [of § 105-241.17], the interpretations provided by Philip Morris wrongly assert a distinction between 'facial' and 'as-applied' constitutional challenges, which does not exist in the statute" (emphasis in original)).

At the hearing, the trial court specifically noted that the Department had changed its theory of the case from what it argued below. (*See* T pp 11-12 [App. 47-48]). Nonetheless, the trial court considered and ruled on the Department's new argument, agreeing with the Department that § 105-241.17(3) should be interpreted to

preclude OAH from hearing any type of constitutional challenge. But the trial court was prohibited from ruling on an issue that the ALJ never considered and never decided. *See Central Telephone*, 174 N.C. App. at 560, 621 S.E.2d at 191. The Department could not raise a new argument on judicial review that it had failed to raise at OAH. (R pp 309-11).

The Department's response that subject matter jurisdiction can be raised for the first time even on appeal is a red herring. First, that is not what the Department did. Rather, the Department started at OAH with one statutory interpretation of § 105-241.17(3) (that it permitted OAH to resolve as-applied challenges) and asserted a different statutory interpretation at the trial court (that it did not permit OAH to resolve any constitutional challenges). The fact that this issue of statutory interpretation involves, according to the Department, OAH's jurisdiction over constitutional challenges does not give the Department free rein to change its interpretation between courts. Nor would the Department's flipping of positions be permitted

even if its new theory were purely jurisdictional and involved no statutory interpretation. *See Grissom* and *Crocker*.

Second, the issue before the trial court was not actually an issue of *its* subject matter jurisdiction, and the Department did not raise this argument about the ALJ being required to dismiss all constitutional challenges before OAH. The Department, by its omission at the OAH stage, therefore lost this new argument advanced to the trial court for the first time, and the trial court, sitting for judicial review as an appellate court, erred in adopting (or even considering) it.

Section 105-241.17 dictates procedure, not jurisdiction. This is shown by how it assumes jurisdiction beginning with OAH and then, depending on if a claim is a facial or as-applied constitutional challenge, it establishes a procedure for facial challenges to then be addressed by the trial court. In other words, § 105-241.17 sets out the venue and process to exhaust administrative remedies in constitutional challenges, but other statutes establish jurisdiction, all of which require a taxpayer's challenge to begin with a contested case before OAH.

Section 150B-23 of the North Carolina Administrative Procedures Act and Section 105-241.15 of the North Carolina Revenue Act establish jurisdiction for a taxpayer dispute commencing before OAH. In fact, this is a mandatory process that every taxpayer must follow to exhaust administrative remedies. N.C.G.S. § 105-241.19 [App. 8]. *See also Gust v. North Carolina Dept. of Revenue*, 231 N.C. App. 551 (2014) (applying § 105-241.19 to preclude a separate action to challenge tax). "[S]tatutory remedies granted to a taxpayer *must* first be exhausted before applying to the courts." *Gill v. Smith*, 233 N.C. 50, 52, 62 S.E.2d 544, 545 (1950) (emphasis added). *See also In Committee of Grievances of N. C. State Bar Association v. Strickland*, 200 N.C. 630, 158 S.E. 110, 112 (1931) ("The courts everywhere are in accord upon the proposition that, if a valid statutory method of determining a disputed question has been established, such remedy so provided is exclusive and must be first resorted to and in the manner specified therein.").

Philip Morris was required by §§ 105-241.15 and 105-241.19 to file its contested case before OAH, and Philip Morris contended, among

other things, that the Department acted erroneously and failed to act as required by law, in its decision to impose additional franchise tax.[17] The trial court, and all parties, agree that Philip Morris had to start with OAH. If jurisdiction was established with OAH, it is not lost until the action was dismissed or otherwise concluded.

"[I]t is the general rule that once jurisdiction attaches, it will not be ousted by subsequent events." *Finks v. Middleton*, 251 N.C. App. 401, 408, 795 S.E.2d 789, 795 (2016) (citation and internal quotation marks omitted). "Jurisdiction is not a light bulb which can be turned off or on during the course of the trial. Once a court acquires jurisdiction over an action it retains jurisdiction over that action throughout the proceeding." *Quesinberry v. Quesinberry*, 196 N.C. App. 118, 123, 674 S.E.2d 775, 778-79 (2009) (citation omitted). In other words, and specific to taxpayer constitutional challenges under § 105-241.17, jurisdiction remains until the proceeding ends, which only ends when the case is dismissed under § 105-241.17(3) or reaches final adjudication in all other instances.

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[17] These are two grounds to set aside an agency action under § 150B-23, which would obviously encompass any violation of law including constitutional law.

When the ALJ did not dismiss the action under § 105-241.17(3), jurisdiction was not lost. Jurisdiction remained through the appeal to the trial court; otherwise, the Department's appeal would be a nullity. *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964) (explaining that court action without subject matter jurisdiction is a nullity). Therefore, the trial court still conducted judicial review while sitting as an appellate court upon the Department's appeal, and all rules about the limited scope of judicial review apply against the Department bringing new arguments to the trial court. The Department has not truly brought a jurisdictional contention—for example, it did not argue that the case did not originate with OAH properly to establish jurisdiction at the outset or that the appeal it had brought was outside of the trial court's jurisdiction. Instead, it brought a contention that the ALJ should have dismissed the case under § 105-241.17(3), which is an issue of OAH procedure not jurisdiction.

Accordingly, the trial court erred in ruling on a theory of the case that OAH never considered or decided. By not raising the argument before OAH, the Department waived the argument that § 105-241.17

requires all constitutional challenges to be dismissed without adjudication before OAH, and the trial court should not have considered this procedural issue, as it was not a challenge to the trial court's subject matter jurisdiction. The only issue properly before the trial court, and thus properly before this Court, is the Department's original argument—that this is a facial challenge and § 105-241.17(3) precludes OAH from considering a facial challenge. *See N.C. Dep't of Transp. v. Davenport*, 108 N.C. App. 178, 181, 423 S.E.2d 327, 329 (1992) (citing *Batch v. Town of Chapel Hill*, 326 N.C. 1, 11, 387 S.E.2d 655, 662 (1990)) (explaining that trial court review "is based solely on the record from the prior proceedings").

V. This Court should affirm OAH's holding that § 105-122(b) violates the Dormant Commerce Clause as applied to Philip Morris.

At the hearing, Philip Morris' counsel asked the trial court to rule on the central question in this action—whether § 105-122(b) can be constitutionally applied to Philip Morris. (T pp 50-51 [App. 52-53]). Counsel argued that doing so would conserve the court's and the parties' resources by not requiring the parties to start the

administrative and judicial review process anew. (*Id.*). The trial court declined, reserving the constitutionality of § 105-122(b) as applied to Philip Morris "for another day." (R p 487 n.14). In the interests of judicial economy, Philip Morris asks the Court to review this issue and affirm OAH's holding that § 105-122(b) violates the Dormant Commerce Clause as applied to Philip Morris.

A. This Court should resolve Philip Morris' as-applied constitutional challenge to § 105-122(b) rather than remanding it for protracted further proceedings.

North Carolina's appellate courts have found it appropriate to resolve the central question of a lawsuit rather than remand for further proceedings where doing so would promote judicial economy and avoid protracted litigation. For example, in *De Bruhl v. State Highway & Public Works Comm'n*, 245 N.C. 139, 95 S.E.2d 553, (1956), the Court held that the trial court's admission of evidence as to the value of the house on the condemned land was prejudicial error because the lower court had concluded that compensation was to be paid only for the land taken. But the Court determined that "[t]o remand the case for a new trial without more would leave the basic question unsettled" as to what

property the state must pay compensation. *Id.* at 143, 95 S.E.2d at 556. Remand also would "result in protracted litigation which may be avoided if that question is now answered." *Id.* Accordingly, because the issue involved no factual questions and the parties had previously briefed it, the Court "fel[t] justified in answering the question essential to a correct solution of this case." *Id.*

Likewise, in *In re Custody of Davis*, 248 N.C. 423, 426, 103 S.E.2d 503, 505-06 (1958), this Court held that the trial court erred in rendering an advisory opinion as to another court's jurisdiction over the mother's petition in a custody action. It nonetheless addressed the merits of the custody action, even though "[o]rdinarily, questions not determinative of the appeal are not decided," so that the critical underlying question would not be left unsettled. *See also State v. Seam*, 263 N.C. App. 355, 364, 823 S.E.2d 605, 611 (2018) , *aff'd*, 373 N.C. 529 (2020) (where the trial court erred in determining that it did not have the authority to decide whether the defendant's sentence was grossly disproportionate, the Court of Appeals made that determination, stating that "because we are capable of making such a

determination in the present appeal, a remand for the trial court to do so is unnecessary and would be inconsistent with considerations of judicial economy").

Here, the central question of this case—whether § 105-122(b) is unconstitutional as applied to Philip Morris—remains unresolved, despite this being the third tribunal to hear or review this case. Both parties fully briefed this constitutional issue in supplemental briefs to OAH (R pp 229-60), and the material facts related to the Department's allegedly unconstitutional tax assessments are undisputed and in the Record. (R pp 75-133). If this Court rules only on the proper interpretation of § 105-241.17(3) and remands for further proceedings, Philip Morris will be required to repeat some or all of this administrative and judicial review process, with the "basic question [still] unsettled." *De Bruhl*, 245 N.C. at 143, 95 S.E.2d at 556. The Court's resolution of the central issue in this action, on the basis of this fully developed record, will serve the interests of judicial economy and the parties' interests in avoiding unnecessary and protracted litigation.

B. Section 105-122(b) is unconstitutional as applied to Philip Morris.

The Commerce Clause of the United States Constitution contains an affirmative grant of authority to Congress to "regulate Commerce… among the several States." U.S. CONST. art. I, § 8, cl. 3. It has also been interpreted to have a "negative command," referred to as the "Dormant" Commerce Clause. *Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542, 549, 135 S. Ct. 1787, 1794, 191 L. Ed. 2d 813 (2015). A state tax is permissible under the Dormant Commerce Clause if it satisfies four requirements, collectively known as the *"Complete Auto"* test. *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977). Specifically, the tax must: (1) be applied to an activity with a substantial nexus with the taxing state; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to the services provided by the state. *Id.* This case invokes the third prong of that test.

Discrimination against interstate commerce "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v.*

Dep't of Env't Quality of State of Oregon, 511 U.S. 93, 99 (1994) (holding that a surcharge on disposal of solid waste generated outside the state violated the Commerce Clause). Here, the Department's calculation of the franchise tax to allow a deduction only to the extent the affiliated corporation is doing business in North Carolina violates the Commerce Clause. The Supreme Court of the United States has struck down this type of discrimination in a lawsuit involving North Carolina's intangibles tax. *Fulton Corp. v. Faulkner,* 516 U.S. 325 (1996).

In *Fulton*, the Supreme Court held that North Carolina's intangibles tax discriminated against interstate commerce in violation of the Commerce Clause. The intangibles tax was similar in relevant respects to the franchise tax in that the availability of a deduction was premised on whether and the extent to which a corporation did business in North Carolina. Under a since-repealed statute, North Carolina levied an "intangibles tax" on corporate stock owned by North Carolina taxpayers computed based on the fair market value of the stock. Taxpayers were entitled to a deduction (the "taxable percentage

deduction") equal to the "apportionment factor" of the corporation whose stock was owned by the taxpayer.

The "apportionment factor" is the fraction which determines how much of the corporation's income is taxable by North Carolina. It is designed to approximate the extent of a corporation's business in the state. At a high level, a corporation that conducts all its business in North Carolina would have an apportionment factor of one hundred percent (and would pay tax on one hundred percent of its income). Conversely, a corporation with no business in the state would have an apportionment factor of zero (and would pay tax on zero percent of its income). Corporations that do some, but not all, of their business in the state would have a factor somewhere between zero and one hundred percent.

Thus, if an individual owned stock in corporations that conducted all their business in North Carolina, the taxable percentage deduction would be one hundred percent and the individual would not owe any intangibles tax. Conversely, if an individual owned stock in corporations that did not conduct any business in North Carolina, the

taxable percentage deduction would be zero and the individual would owe intangibles tax on one hundred percent of the value of the stock.

For example, assume ABC Corporation has an apportionment factor of one hundred percent and XYZ Corporation has an apportionment factor of zero. Assume John owns stock in both of those corporations in the amount of one thousand dollars each. With respect to ABC Corporation, John would be entitled to a taxable percentage deduction of one hundred percent and would owe no intangibles tax on this stock. John would be entitled to the deduction because ABC Corporation did all its business in North Carolina. Regarding XYZ Corporation, John would not be entitled to any deduction because XYZ Corporation did not do any business in North Carolina and would pay tax on the full value of the stock.

In *Fulton*, the Supreme Court held this method of calculating the intangibles tax violated the Commerce Clause, pointedly stating there was "no doubt" the tax discriminated against interstate commerce. 516 U.S. at 332. As the Court explained,

> [a] regime that taxes stock only to the degree that its issuing corporation participates in interstate commerce favors

> domestic corporations [doing business in North Carolina] over their foreign competitors [not doing business in North Carolina] in raising capital among North Carolina residents and tends, at least, to discourage domestic corporations from plying their trades in interstate commerce.

Id.

Other courts have relied on *Fulton* to find similar Commerce Clause violations. *See Farmer Bros. Co. v. Franchise Tax Board,* 108 Cal. App. 4th 976, 986, 134 Cal. Rptr. 2d 390, 398 (2003) (holding that the state's dividend received deduction violated the Commerce Clause because the deduction was allowed only when the dividends were declared from income which was taxed by California; the tax discriminated against interstate commerce "because it affords to taxpayers a deduction for dividends received from corporations subject to tax in California, while no deduction is afforded for dividends received from corporations not subject to tax in California"); *AT&T Corp. v. Surtees,* 953 So. 2d 1240, 1245 (Ala. Civ. App. 2006) (rejecting a taxation scheme imposing a "corporate shares" tax and a "business privilege" tax, each of which permitted a deduction from the taxable base for the book value of investments *in other entities doing business*

in Alabama but not if the entity in which the corporation invested did not do business in Alabama; the court held this "differential treatment" was discriminatory in imposing a heavier tax burden if the entity in which the taxpayer invested did not do business in Alabama and in encouraging corporations subject to the Alabama tax to invest in entities that do business in Alabama).

As in these cases, Philip Morris purportedly is not entitled to a deduction of receivables from those debtor corporations that did not do any business in North Carolina. Just like the intangibles tax in *Fulton*, the Department's regime that taxes stock (the capital stock base) only to the degree the (debtor) corporation participates in interstate commerce (does business in North Carolina) favors domestic corporations (doing business in North Carolina) over foreign corporations (not doing business in North Carolina).

The tax calculation in *Fulton* was more complicated, but the principle from that case and those following it is simple: a state tax cannot depend on whether or to the extent a corporation does business in the taxing state. The Department's calculation of Philip Morris'

franchise tax has the same inherent flaw as the calculation of the intangibles tax in *Fulton.* As in *Fulton,* the availability and amount of the deduction under the Department's application of the statute depends on whether and the degree to which the debtor corporation participates in interstate commerce. The ability to obtain a deduction is available only to corporations loaning funds to affiliated companies doing business in North Carolina. Corporations loaning money to affiliated companies not doing business in North Carolina are not entitled to the deduction.

As in *AT&T Corp.*, the Department's differential treatment encourages corporations like Philip Morris to invest in entities (subsidiaries and affiliates) that do business in North Carolina at the expense of entities that do not do business in North Carolina. Likewise, a heavier tax burden is imposed if the entity in which Philip Morris invested does not do business in North Carolina.

Based on *Fulton* and its progeny, in determining Philip Morris' North Carolina franchise tax liability, the affiliated indebtedness calculation must allow a deduction for all receivables—not just those

from affiliates doing business in North Carolina—to comport with the Commerce Clause. The Department's application of the franchise tax statute impermissibly discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court and determine that the Department's application of § 105-122(b) to Philip Morris was unconstitutional. To reach this outcome, this Court should determine that OAH had jurisdiction to rule upon as-applied constitutional challenges pursuant to § 105-241.17(3), that Philip Morris brought an as-applied constitutional challenge under § 105-241.17(3) against the Department's application of § 105-122(b) to Philip Morris, and that the trial court erred in not affirming the OAH decision. In the alternative, this Court should reverse the trial court on its interpretation that § 105-241.17 requires all constitutional challenges to be dismissed by OAH, determine that Philip Morris brought an as-applied constitutional challenge to the Department's

application of § 105-122(b), and remand to the trial court to resolve Philip Morris' as-applied constitutional challenge.

Respectfully submitted, this the 20th day of November, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing PHILIP MORRIS USA, INC.'S APPELLANT'S BRIEF via email addressed to the following person at the following email address which is the last address known to me:

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West's North Carolina General Statutes Annotated
Chapter 105. Taxation
Subchapter I. Levy of Taxes (Refs & Annos)
Article 3. Franchise Tax (Refs & Annos)

This section has been updated. Click here for the updated version.

N.C.G.S.A. § 105-122

§ 105-122. Franchise or privilege tax on domestic and foreign corporations

Effective: June 26, 2012 to August 22, 2013

(a) An annual franchise or privilege tax is imposed on a corporation doing business in this State. The tax is determined on the basis of the books and records of the corporation as of the close of its income year. A corporation subject to the tax must file a return under affirmation with the Secretary at the place and in the manner prescribed by the Secretary. The return must be signed by the president, vice-president, treasurer, or chief financial officer of the corporation. The return is due on or before the fifteenth day of the fourth month following the end of the corporation's income year.

(b) Determination of Capital Base. -- A corporation taxed under this section shall determine the total amount of its issued and outstanding capital stock, surplus, and undivided profits. No reservation or allocation from surplus or undivided profits is allowed except as provided below:

(1) Definite and accrued legal liabilities.

(1a) Billings in excess of costs that are considered a deferred liability under the percentage of completion method of revenue recognition.

(2) Taxes accrued, dividends declared, and reserves for depreciation of tangible assets and for amortization of intangible assets as permitted for income tax purposes.

(3) When including deferred tax liabilities, a corporation may reduce the amount included in its base by netting against that amount deferred tax assets. The reduction may not decrease deferred tax liabilities below zero (0).

(4) Reserves for the cost of any air-cleaning device or sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed which reduces the amount of air or water pollution resulting from the emission of air contaminants or the discharge of sewage and industrial wastes or other polluting materials or substances into the outdoor atmosphere or streams, lakes, or rivers, upon condition that the corporation claiming such deductible liability shall furnish to the Secretary a certificate from the Department of Environment and Natural Resources or from a local air pollution control program for air-cleaning devices located in an area where the Environmental Management Commission has certified a local air pollution control program pursuant to G.S. 143-215.112 certifying that the Environmental Management Commission or local air pollution control program has found as a fact that the air-cleaning device, waste treatment plant or pollution abatement equipment purchased or

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constructed and installed as above described has actually been constructed and installed and that such plant or equipment complies with the requirements of the Environmental Management Commission or local air pollution control program with respect to such devices, plants or equipment, that such device, plant or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the Environmental Management Commission or local air pollution control program and that the primary purpose thereof is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste and not merely incidental to other purposes and functions.

(5) Reserves for the cost of purchasing and installing equipment or constructing facilities for the purpose of recycling or resource recovering of or from solid waste or for the purpose of reducing the volume of hazardous waste generated shall be treated as deductible for the purposes of this section upon condition that the corporation claiming such deductible liability shall furnish to the Secretary a certificate from the Department of Environment and Natural Resources certifying that the Department of Environment and Natural Resources has found as a fact that the equipment or facility has actually been purchased, installed or constructed, that it is in conformance with all rules and regulations of the Department of Environment and Natural Resources, and the recycling or resource recovering is the primary purpose of the facility or equipment.

(6) Reserves for the cost of constructing facilities of any private or public utility built for the purpose of providing sewer service to residential and outlying areas shall be treated as deductible for the purposes of this section; the deductible liability allowed by this section shall apply only with respect to such pollution abatement plants or equipment constructed or installed on or after January 1, 1955.

(7) The cost of treasury stock.

(8) In the case of an international banking facility, the capital base shall be reduced by the excess of the amount as of the end of the taxable year of all assets of an international banking facility which are employed outside the United States over liabilities of the international banking facility owed to foreign persons. For purposes of such reduction, foreign persons shall have the same meaning as defined in G.S. 105-130.5(b)(13)d.

Every corporation doing business in this State which is a parent, subsidiary, or affiliate of another corporation shall add to its capital stock, surplus, and undivided profits all indebtedness owed to a parent, subsidiary, or affiliated corporation as a part of its capital used in its business and as a part of the base for franchise tax under this section. If any part of the capital of the creditor corporation is capital borrowed from a source other than a parent, subsidiary, or affiliate, the debtor corporation, which is required under this subsection to include in its tax base the amount of debt by reason of being a parent, subsidiary, or affiliate of the creditor corporation, may deduct from the debt included a proportionate part determined on the basis of the ratio of the borrowed capital of the creditor corporation to the total assets of the creditor corporation. If the creditor corporation is also taxable under the provisions of this section, the creditor corporation is allowed to deduct from the total of its capital, surplus, and undivided profits the amount of any debt owed to it by a parent, subsidiary or affiliated corporation to the extent that the debt has been included in the tax base of the parent, subsidiary, or affiliated debtor corporation reporting for taxation under the provisions of this section.

(b1) Definitions.--The following definitions apply in subsection (b) of this section:

(1) Affiliate.--The same meaning as specified in G.S. 105-130.2.

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(2) Indebtedness.--All loans, credits, goods, supplies, or other capital of whatsoever nature furnished by a parent, subsidiary, or affiliated corporation, other than indebtedness endorsed, guaranteed, or otherwise supported by one of these corporations.

(3) Parent.--The same meaning as specified in G.S. 105-130.2.

(4) Subsidiary.--The same meaning as specified in G.S. 105-130.2.

(c) Repealed by S.L. 2007-491, § 2, eff. Jan. 1, 2008.

(c1) Apportionment.--A corporation that is doing business in this State and in one or more other states must apportion its capital stock, surplus, and undivided profits to this State. A corporation must use the apportionment method set out in subdivision (1) of this subsection unless the Department has authorized it to use a different method under subdivision (2) of this subsection. The portion of a corporation's capital stock, surplus, and undivided profits determined by applying the appropriate apportionment method is considered the amount of capital stock, surplus, and undivided profits the corporation uses in its business in this State.

(1) Statutory.--A corporation that is subject to income tax under Article 4 of this Chapter must apportion its capital stock, surplus, and undivided profits by using the fraction it applies in apportioning its income under that Article. A corporation that is not subject to income tax under Article 4 of this Chapter must apportion its capital stock, surplus, and undivided profits by using the fraction it would be required to apply in apportioning its income if it were subject to that Article. The apportionment method set out in this subdivision is considered the statutory method of apportionment and is presumed to be the best method of determining the amount of a corporation's capital stock, surplus, and undivided profits attributable to the corporation's business in this State.

(2) Alternative.--A corporation that believes the statutory apportionment method set out in subdivision (1) of this subsection subjects a greater portion of its capital stock, surplus, and undivided profits to tax under this section than is attributable to its business in this State may make a written request to the Secretary for permission to use an alternative method. The request must set out the reasons for the corporation's belief and propose an alternative method. The corporation has the burden of establishing by clear, cogent, and convincing proof that the statutory apportionment method subjects a greater portion of the corporation's capital stock, surplus, and undivided profits to tax under this section than is attributable to its business in this State and that the proposed alternative method is a better method of determining the amount of the corporation's capital stock, surplus, and undivided profits attributable to the corporation's business in this State.

The Secretary must issue a written decision on a corporation's request for an alternative apportionment method. If the decision grants the request, it must describe the alternative method the corporation is authorized to use and state the tax years to which the alternative method applies. A decision may apply to no more than three tax years, unless the provisions of subdivision (3) of this subsection applies. A corporation may renew a request to use an alternative apportionment method by following the procedure in this subdivision. A decision of the Secretary on a request for an alternative apportionment method is final and is not subject to administrative or judicial review. A corporation authorized to use an alternative method may apportion its capital stock, surplus, and undivided profits in accordance with the alternative method or the statutory method.

(3) Repealed by S.L. 2011-330, § 5, eff. June 27, 2011.

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(d) After determining the proportion of its total capital stock, surplus and undivided profits as set out in subsection (c) of this section, which amount shall not be less than fifty-five percent (55%) of the appraised value as determined for ad valorem taxation of all the real and tangible personal property in this State of each corporation nor less than its total actual investment in tangible property in this State, every corporation taxed under this section shall annually pay to the Secretary of Revenue, at the time the report and statement are due, a franchise or privilege tax at the rate of one dollar and fifty cents ($1.50) per one thousand dollars ($1,000) of the total amount of capital stock, surplus and undivided profits as provided in this section. The tax imposed in this section shall not be less than thirty-five dollars ($35.00) and shall be for the privilege of carrying on, doing business, and/or the continuance of articles of incorporation or domestication of each corporation in this State. Appraised value of tangible property including real estate is the ad valorem valuation for the calendar year next preceding the due date of the franchise tax return. The term " total actual investment in tangible property" as used in this section means the total original purchase price or consideration to the reporting taxpayer of its tangible properties, including real estate, in this State plus additions and improvements thereto less reserve for depreciation as permitted for income tax purposes, and also less any indebtedness incurred and existing by virtue of the purchase of any real estate and any permanent improvements made thereon. In computing "total actual investment in tangible personal property" there shall also be deducted reserves for the entire cost of any air-cleaning device or sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed which reduces the amount of air or water pollution resulting from the emission of air contaminants or the discharge of sewage and industrial wastes or other polluting materials or substances into the outdoor atmosphere or into streams, lakes, or rivers, upon condition that the corporation claiming this deduction shall furnish to the Secretary a certificate from the Department of Environment and Natural Resources or from a local air pollution control program for air-cleaning devices located in an area where the Environmental Management Commission has certified a local air pollution control program pursuant to G.S. 143-215.112 certifying that said Department or local air pollution control program has found as a fact that the air-cleaning device, waste treatment plant or pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that the device, plant or equipment complies with the requirements of the Environmental Management Commission or local air pollution control program with respect to the devices, plants or equipment, that the device, plant or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the Environmental Management Commission or local air pollution control program and that the primary purpose is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste and not merely incidental to other purposes and functions. The cost of constructing facilities of any private or public utility built for the purpose of providing sewer service to residential and outlying areas is treated as deductible for the purposes of this section; the deductible liability allowed by this section shall apply only with respect to pollution abatement plants or equipment constructed or installed on or after January 1, 1955.

(d1) Credits. -- A corporation is allowed a credit against the tax imposed by this section for a taxable year equal to one-half of the amount of tax payable during the taxable year under Article 5E of this Chapter. The credit allowed by this subsection may not exceed the amount of tax imposed by this section for the taxable year, reduced by the sum of all other credits allowed against that tax, except tax payments made by or on behalf of the taxpayer.

(e) Any corporation which changes its income year, and files a "short period" income tax return pursuant to G.S. 105-130.15 shall file a franchise tax return in accordance with the provisions of this section in the manner and as of the date specified in subsection (a) of this section. Such corporation shall be entitled to deduct from the total franchise tax computed (on an annual basis) on such return the amount of franchise tax previously paid which is applicable to the period subsequent to the beginning of the new income year.

(f) The report, statement and tax required by this section shall be in addition to all other reports required or taxes levied and assessed in this State.

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(g) Counties, cities and towns shall not levy a franchise tax on corporations taxed under this section.

(h) Repealed by Laws 1981 (Reg. Sess., 1982), c. 1211, § 5.

Credits

Amended by Laws 1943, c. 400, § 3; Laws 1945, c. 708, § 3; Laws 1947, c. 501, § 3; Laws 1951, c. 643, § 3; Laws 1953, c. 1302, § 3; Laws 1955, c. 1100, § 2 1/2; Laws 1955, c. 1350, § 17; Laws 1957, c. 1340, § 3; Laws 1959, c. 1259, § 3; Laws 1963, c. 1169, § 1; Laws 1967, c. 286; Laws 1967, c. 892, §§ 10, 11; Laws 1967, c. 1110, § 2; Laws 1973, c. 476, § 193; Laws 1973, c. 695, § 17; Laws 1973, c. 1262, § 23; Laws 1973, c. 1287, § 3; Laws 1975, c. 764, § 2; Laws 1977, c. 771, § 4; Laws 1981, c. 704, § 18; Laws 1981, c. 855, § 3; Laws 1982, c. 1211, § 5; Laws 1985, c. 656, § 40; Laws 1985 (Reg. Sess., 1986), c. 826, § 6; Laws 1985 (Reg. Sess., 1986), c. 854, § 1; Laws 1987 (Reg. Sess., 1988), c. 882, § 4.3; Laws 1989, c. 148, § 1; Laws 1989, c. 727, §§ 218, 219; Laws 1991, c. 30, § 5; Laws 1993, c. 532, § 11, eff. Jan. 1, 1994; Laws 1995 (Reg. Sess., 1996), c. 560, § 1; S.L. 1997-443, § 11A.119(a), eff. July 1, 1997; S.L. 1998-22, §§ 8, 9, eff. July 1, 1999; S.L. 1998-98, §§ 72, 77, eff. Aug. 14, 1998; S.L. 1998-217,§ 43, eff. Oct. 31, 1998; S.L. 1999-337, § 21, eff. July 22, 1999; S.L. 2001-427, § 12(a), eff. Sept. 28, 2001; S.L. 2003-416, § 5(j), eff. Aug. 14, 2003; S.L. 2006-95, § 1.1, eff. Jan. 1, 2007; S.L. 2006-162, § 2, eff. July 24, 2006; S.L. 2007-491, § 11, eff. Jan. 1, 2008; S.L. 2008-134, § 3(b), eff. Jan. 1, 2009; S.L. 2009-422, § 1, eff. Jan. 1, 2010; S.L. 2009-445, § 2, eff. Aug. 7, 2009; S.L. 2010-89, § 2(c), eff. July 11, 2010; S.L. 2011-330, § 5, eff. June 27, 2011; S.L. 2011-145, § 31A.2(a), eff. Jan. 1, 2007; S.L. 2012-79, § 1.14(a), eff. June 26, 2012.

N.C.G.S.A. § 105-122, NC ST § 105-122

The statutes and Constitution are current through S.L. 2023-125 of the 2023 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

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§ 105-241.15. Contested case hearing on final determination.

(a) Contest Final Determination. – A taxpayer who disagrees with a notice of final determination issued by the Department may contest the determination by filing a petition for a contested case hearing at the Office of Administrative Hearings in accordance with Article 3 of Chapter 150B of the General Statutes. A taxpayer may file a petition for a contested case hearing only if the taxpayer has exhausted the prehearing remedy. A taxpayer's prehearing remedy is exhausted when the Department issues a final determination after conducting a review and a conference.

(b) Contest Statute of Limitations. – A taxpayer who disagrees with a notice of denial issued by the Department pursuant to G.S. 105-241.7(c1) may contest the statute of limitations determination by filing a petition for a contested case hearing at the office of Administrative Hearings in accordance with Article 3 of Chapter 150B of the General Statutes on the sole issue of whether the statute of limitations bars the taxpayer's claim. A final decision by the administrative law judge regarding the statute of limitations is subject to judicial review under Article 4 of Chapter 150B of the General Statutes and under G.S. 105-241.16. In the event judicial review of the decision is not sought and the final decision is that the taxpayer's claim was not barred by the statute of limitations, then the administrative law judge must remand the matter to the Department for consideration of the substantive issues. In the event judicial review is sought and it is finally determined that the taxpayer's claim was not barred by the statute of limitations, then the matter shall be remanded to the Department for consideration of the substantive issues. Any remand shall be regarded as a new amended return or claim for refund timely filed within the statute of limitations under G.S. 105-241.7(c). (2007-491, s. 1; 2016-76, s. 2(b).)

§ 105-241.17. Civil action challenging statute as unconstitutional.

A taxpayer who claims that a tax statute is unconstitutional may bring a civil action in the Superior Court of Wake County to determine the taxpayer's liability under that statute if all of the conditions in this section are met. In filing an action under this section, a taxpayer must follow the procedures for a mandatory business case set forth in G.S. 7A-45.4(b) through (f). The conditions for filing a civil action are:

(1) The taxpayer exhausted the prehearing remedy by receiving a final determination after a review and a conference.

(2) The taxpayer commenced a contested case at the Office of Administrative Hearings.

(3) The Office of Administrative Hearings dismissed the contested case petition for lack of jurisdiction because the sole issue is the constitutionality of a statute and not the application of a statute.

(4) The taxpayer has paid the amount of tax, penalties, and interest the final determination states is due.

(5) The civil action is filed within two years of the dismissal. (2007-491, s. 1.)

§ 105-241.19. Declaratory judgments, injunctions, and other actions prohibited.

The remedies in G.S. 105-241.11 through G.S. 105-241.18 set out the exclusive remedies for disputing the denial of a requested refund, a taxpayer's liability for a tax, or the constitutionality of a tax statute. Any other action is barred. Neither an action for declaratory judgment, an action for an injunction to prevent the collection of a tax, nor any other action is allowed. (2007-491, s. 1; 2008-107, s. 28.28(c).)

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2007

SESSION LAW 2007-491
SENATE BILL 242

AN ACT TO REFORM THE PROCESS FOR ADMINISTRATIVE AND JUDICIAL REVIEW OF DISPUTED TAX MATTERS.

The General Assembly of North Carolina enacts:

SECTION 1. Article 9 of Chapter 105 is amended by adding the following new sections to read:

"**§ 105-241.6. Statute of limitations for refunds.**

(a) General. – The general statute of limitations for obtaining a refund of an overpayment applies unless a different period applies under subsection (b) of this section. The general statute of limitations for obtaining a refund of an overpayment is the later of the following:

(1) Three years after the due date of the return.

(2) Two years after payment of the tax.

(b) Exceptions. – The exceptions to the general statute of limitations for obtaining a refund of an overpayment are as follows:

(1) Federal Determination. – If a taxpayer files a return reflecting a federal determination and the return is filed within the time required by this Subchapter, the period for requesting a refund is 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, whichever is later.

(2) Waiver. – 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.

(3) Worthless Debts or Securities. – Section 6511(d)(1) of the Code applies to an overpayment of the tax levied in Part 2 or 3 of Article 4 of this Chapter to the extent the overpayment is attributable to either of the following:

a. The deductibility by the taxpayer under section 166 of the Code of a debt that becomes worthless, or under section 165(g) of the Code of a loss from a security that becomes worthless.

b. The effect of the deductibility of a debt or loss described in subpart a. of this subdivision on the application of a carryover to the taxpayer.

(4) Capital Loss and Net Operating Loss Carrybacks. – Section 6511(d)(2) of the Code applies to an overpayment of the tax levied in Part 2 or 3 of Article 4 of this Chapter to the extent the overpayment is

attributable to a capital loss carryback under section 1212(c) of the Code or to a net operating loss carryback under section 172 of the Code.

"**§ 105-241.7. Procedure for obtaining a refund.**

(a) Initiated by Department. – The Department must refund an overpayment made by a taxpayer when the Department processes a return and finds all of the following:

(1) The statute of limitations for obtaining a refund has not expired.

(2) The amount shown due on the return is not correct.

(3) The correction of the amount due shows that the taxpayer has overpaid the tax.

(b) Initiated by Taxpayer. – A taxpayer may request a refund of an overpayment made by the taxpayer by taking one of the following actions within the statute of limitations for obtaining a refund:

(1) Filing an amended return reflecting an overpayment due the taxpayer.

(2) Filing a claim for refund. The claim must identify the taxpayer, the type and amount of tax overpaid, the filing period to which the overpayment applies, and the basis for the claim. The taxpayer's statement of the basis of the claim does not limit the taxpayer from changing the basis.

(c) Action on Request. – When a taxpayer files an amended return or a claim for refund, the Department must take one of the actions listed in this subsection within six months after the date the amended return or claim for refund is filed. If the Department does not take one of these actions within this time limit, the inaction is considered a proposed denial of the requested refund.

(1) Send the taxpayer a refund of the amount shown due on the amended return or claim for refund.

(2) Adjust the amount of the requested refund by increasing or decreasing the amount shown due on the amended return or claim for refund and send the taxpayer a refund of the adjusted amount. If the adjusted amount is less than the amount shown due on the amended return or claim for refund, the adjusted refund must include a reason for the adjustment. The adjusted refund is considered a notice of proposed denial for the amount of the requested refund that is not included in the adjusted refund.

(3) Deny the refund and send the taxpayer a notice of proposed denial.

(4) Send the taxpayer a letter requesting additional information concerning the requested refund. If a taxpayer does not respond to a request for information, the Department may deny the refund and send the taxpayer a notice of proposed denial. If a taxpayer provides the requested information, the Department must take one of the actions listed in this subsection within the later of the following:

a. The remainder of the six-month period.

b. 30 days after receiving the information.

c. A time period mutually agreed upon by the Department and the taxpayer.

(d) Notice. – A notice of a proposed denial of a request for refund must contain the following information:

(1) The basis for the proposed denial. The statement of the basis of the denial does not limit the Department from changing the basis.

(2) The circumstances under which the proposed denial will become final.

(e) Restrictions. – The Department may not refund any of the following:

(1) Until a taxpayer files a final return for a tax period, an amount paid before the final return is filed.

(2) An overpayment setoff under Chapter 105A, the Setoff Debt Collection Act, 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 in this Article.

(4) An individual income tax overpayment of less than one dollar ($1.00) or another tax overpayment of less than three dollars ($3.00), unless the taxpayer files a written claim for the refund.

(f) Effect of Denial or Refund. – 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 in this Article.

"**§ 105-241.8. Statute of limitations for assessments.**

(a) General. – The general statute of limitations for proposing an assessment applies unless a different period applies under subsection (b) of this section. The general statute of limitations for proposing an assessment is the later of the following:

(1) Three years after the due date of the return.

(2) Three years after the taxpayer filed the return.

(b) Exceptions. – The exceptions to the general statute of limitations for proposing an assessment are as follows:

(1) Federal determination. – If a taxpayer files a return reflecting a federal determination and the return is filed within the time required by this Subchapter, the period for proposing an assessment of any tax due is one year after the return is filed or three years after the original return was filed or due to be filed, whichever is later. If there is a federal determination and the taxpayer does not 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.

(2) Failure to file or filing false return. – There is no statute of limitations and the Secretary may propose an assessment of tax due from a taxpayer at any time if any of the following applies:

a. The taxpayer did not file a return.

b. The taxpayer filed a fraudulent return.

c. The taxpayer attempted in any manner to fraudulently evade or defeat the tax.

(3) Tax forfeiture. – If a taxpayer forfeits a tax credit or tax benefit pursuant to forfeiture provisions of this Chapter, the period for proposing an assessment of any tax due as a result of the forfeiture is three years after the date of the forfeiture.

(4) Nonrecognition of gain. – 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.

"**§ 105-241.9. Procedure for proposing an assessment.**

(a) Authority. – The Secretary may propose an assessment against a taxpayer for tax due from the taxpayer. The Secretary must base a proposed assessment on the best information available. A proposed assessment of the Secretary is presumed to be correct.

(b) Time Limit. – 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.

(c) Notice. – The Secretary must give a taxpayer written notice of a proposed assessment. The notice of a proposed assessment must contain the following information:

(1) The basis for the proposed assessment. The statement of the basis for the proposed assessment does not limit the Department from changing the basis.

(2) The amount of tax, interest, and penalties included in the proposed assessment. The amount for each of these must be stated separately.

(3) The circumstances under which the proposed assessment will become final and collectible.

"**§ 105-241.10. Limit on refunds and assessments after a federal determination.**

The limitations in this section apply 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. A federal determination is a correction or final determination by the federal government of the amount of a federal tax due. A return reflecting a federal determination is timely if it is filed within the time required by G.S. 105-32.8, 105-130.20, 105-159, 105-160.8, 105-163.6A, or 105-197.1, as appropriate. The limitations are:

(1) Refund. – A taxpayer is allowed a refund only if the refund is the result of adjustments related to the federal determination.

(2) Assessment. – A taxpayer is liable for additional tax only if the additional tax is the result of adjustments related to the federal determination. A proposed assessment may not include an amount that is outside the scope of this liability.

"**§ 105-241.11. Requesting review of proposed denial of refund or proposed assessment.**

(a) Procedure. – A taxpayer who objects to a proposed denial of a refund or a proposed assessment of tax may request a Departmental review of the proposed action by filing a request for review. The request must be filed with the Department within 45 days after the following:

(1) The date the notice of the proposed denial of the refund or proposed assessment was mailed to the taxpayer, if the notice was delivered by mail.

(2) The date the notice of the proposed denial of the refund or proposed assessment was delivered to the taxpayer, if the notice was delivered in person.

(3) The date that inaction by the Department on a request for refund was considered a proposed denial of the refund.

(b) Filing. – A request for a Departmental review of a proposed denial of a refund or a proposed assessment is considered filed on the following dates:

(1) For a request that is delivered in person, the date it is delivered.

(2) For a request that is not delivered in person, the date the Department receives it.

"**§ 105-241.12. Result when taxpayer does not request a review.**

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

(b) Assessment. – If a taxpayer does not file a timely request for a Departmental review of a proposed assessment, the proposed assessment is final and is not subject to further administrative or judicial review. Upon payment of the tax, the taxpayer may request a refund of the tax.

Before the Department collects a proposed assessment that becomes final when the taxpayer does not file a timely request for a Departmental review, the Department must send the taxpayer a notice of collection. A notice of collection must contain the following information:

(1) A statement that the proposed assessment is final and collectible.

(2) The amount of tax, interest, and penalties payable by the taxpayer.

(3) An explanation of the collection options available to the Department if the taxpayer does not pay the amount shown due on the notice and any remedies available to the taxpayer concerning these collection options.

"**§ 105-241.13. Action on request for review.**

(a) Action on Request. – If a taxpayer files a timely request for a Departmental review of a proposed denial of a refund or a proposed assessment, the Department must conduct a review of the proposed denial or proposed assessment and take one of the following actions:

(1) Grant the refund or remove the assessment.

(2) Schedule a conference with the taxpayer.

(3) Request additional information from the taxpayer concerning the requested refund or proposed assessment.

(b) Conference. – When the Department reviews a proposed denial of a refund or a proposed assessment and does not grant the refund or remove the assessment, the Department must schedule a conference with the taxpayer. The Department must set the time and place for the conference, which may include a conference by telephone, and must send the taxpayer notice of the designated time and place. The Department must send the notice at least 30 days before the date of the conference or, if the Department and the taxpayer agree, within a shorter period.

The conference is an informal proceeding at which the taxpayer and the Department must attempt to resolve the case. Testimony under oath is not taken, and the rules of evidence do not apply. A taxpayer may designate a representative to act on the taxpayer's behalf. The taxpayer may present any objections to the proposed denial of refund or proposed assessment at the conference.

(c) After Conference. – One of the following must occur after the Department conducts a conference on a proposed denial of a refund or a proposed assessment:

(1) The Department and the taxpayer agree on a settlement.

(2) The Department and the taxpayer agree that additional time is needed to resolve the taxpayer's objection to the proposed denial of the refund or proposed assessment.

(3) The Department and the taxpayer are unable to resolve the taxpayer's objection to the proposed denial of the refund or proposed assessment. If a taxpayer fails to attend a scheduled conference on the proposed denial of a refund or a proposed assessment without prior notice to the Department, the Department and the taxpayer are considered to be unable to resolve the taxpayer's objection.

"**§ 105-241.14. Final determination after Departmental review.**

(a) Refund. – If a taxpayer files a timely request for a Departmental review of a proposed denial of a refund and the Department and the taxpayer are unable to resolve the taxpayer's objection to the proposed denial, the Department must send the taxpayer a notice of final determination concerning the refund. The notice of final determination must state the basis for the determination and inform the taxpayer of the procedure for contesting the determination. The statement of the basis for the determination does not limit the Department from changing the basis.

(b) Assessment. – If a taxpayer files a timely request for a Departmental review of a proposed assessment and the Department and the taxpayer are unable to resolve the taxpayer's objection to the proposed assessment, the Department must send the taxpayer

a notice of final determination concerning the assessment. A notice of final determination concerning an assessment must contain the following information:

(1) The basis for the determination. This information may be stated on the notice or be set out in a separate document. The statement of the basis for the determination does not limit the Department from changing the basis.

(2) The amount of tax, interest, and penalties payable by the taxpayer.

(3) The procedure the taxpayer must follow to contest the final determination.

(4) A statement that the amount payable stated on the notice is collectible by the Department unless the taxpayer contests the final determination.

(5) An explanation of the collection options available to the Department if the taxpayer does not pay the amount shown due on the notice and any remedies available to the taxpayer concerning these collection options.

(c) Time Limit. – The process set out in G.S. 105-241.13 for reviewing and attempting to resolve a proposed denial of a refund or a proposed assessment must conclude, and a final determination must be issued within nine months after the date the taxpayer files a request for review. The Department and the taxpayer may extend this time limit by mutual agreement. Failure to issue a notice of final determination within the required time does not affect the validity of a proposed assessment.

"**§ 105-241.15. Contested case hearing on final determination.**

A taxpayer who disagrees with a notice of final determination issued by the Department may contest the determination by filing a petition for a contested case hearing at the Office of Administrative Hearings in accordance with Article 3 of Chapter 150B of the General Statutes. A taxpayer may file a petition for a contested case hearing only if the taxpayer has exhausted the prehearing remedy. A taxpayer's prehearing remedy is exhausted when the Department issues a final determination after conducting a review and a conference.

"**§ 105-241.16. Judicial review of decision after contested case hearing.**

A taxpayer aggrieved by the final decision in a contested case commenced at the Office of Administrative Hearings may seek judicial review of the decision in accordance with Article 4 of Chapter 150B of the General Statutes. Notwithstanding G.S. 150B-45, a petition for judicial review must be filed in the Superior Court of Wake County and in accordance with the procedures for a mandatory business case set forth in G.S. 7A-45.4(b) through (f). A taxpayer who files a petition for judicial review must pay the amount of tax, penalties, and interest the final decision states is due. A taxpayer may appeal a decision of the Business Court to the appellate division in accordance with G.S. 150B-52.

"**§ 105-241.17. Civil action challenging statute as unconstitutional.**

A taxpayer who claims that a tax statute is unconstitutional may bring a civil action in the Superior Court of Wake County to determine the taxpayer's liability under that statute if all of the conditions in this section are met. In filing an action under this section, a taxpayer must follow the procedures for a mandatory business case set forth in G.S. 7A-45.4(b) through (f). The conditions for filing a civil action are:

(1) The taxpayer exhausted the prehearing remedy by receiving a final determination after a review and a conference.

(2) The taxpayer commenced a contested case at the Office of Administrative Hearings.

(3) The Office of Administrative Hearings dismissed the contested case petition for lack of jurisdiction because the sole issue is the constitutionality of a statute and not the application of a statute.

(4) The taxpayer has paid the amount of tax, penalties, and interest the final determination states is due.

(5) The civil action is filed within two years of the dismissal.

"**§ 105-241.18. Reserved for future codification purposes.**

"**§ 105-241.19. Declaratory judgments, injunctions, and other actions prohibited.**

The remedies in G.S. 105-241.11 through G.S. 105-241.17 set out the exclusive remedies for disputing the denial of a requested refund, a taxpayer's liability for a tax, or the constitutionality of a tax statute. Any other action is barred. Neither an action for declaratory judgment, an action for an injunction to prevent the collection of a tax, nor any other action is allowed.

"**§ 105-241.20. Delivery of notice to the taxpayer.**

(a) Scope. – This section applies to the following notices:

(1) A proposed denial of a refund.

(2) A proposed assessment.

(3) A notice of collection.

(4) A final determination.

(b) Method. – The Secretary must deliver a notice listed in subsection (a) of this section to a taxpayer either in person or by United States mail sent to the taxpayer's last known address. A notice mailed to a taxpayer is presumed to have been received by the taxpayer unless the taxpayer makes an affidavit to the contrary within 90 days after the notice was mailed. If the taxpayer makes this affidavit, the notice is considered to have been delivered on the date the taxpayer makes the affidavit, and any time limit affected by the notice is extended to the date the taxpayer makes the affidavit.

"**§ 105-241.21. Interest on taxes.**

(a) Rate. – The interest rate set by the Secretary applies to interest that accrues on overpayments and assessments of tax. On or before June 1 and December 1 of each year, the Secretary must establish the interest rate to be in effect during the six-month period beginning on the next succeeding July 1 and January 1, respectively. In determining the interest rate, the Secretary must give due consideration to current market conditions and to the rate that will be in effect on that date pursuant to the Code. If no new rate is established, the rate in effect during the preceding six-month period continues in effect. The rate established by the Secretary may not be less than five percent (5%) per year and may not exceed sixteen percent (16%) per year.

(b) Accrual on Underpayments. – Interest accrues on an underpayment of tax from the date set by statute for payment of the tax until the tax is paid. Interest accrues only on the principal of the tax and does not accrue on any penalty.

(c) Accrual on Refund. – Interest accrues on an overpayment of tax from the time set in the following subdivisions until the refund is paid.

(1) Franchise, income, and gross premiums. – Interest on an overpayment of a tax levied under Article 3 of this Chapter and payable on an annual basis or of a tax levied under Article 4 or 8B of this Chapter accrues from a date 45 days after the latest of the following dates:

a. The date the final return was filed.

b. The date the final return was due to be filed.

c. The date of the overpayment. The date of an overpayment of a tax levied under Article 4 or Article 8B of this Chapter is determined in accordance with section 6611(d), (f), (g), and (h) of the Code.

(2) All other taxes. – Interest on an overpayment of a tax that is not included in subdivision (1) of this subsection accrues from a date that is 90 days after the date the tax was paid.

(d) When Refund Is Paid. – A refund sent to a taxpayer is considered paid on a date determined by the Secretary that is no sooner than five days after a refund check is mailed. A refund set off against a debt pursuant to Chapter 105A of the General Statutes is considered paid five days after the Department mails the taxpayer a notice of the setoff, unless G.S. 105A-5 or G.S. 105A-8 requires the agency that requested the setoff to return the refund to the taxpayer. In this circumstance, the refund that was set off is not considered paid until five days after the agency that requested the refund mails the taxpayer a check for the refund.

"**§ 105-241.22. Collection of tax.**

The Department may collect a tax in the following circumstances:

(1) When a taxpayer files a return showing tax due with the return and does not pay the amount shown due.

(2) When the Department sends a notice of collection after a taxpayer does not file a timely request for a Departmental review of a proposed assessment of tax.

(3) When a taxpayer and the Department agree on a settlement concerning the amount of tax due.

(4) When the Department sends a notice of final determination concerning an assessment of tax and the taxpayer does not file a timely petition for a contested case hearing on the assessment.

(5) When a final decision is issued on a proposed assessment of tax after a contested case hearing.

(6) When the Office of Administrative Hearings dismisses a petition for a contested case for lack of jurisdiction because the sole issue is the constitutionality of a statute and not the application of a statute.

"**§ 105-241.23. Jeopardy assessment and collection.**

(a) Action. – The Secretary may at any time within the statute of limitations immediately assess and collect any tax the Secretary finds is due from a taxpayer if the Secretary determines that collection of the tax is in jeopardy and immediate assessment

and collection are necessary in order to protect the interest of the State. In making a jeopardy collection, the Secretary may use any of the collection remedies in G.S. 105-242 and is not required to wait any period of time before using these remedies. Within 30 days after initiating a jeopardy collection, the Secretary must give the taxpayer the notice of proposed assessment required by G.S. 105-241.9.

(b) Review by Department. – Within five days after initiating a jeopardy collection that is not the result of a criminal investigation or of a liability for a tax imposed under Article 2D of this Chapter, the Secretary must provide the taxpayer with a written statement of the information upon which the Secretary relied in initiating the jeopardy collection. Within 30 days after receipt of this written statement or, if no statement is received, within 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 30 days after the request.

(c) Judicial Review. – Within 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 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 20-day limit on the court should be extended, the court may grant an extension of not more than 40 additional days."

SECTION 2. The following statutes are repealed:

(1) G.S. 20-91.1
(2) G.S. 20-91.2
(3) G.S. 20-98
(4) G.S. 20-99
(5) G.S. 105-104
(6) G.S. 105-122(c)
(7) G.S. 105-130.4(t)
(8) G.S. 105-164.43
(9) G.S. 105-239
(10) G.S. 105-241.1
(11) G.S. 105-241.2
(12) G.S. 105-241.3
(13) G.S. 105-241.4
(14) G.S. 105-241.5
(15) G.S. 105-266

(16) G.S. 105-266.1
(17) G.S. 105-267
(18) G.S. 105-269.2
(19) G.S. 143A-38
(20) G.S. 150B-1(e)(6)
(21) G.S. 150B-28(b).

SECTION 3. G.S. 1-52(15) reads as rewritten:

"**§ 1-52. Three years.**

Within three years an action –

…

(15) For the recovery of taxes paid as provided in ~~G.S. 105-267 and~~ G.S. 105-381.

…."

SECTION 4. G.S. 7A-45.4 reads as rewritten:

'**§ 7A-45.4. Designation of mandatory complex business cases.**

(a) A mandatory complex business case is an action that involves a material issue related to:

(1) The law governing corporations, except charitable and religious organizations qualified under G.S. 55A-1-40(4) on the grounds of religious purpose, partnerships, limited liability companies, and limited liability partnerships, including issues concerning governance, involuntary dissolution of a corporation, mergers and acquisitions, breach of duty of directors, election or removal of directors, enforcement or interpretation of shareholder agreements, and derivative actions.
(2) Securities law, including proxy disputes and tender offer disputes.
(3) Antitrust law, except claims based solely on unfair competition under G.S. 75-1.1.
(4) State trademark or unfair competition law, except claims based solely on unfair competition under G.S. 75-1.1.
(5) Intellectual property law, including software licensing disputes.
(6) The Internet, electronic commerce, and biotechnology.
(7) Tax law, when the dispute has been the subject of a contested tax case for which judicial review is requested under G.S. 105-241.16 or the dispute is a civil action under G.S. 105-241.17.

(b) Any party may designate a civil action or a petition for judicial review under G.S. 105-241.16 as a mandatory complex business case by filing a Notice of Designation in the Superior Court in which the action has been filed and simultaneously serving the notice on each opposing party or counsel and on the Special Superior Court Judge for Complex Business Cases who is then the senior Business Court Judge. A copy of the notice shall also be sent contemporaneously by e-mail or facsimile transmission to the Chief Justice of the Supreme Court for approval of the designation of the action as a mandatory complex business case and assignment to a specific Business Court Judge.

(c) The Notice of Designation shall, in good faith and based on information reasonably available, succinctly state the basis of the designation and include a certificate by or on behalf of the designating party that the civil action meets the criteria for designation as a mandatory complex business case pursuant to subsection (a) of this section.

(d) The Notice of Designation shall be filed:

(1) By the ~~plaintiff or third-party plaintiff~~ plaintiff, the third-party plaintiff, or the petitioner for judicial review contemporaneously with the filing of the ~~complaint or third-party complaint~~ complaint, third-party complaint, or the petition for judicial review in the action.

(2) By any intervenor when the intervenor files a motion for permission to intervene in the action.

(3) By any defendant or any other party within 30 days of receipt of service of the pleading seeking relief from the defendant or party.

(e) Within 30 days after service of the Notice of Designation, any other party may, in good faith, file and serve an opposition to the designation of the action as a mandatory business case. Based on the opposition or ex mero motu, the Business Court Judge may determine that the action should not be designated as a mandatory complex business case. If a party disagrees with the decision, the party may appeal to the Chief Justice of the Supreme Court.

(f) Once a designation is filed under subsection (d) of this section, and after preliminary approval by the Chief Justice, a case shall be designated and administered a complex business case. All proceedings in the action shall be before the Business Court Judge to whom it has been assigned unless and until an order has been entered under subsection (e) of this section ordering that the case not be designated a mandatory complex business case or the Chief Justice revokes approval. If complex business case status is revoked or denied, the action shall be treated as any other civil action, unless it is designated as an exceptional civil case or a discretionary complex business case pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts."

SECTION 5. G.S. 20-64(f) reads as rewritten:

"(f) The owner or transferor of a registered vehicle who surrenders the registration plate to the division may secure a refund for the unexpired portion of such plate prorated on a monthly basis, beginning the first day of the month following surrender of the plate to the division, provided the annual fee of such surrendered plate is sixty dollars ($60.00) or more. This refund may not exceed one half of the annual license fee. No refund shall be made unless the owner or transferor furnishes proof of financial responsibility on the registered vehicle effective until the date of the surrender of the plate. Proof of financial responsibility shall be furnished in a manner prescribed by the Commissioner. ~~Any unauthorized refund may be recovered in the manner set forth in G.S. 20-99.~~"

SECTION 6. G.S. 105-32.8 reads as rewritten:

"**§ 105-32.8. Federal determination that changes the amount of tax payable to the State.**

If the federal government corrects or otherwise determines the gross estate tax imposed under section 2001 of the Code or the amount of the maximum state death tax credit allowed an estate under section 2011 of the Code, the personal representative must, within six months after being notified of the correction or final determination by the federal government, file an estate tax return with the Secretary reflecting the correct amount of tax payable under this Article. If the federal government corrects or otherwise determines the amount of the maximum state generation-skipping transfer tax credit allowed under section 2604 of the Code, the person who made the transfer must, within six months after being notified of the correction or final determination by the federal government, file a tax return with the Secretary reflecting the correct amount of tax payable under this Article.

The Secretary must ~~assess and collect~~ propose an assessment for any additional tax due as provided in Article 9 of this Chapter and must refund any overpayment of tax as provided in Article 9 of this Chapter. A person who fails to report a federal correction or determination in accordance with this section is subject to the penalties in G.S. 105-236 and forfeits the right to any refund due by reason of the determination."

SECTION 7. G.S. 105-109(b) reads as rewritten:

"(b) License Required. – Before a person may engage in a business, trade, or profession for which a license is required under this Article, the person must be licensed by the ~~Department pursuant to G.S. 105-104.~~ Department. To obtain a license, a person must submit an application to the Department for the license and pay the required tax. An application for a license is considered a return.

The Department must issue a license to a person who files a completed application and pays the required tax. A license must be displayed conspicuously at the location of the licensed business, trade, or profession."

SECTION 8. G.S. 105-113.111 reads as rewritten:

"**§ 105-113.111. Assessments.**

Notwithstanding any other provision of law, an assessment against a dealer who possesses an unauthorized substance to which a stamp has not been affixed as required by this Article shall be made as provided in this section. The Secretary shall assess a tax, applicable penalties, and interest based on personal knowledge or information available to the Secretary. The Secretary shall notify the dealer in writing of the amount of the tax, penalty, and interest due, and demand its immediate payment. The notice and demand shall be either mailed to the dealer at the dealer's last known address or served on the dealer in person. If the dealer does not pay the tax, penalty, and interest immediately upon receipt of the notice and demand, the Secretary shall collect the tax, penalty, and interest pursuant to the ~~procedure set forth~~ jeopardy collection procedures in G.S. 105-241.23 or the general collection procedures in G.S. 105-242, ~~105-241.1(g) for jeopardy assessments or the procedure set forth in G.S. 105-242,~~ including causing execution to be issued immediately against the personal property of the dealer, unless the dealer files with the Secretary a bond in the amount of the asserted liability for the tax, penalty, and interest. The Secretary shall use all means available to collect the tax, penalty, and interest from any property in which the dealer has a legal, equitable, or

beneficial interest. The dealer may seek review of the assessment as provided in Article 9 of this Chapter."

S**ECTION 9.** G.S. 105-113.113 reads as rewritten:

"**§ 105-113.113. Use of tax proceeds.**

(a) Special Account. – The Unauthorized Substances Tax Account is established as a special nonreverting account. The Secretary shall credit the proceeds of the tax levied by this Article to ~~a special nonreverting account, to be called the State Unauthorized Substances Tax Account, until the tax proceeds are unencumbered. The Secretary shall remit the unencumbered tax proceeds as provided in this section on a quarterly or more frequent basis. Tax proceeds are unencumbered when either of the following occurs:~~

~~(1) The tax has been fully paid and the taxpayer has no current right under G.S. 105-267 to seek a refund.~~

~~(2) The taxpayer has been notified of the final assessment of the tax under G.S. 105-241.1 and has neither fully paid nor timely contested the tax under G.S. 105-241.1 through G.S. 105-241.4 or G.S. 105-267.~~

the Account.

(b) Distribution. – The Secretary shall distribute unencumbered tax proceeds in the Unauthorized Substances Tax Account on a quarterly or more frequent basis. Tax proceeds in the Account are unencumbered when they are collectible under G.S. 105-241.22. The Secretary shall ~~remit~~ distribute seventy-five percent (75%) of the ~~part of the~~ unencumbered tax proceeds in the Account that ~~was~~ were collected by assessment to the State or local law enforcement agency that conducted the investigation of a dealer that led to the assessment. If more than one State or local law enforcement agency conducted the investigation, the Secretary shall determine the equitable share for each agency based on the contribution each agency made to the investigation. The Secretary shall credit the remaining unencumbered tax proceeds in the Account to the General Fund.

(c) Refunds. – The refund of a tax that has already been distributed shall be drawn initially from the ~~State~~ Unauthorized Substances Tax Account. The amount of refunded taxes that ~~had been~~ were distributed to a law enforcement agency under this section and any interest shall be subtracted from succeeding distributions from the Account to that law enforcement agency. The amount of refunded taxes that ~~had been~~ were credited to the General Fund under this section and any interest shall be subtracted from succeeding credits to the General Fund from the Account."

SECTION 10. G.S. 105-122(a) reads as rewritten:

"(a) An annual franchise or privilege tax is imposed on a corporation doing business in this State. A corporation subject to the tax must file a return under affirmation with the Secretary at the place and in the manner prescribed by the Secretary. The return must be signed by the president, vice-president, treasurer, or chief financial officer of the corporation. The return is due on or before the fifteenth day of the fourth month following the end of the corporation's income year. ~~Every corporation, domestic and foreign, incorporated, or, by an act, domesticated under the laws of this State or doing business in this State, except as otherwise provided in this Article, shall,~~

~~on or before the fifteenth day of the third month following the end of its income year, annually make and deliver to the Secretary in the form prescribed by the Secretary a full, accurate, and complete report and statement signed by either its president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary, containing the facts and information required by the Secretary as shown by the books and records of the corporation at the close of the income year.~~

~~There shall be annexed to the return required by this subsection the affirmation of the officer signing the return.~~"

SECTION 11. G.S. 105-122 is amended by adding a new subsection to read:

"(c1) Apportionment. – A corporation that is doing business in this State and in one or more other states must apportion its capital stock, surplus, and undivided profits to this State. A corporation must use the apportionment method set out in subdivision (1) of this subsection unless the Department has authorized it to use a different method under subdivision (2) of this subsection. The portion of a corporation's capital stock, surplus, and undivided profits determined by applying the appropriate apportionment method is considered the amount of capital stock, surplus, and undivided profits the corporation uses in its business in this State.

(1) Statutory. – A corporation that is subject to income tax under Article 4 of this Chapter must apportion its capital stock, surplus, and undivided profits by using the fraction it applies in apportioning its income under that Article. A corporation that is not subject to income tax under Article 4 of this Chapter must apportion its capital stock, surplus, and undivided profits by using the fraction it would be required to apply in apportioning its income if it were subject to that Article. The apportionment method set out in this subdivision is considered the statutory method of apportionment and is presumed to be the best method of determining the amount of a corporation's capital stock, surplus, and undivided profits attributable to the corporation's business in this State.

(2) Alternative. – A corporation that believes the statutory apportionment method set out in subdivision (1) of this subsection subjects a greater portion of its capital stock, surplus, and undivided profits to tax under this section than is attributable to its business in this State may make a written request to the Secretary for permission to use an alternative method. The request must set out the reasons for the corporation's belief and propose an alternative method. The corporation has the burden of establishing by clear, cogent, and convincing proof that the statutory apportionment method subjects a greater portion of the corporation's capital stock, surplus, and undivided profits to tax under this section than is attributable to its business in this State and that the proposed alternative method is a better method of determining the amount of the corporation's capital stock, surplus, and undivided profits attributable to the corporation's business in this State.

The Secretary must issue a written decision on a corporation's request for an alternative apportionment method. If the decision grants the request, it must describe the alternative method the corporation is authorized to use and state the tax years to which the alternative method applies. A decision may apply to no more than three tax years. A corporation may renew a request to use an alternative apportionment method by following the procedure in this subdivision. A decision of the Secretary on a request for an alternative apportionment method is final and is not subject to administrative or judicial review. A corporation authorized to use an alternative method may apportion its capital stock, surplus, and undivided profits in accordance with the alternative method or the statutory method."

SECTION 12. G.S. 105-130.4 is amended by adding a new subsection to read:

"(t1) Alternative Apportionment Method. – A corporation that believes the statutory apportionment method that otherwise applies to it under this section subjects a greater portion of its income to tax than is attributable to its business in this State may make a written request to the Secretary for permission to use an alternative method. The request must set out the reasons for the corporation's belief and propose an alternative method.

The statutory apportionment method that otherwise applies to a corporation under this section is presumed to be the best method of determining the portion of the corporation's income that is attributable to its business in this State. A corporation has the burden of establishing by clear, cogent, and convincing proof that the proposed alternative method is a better method of determining the amount of the corporation's income attributable to the corporation's business in this State.

The Secretary must issue a written decision on a corporation's request for an alternative apportionment method. If the decision grants the request, it must describe the alternative method the corporation is authorized to use and state the tax years to which the alternative method applies. A decision may apply to no more than three tax years. A corporation may renew a request to use an alternative apportionment method by following the procedure in this subsection. A decision of the Secretary on a request for an alternative apportionment method is final and is not subject to administrative or judicial review. A corporation authorized to use an alternative method may apportion its income in accordance with the alternative method or the statutory method."

SECTION 13. G.S. 105-130.6A(e) reads as rewritten:

"(e) Cap for Bank Holding Companies. – After calculating the expense adjustment as provided in subsection (c) of this section, each bank holding company must calculate the amount of additional tax that results from the expense adjustments for the holding company and for every corporation in the holding company's affiliated group for the taxable year. If the expense adjustments result in additional tax exceeding eleven million dollars ($11,000,000) for a taxable year for the affiliated group, the affiliated group may reduce the amount of the expense adjustment so that the resulting additional tax does not exceed this maximum. This maximum applies once to each affiliated group

each taxable year, whether or not the group includes more than one bank holding company.

The members of the affiliated group may allocate this reduction among themselves in their discretion. In order to take this reduction, each member of the affiliated group that is required to file a return under this Part and that has dividends for the taxable year must provide a schedule with its return that lists every member of the group that has dividends, the amount of the dividends, and whether the member is a bank holding company. In addition, the schedule must show the expense adjustments for those members whose additional tax as a result of the expense adjustment constitutes the maximum amount. In addition, each member must provide any other documentation required by the Secretary.

If the expense adjustment for an affiliated group is reduced under this subsection, and the return of a member of the group is later changed in a manner that reduces below the maximum the amount of additional tax for the group resulting from the expense adjustment, the Secretary may increase the expense adjustment for any member of the group in order to increase to the maximum the amount of additional tax for the group resulting from the expense adjustment. In this situation, the amount of the increase is considered a forfeited tax benefit with respect to the affiliated group for the purposes of G.S. ~~105-241.1(e).~~ 105-241.8. The date of the forfeiture is the date of the change that triggers the Secretary's authority to increase the expense adjustment. Any member whose expense adjustment the Secretary increases is liable for interest on the amount of the increase at the rate established under ~~105-241.1(i),~~ G.S. 105-241.21 computed from the date the taxes would have been due if the expense adjustment had been calculated correctly on the original return. The amount of the increase and the interest are due 60 days after the date of the forfeiture. A taxpayer that fails to pay the amount of the increase and interest by the due date is subject to the penalties provided in G.S. 105-236."

SECTION 14. G.S. 105-130.17 reads as rewritten:

"**§ 105-130.17. Time and place of filing returns.**

(a) Returns must be filed as prescribed by the Secretary at the place prescribed by the Secretary. Returns must be in the form prescribed by the Secretary. The Secretary ~~shall~~ must furnish forms in accordance with G.S. 105-254.

(b) Except as otherwise provided in this section, the return of a corporation shall be filed on or before the fifteenth day of the ~~third~~ fourth month following the close of its income year. An income year ending on any day other than the last day of the month shall be deemed to end on the last day of the calendar month ending nearest to the last day of a taxpayer's actual income year.

(c) In the case of mutual associations formed under G.S. 54-111 through 54-128 to conduct agricultural business on the mutual plan and marketing associations organized under G.S. 54-129 through 54-158, which are required to file under subsection (a)(9) of G.S. 105-130.11, a return made on the basis of a calendar year shall be filed on or before the fifteenth day of the September following the close of the calendar year, and a return made on the basis of a fiscal year shall be filed on or before the fifteenth day of the ninth month following the close of the fiscal year.

(d) A taxpayer may ask the Secretary for an extension of time to file a return under G.S. 105-263.

(d1) Organizations described in G.S. 105-130.11(a)(1), (3), (4), (5), (6), (7) and (8) that are required to file a return under G.S. 105-130.11(b) shall file a return made on the basis of a calendar year on or before the fifteenth day of May following the close of the calendar year and a return made on the basis of a fiscal year on or before the fifteenth day of the fifth month following the close of the fiscal year.

(e) Any corporation that ceases its operations in this State before the end of its income year because of its intention to dissolve or to withdraw from this State, or because of a merger, conversion, or consolidation or for any other reason whatsoever shall file its return for the then current income year within ~~75~~105 days after the date it terminates its business in this State.

(f) Repealed by Session Laws 1998-217, s. 42, effective October 31, 1998.

(g) A corporation that files a federal return pursuant to section 6072(c) of the Code shall file its return on or before the fifteenth day of the ~~sixth~~ seventh month following the close of its income year."

SECTION 15. G.S. 105-130.20 reads as rewritten:

"**§ 105-130.20. Federal corrections.**

If a taxpayer's federal taxable income is corrected or otherwise determined by the federal government, the taxpayer must, within six months after being notified of the correction or final determination by the federal government, file an income tax return with the Secretary reflecting the corrected or determined taxable income. The Secretary ~~shall determine from all available evidence the taxpayer's correct tax liability for the income year. As used in this section, the term "all available evidence" means evidence of any kind that becomes available to the Secretary from any source, whether or not the evidence was considered in the federal correction or determination.~~

~~The Secretary shall assess and collect~~ must propose an assessment for any additional tax due from the taxpayer as provided in Article 9 of this Chapter. The Secretary ~~shall~~ must refund any overpayment of tax as provided in Article 9 of this Chapter. A taxpayer that fails to comply with this section is subject to the penalties in G.S. 105-236 and forfeits its rights to any refund due by reason of the determination."

SECTION 16. G.S. 105-159 reads as rewritten:

"**§ 105-159. Federal corrections.**

If a taxpayer's federal taxable income is corrected or otherwise determined by the federal government, the taxpayer must, within six months after being notified of the correction or final determination by the federal government, file an income tax return with the Secretary reflecting the corrected or determined taxable income. The Secretary ~~shall determine from all available evidence the taxpayer's correct tax liability for the taxable year. As used in this section, the term "all available evidence' means evidence of any kind that becomes available to the Secretary from any source, whether or not the evidence was considered in the federal correction or determination.~~

~~The Secretary shall assess and collect~~ must propose an assessment for any additional tax due from the taxpayer as provided in Article 9 of this Chapter. The Secretary ~~shall~~ must refund any overpayment of tax as provided in Article 9 of this Chapter. A taxpayer

who fails to comply with this section is subject to the penalties in G.S. 105-236 and forfeits the right to any refund due by reason of the determination."

SECTION 17. G.S. 105-163.6A reads as rewritten:

"**§ 105-163.6A. Federal corrections.**

If the amount of taxes an employer is required to withhold and pay under the Code is corrected or otherwise determined by the federal government, the employer must, within ~~two years~~ six months after being notified of the correction or final determination by the federal government, file a return with the Secretary reflecting the corrected or determined amount. The Secretary ~~shall determine from all available evidence the correct amount the employer should have paid under this Article for the period covered by the federal determination. As used in this section, the term "all available evidence" means evidence of any kind that becomes available to the Secretary from any source, whether or not the evidence was considered in the federal correction or determination.~~

~~The Secretary shall assess and collect~~ must propose an assessment for any additional tax due from the employer as provided in Article 9 of this Chapter. If there has been an overpayment of the tax, the Secretary ~~shall~~ must either refund the overpayment to the employer in accordance with G.S. 105-163.9 or credit the amount of the overpayment to the individual in accordance with G.S. 105-163.10. An employer who fails to comply with this section is subject to the penalties in G.S. 105-236 and forfeits the right to any refund due by reason of the determination. Failure of an employer to comply with this section does not, however, affect an individual's right to a credit under G.S. 105-163.10."

SECTION 18. G.S. 105-163.9 reads as rewritten:

"**§ 105-163.9. Refund of overpayment to withholding agent.**

A withholding agent who pays the Secretary more under this Article than the Article requires the agent to pay may obtain a refund of the overpayment by filing ~~an application~~ a request for a refund with the Secretary. No refund is allowed, however, if the withholding agent withheld the amount of the overpayment from the wages or compensation of the agent's employees or contractors. A withholding agent must file ~~an application~~ a request for a refund within the time period set in G.S. ~~105-266.~~ G.S. 105-241.6. Interest accrues on a refund as provided in ~~G.S. 105-266.~~G.S. 105-241.21."

SECTION 19. G.S. 105-164.29(d) reads as rewritten:

"(d) Revocation. ~~Whenever~~ The failure of a wholesale merchant or retailer ~~fails~~ to comply with this Article or ~~violates G.S. 14-401.18, the Secretary, upon hearing, after giving 10 days' notice in writing, specifying the time and place of hearing and requiring the wholesale merchant or retailer to show cause why the certificate of registration should not be revoked, may revoke or suspend the certificate of registration. The notice may be served personally or by registered mail directed to the last known address of the wholesale merchant or retailer. All provisions with respect to review and appeals of the Secretary's decisions as provided by G.S. 105-241.2, 105-241.3, and 105-241.4 apply to this section.~~ G.S. 14-401.18 is grounds for revocation of the wholesale merchant's or retailer's certificate of registration. Before the Secretary revokes a wholesale merchant's or retailer's certificate of registration, the Secretary must notify the wholesale merchant

or retailer that the Secretary proposes to revoke the certificate of registration and that the proposed revocation will become final unless the wholesale merchant or retailer objects to the proposed revocation and files a request for a Departmental review within the time set in G.S. 105-241.11 for requesting a Departmental review of a proposed assessment. The notice must be sent in accordance with the methods authorized in G.S. 105-241.20. The procedures in Article 9 of this Chapter for review of a proposed assessment apply to the review of a proposed revocation."

SECTION 20. G.S. 105-164.38(c) reads as rewritten:

"(c) Assessment. – The period of limitations for assessing liability against the buyer of a business or the stock of goods of a business and for enforcing the lien against the property expires one year after the end of the period of limitations for assessment against the person who sold the business or the stock of goods. Except as otherwise provided in this section, the assessment procedures in Article 9 of this Chapter apply to a person who buys a business or the stock of goods of a business ~~and that person's liability for unpaid taxes are subject to the provisions of G.S. 105-241.1, 105-241.2, 105-241.3, and 105-241.4 and to other remedies for the collection of taxes~~ to the same extent as if the person had incurred the original tax liability."

SECTION 21. G.S. 105-187.10(b) reads as rewritten:

"(b) Unpaid Taxes. – The remedies for collection of taxes in ~~G.S. 20-99~~ Article 9 of this Chapter apply to the taxes levied by this Article and collected by the Commissioner. In applying these remedies, the Commissioner has the same authority as the Secretary."

SECTION 22. G.S. 105-197.1 reads as rewritten:

"**§ 105-197.1. Federal corrections.**

If the amount of a taxpayer's net gifts is corrected or otherwise determined by the federal government, the taxpayer must, within six months after being notified of the correction or final determination by the federal government, file a gift tax return with the Secretary ~~of Revenue~~ reflecting the corrected or determined net gifts. The Secretary ~~of Revenue shall determine from all available evidence the taxpayer's correct tax liability for the taxable year. As used in this section, the term "all available evidence" means evidence of any kind that becomes available to the Secretary from any source, whether or not the evidence was considered in the federal correction or determination.~~

~~The Secretary shall assess and collect~~ must propose an assessment for any additional tax due from the taxpayer as provided in Article 9 of this Chapter. The Secretary ~~shall~~ must refund any overpayment of tax as provided in Article 9 of this Chapter. A taxpayer who fails to comply with this section is subject to the penalties in G.S. 105-236 and forfeits the right to any refund due by reason of the determination."

SECTION 23. G.S. 105-228.5(f) reads as rewritten:

"(f) **(Effective for taxable years beginning on or after January 1, 2008)** Installment Payments Required. – Taxpayers that are subject to the tax imposed by this section and have a premium tax liability of ten thousand dollars ($10,000) or more for business done in North Carolina during the immediately preceding year shall remit three equal quarterly installments with each installment equal to at least thirty-three and one-third percent (33 1/3%) of the premium tax liability incurred in the immediately

preceding taxable year. The quarterly installment payments shall be made on or before April 15, June 15, and October 15 of each taxable year. The company shall remit the balance by the following March 15 in the same manner provided in this section for annual returns.

The Secretary ~~of Revenue~~ may permit an insurance company to pay less than the required estimated payment when the insurer reasonably believes that the total estimated payments made for the current year will exceed the total anticipated tax liability for the year.

An underpayment or an overpayment of an installment payment required by this subsection ~~shall bear interest at the rate established under G.S. 105-241.1(i). Any overpayment shall bear interest as provided in G.S. 105-266(b) and, together with the interest,~~ accrues interest in accordance with G.S. 105-241.21. An overpayment of tax shall be credited to the company and applied against the taxes imposed upon the company under this Article."

SECTION 24. G.S. 105-228.37 reads as rewritten:

"**§ 105-228.37. Refund of overpayment of tax.**

(a) Refund Request. – A taxpayer who pays more tax than is due under this Article may request a refund of the overpayment by filing a written request for a refund with the board of county commissioners of the county where the tax was paid. The request must be filed within six months after the date the tax was paid and must explain why the taxpayer believes a refund is due.

(b) Hearing by County. – A board of county commissioners must ~~review~~ conduct a hearing on a request for refund ~~and must follow the time limitations set in G.S. 105-266.1 for holding a hearing and making a decision.~~ in accordance with the procedures that apply to a hearing held by a board of equalization and review on an appeal concerning the listing or appraisal of property. If the board decides that a refund is due, it must refund the county's portion of the overpayment, together with any applicable interest, to the taxpayer. If the board finds that no refund is due, the written decision of the board must inform the taxpayer that the taxpayer may ~~ask the Secretary to review the decision. The board must send the Secretary a copy of a decision on a request for refund.~~appeal the decision to the Property Tax Commission.

(c) Review by ~~Secretary.~~ Commission. – ~~A taxpayer whose request for a refund is denied by a board of county commissioners may obtain a review of the board's decision by the Secretary. The request must be made in writing and must be filed within 30 days after the taxpayer receives the board's decision denying the refund. The Secretary must send the board of county commissioners a copy of the Secretary's decision made on the request. If the Secretary~~ The procedure in G.S. 105-290 for the appeal to the Property Tax Commission of a decision of a board of equalization and review concerning the listing or appraisal of property applies to the appeal of a denial by a board of county commissioners of a request for a refund of tax paid under this Article. If the Commission determines that a refund is due, the board of county commissioners must refund the county's portion of the overpayment, together with any applicable interest, to the taxpayer. A decision of the Commission is binding on the Secretary ~~is binding~~ and on a board of county commissioners.

(d) Judicial Review. – A ~~taxpayer who disagrees with a~~ decision of the ~~Secretary~~ Property Tax Commission ~~may bring an action against the county and the State to recover the disputed overpayment. The action may be brought in the Superior Court of Wake County or in the superior court of the county where the tax was paid.~~is subject to judicial review in accordance with G.S. 7A-29.

(e) Recording Correct Deed. – Before a tax is refunded, the taxpayer must record a new instrument reflecting the correct amount of tax due. If no tax is due because an instrument was recorded in the wrong county, then the taxpayer must record a document stating that no tax was owed because the instrument being corrected was recorded in the wrong county. The taxpayer must include in the document the names of the grantors and grantees and the deed book and page number of the instrument being corrected.

When a taxpayer records a corrected instrument, the taxpayer must inform the register of deeds that the instrument being recorded is a correcting instrument. The taxpayer must give the register of deeds a copy of the decision granting the refund that shows the correct amount of tax due. The correcting instrument must include the deed book and page number of the instrument being corrected. The register of deeds must notify the county finance officer and the Secretary when the correcting instrument has been recorded.

(f) Interest. – An overpayment of tax bears interest at the rate established in G.S. ~~105-241.1(i)~~ 105-241.21 from the date that interest begins to accrue. Interest begins to accrue on an overpayment 30 days after the request for a refund is filed by the taxpayer with the board of county commissioners."

SECTION 25. G.S. 105-228.90(b) reads as rewritten:

"(b) Definitions. – The following definitions apply in this Article:

…

(7) Tax. – A tax levied under Subchapter I, V, or VIII of this Chapter, the primary forest product assessment levied under Article 12 of Chapter 113A of the General Statutes, or an inspection tax levied under Article 3 of Chapter 119 of the General Statutes. Unless the context clearly requires otherwise, the ~~terms "tax" and "additional tax" include~~ term "tax" includes penalties and interest as well as the principal amount.

…."

SECTION 26. G.S. 105-236(a)(4) reads as rewritten:

"(4) Failure to Pay Tax When Due. – In the case of failure to pay any tax when due, without intent to evade the tax, the Secretary shall assess a penalty equal to ten percent (10%) of the tax, ~~except that the penalty shall in no event be less than~~ subject to a minimum of five dollars ($5.00). This penalty does not apply in any of the following circumstances:

a. When the amount of tax shown as due on an amended return is paid when the return is filed.

b. When ~~a tax due but not shown on a return is assessed by~~ the Secretary proposes an assessment for tax due but not shown on

a return and the tax due ~~and~~ is paid within ~~30~~45 days after the date of the ~~proposed~~ notice of proposed assessment of the tax."

SECTION 27. G.S. 105-239.1 reads as rewritten:

"**§ 105-239.1. Transferee liability.**

(a) Lien and Liability. – Property transferred for an inadequate consideration to a donee, heir, legatee, devisee, distributee, stockholder of a liquidated corporation, or any other person at a time when the transferor is insolvent or is rendered insolvent by reason of the transfer ~~shall be~~ is subject to a lien for any taxes owing by the transferor to the State of North Carolina at the time of the transfer whether or not the amount of the taxes has been ascertained or assessed at the time of the transfer. G.S. 105-241 applies to this tax lien. In the event the transferee has disposed of the property so that it cannot be subjected to the State's tax lien, the transferee ~~shall be~~ is personally liable for the difference between the fair market value of the property at the time of the transfer and the actual consideration, if any, paid to the transferor by the transferee.

~~Upon a foreclosure of the State's tax lien upon property in the hands of a transferee, the value of any consideration that the transferee proves has been given to the transferor shall be paid to the transferee out of the proceeds of the foreclosure sale before applying the proceeds toward the satisfaction of the State's tax lien.~~

~~In order to proceed against the transferee or property in the transferee's hands, the Secretary shall cause to be docketed in the office of the clerk of the superior court of the county wherein the transferee resides or the property is located, as the case may be, a certificate of tax liability as provided in G.S. 105-242 or a lien certificate which shall set forth the amount of the lien as determined by the Secretary or as finally determined upon appeal and a description of the property subject to the lien. Thereafter, execution may be issued against the transferee as in the case of other money judgments except that no homestead or personal exemption shall be allowable or, upon a lien certificate, an execution may be issued directing the sheriff to seize the property subject to the lien and sell same in the same manner as property is sold under execution. Such procedure and collection shall be subject to the provisions of subsection (c) of this section.~~

(b) Procedure. – The Department may proceed to enforce a lien that arises under this section against property transferred by a taxpayer to another person or to hold that person liable for the tax due by sending the person a notice of proposed assessment in accordance with G.S. 105-241.9. The Department has the burden of establishing that a person to whom property was transferred is liable. The period of limitations for assessment of any liability against a transferee or enforcing the lien against the transferred property ~~shall expire~~ expires one year after the expiration of the period of limitations for assessment against the transferor.

(c) Proceeds. – When property transferred by a taxpayer to another person is sold to satisfy the lien that arises under this section, the person is entitled to receive from the proceeds of the sale the amount of consideration, if any, the person paid for the property. The proceeds must be applied for this purpose before they are applied to satisfy the lien. ~~The provisions of G.S. 105-241.1, 105-241.2, 105-241.3, 105-241.4, 105-266.1 and 105-267 with respect to assessment procedure, demand for refund, review, and appeal shall apply to the liability of any transferee assessed under this~~

~~section or of any property subject to the liability imposed by this section and to the assertion of a lien upon property in the hands of the transferee.~~

~~(d) In any proceeding before the Tax Review Board or in any court of the State the burden of proof shall be upon the Secretary of Revenue to show that a person is liable as a transferee of property of a taxpayer under this section.~~"

SECTION 28. G.S. 105-242(a) reads as rewritten:

"(a) ~~Warrants for Collection of Taxes.~~ Levy and Sale. ~~If any tax levied by the State and payable to the Secretary has not been paid within 30 days after the taxpayer was given a notice of final assessment of the tax under G.S. 105-241.1(d1),~~ If a taxpayer does not pay a tax within 30 days after it is collectible under G.S. 105-241.22, the Secretary may take either of the following actions to collect the tax:

(1) ~~The Secretary may issue~~ Issue a warrant ~~or an order under the Secretary's hand and official seal, directed to~~ directing the sheriff of any county of the ~~State, commanding him~~ State to levy upon and sell the real and personal property of the taxpayer found within the county for the payment of the ~~tax, including penalties and interest,~~ tax and the cost of executing the warrant and to return to the Secretary the money collected, within a time to be specified in the ~~warrant,~~ warrant but not less than 60 days from the date of the ~~warrant; the sheriff upon receipt of the warrant shall proceed in all respects with like effect and in the same manner prescribed by law in respect to~~ warrant. The procedure for executions issued against property upon judgments of a ~~court of record, and shall be entitled to the same fees for services in executing the warrant, to be collected in the same manner.~~court apply to executions under a warrant.

(2) ~~The Secretary may issue~~ Issue a warrant ~~or order under the Secretary's hand and seal~~ to any revenue officer or other employee of the Department ~~of Revenue~~ charged with the duty to collect taxes, commanding the officer or employee to levy upon and sell the taxpayer's personal ~~property, including that described in G.S. 105-366(d),~~ property found within the State for the payment of the ~~tax, including penalties and interest.~~ tax. Except as otherwise provided in this subdivision, the levy upon ~~the~~ and sale of personal property ~~shall be governed by~~ by an officer or employee of the Department is subject to and must be conducted in accordance with the laws ~~regulating levy and~~ governing the sale of property levied upon under execution. The ~~person to whom the warrant is directed shall proceed to levy upon and sell the personal property subject to levy in the same manner and with the same powers and authority normally exercised by sheriffs in levying upon and selling personal property under execution, except that the property may be sold in any county, in the discretion of the Secretary. In addition to the notice of sale required by the laws governing sale of property levied upon under execution, the~~ Secretary may sell the property levied upon in any county and may

advertise the sale in any reasonable manner and for any reasonable period of time to produce an adequate bid for the property. Levy and sale fees, plus actual advertising costs, ~~shall~~ must be added to and collected in the same manner as taxes. The Secretary is not required to file a report of sale with the clerk of superior court, ~~as required by the laws governing sale of property levied upon under execution,~~ if the sale is otherwise publicly reported."

SECTION 29. G.S. 105-242(b) reads as rewritten:

"(b) Garnishment and Attachment. – ~~Bank deposits, rents, salaries, wages, and all other choses in action or property incapable of manual levy or delivery, including property held in the Escheat Fund, hereinafter called the intangible, belonging, owing, or to become due to any taxpayer subject to any of the provisions of this Subchapter, or which has been transferred by such taxpayer under circumstances which would permit it to be levied upon if it were tangible, shall be subject to attachment or garnishment as herein provided, and the person owing said intangible, matured or unmatured, or having same in his possession or control, hereinafter called the garnishee, shall become liable for all sums due by the taxpayer under this Subchapter to the extent of the amount of the intangible belonging, owing, or to become due to the taxpayer subject to the setoff of any matured or unmatured indebtedness of the taxpayer to the garnishee; provided, however, the garnishee shall not become liable for any sums represented by or held pursuant to any negotiable instrument issued and delivered by the garnishee to the taxpayer and negotiated by the taxpayer to a bona fide holder in due course, and whenever any sums due by the taxpayer and subject to garnishment are so held or represented, the garnishee shall hold such sums for payment to the Secretary of Revenue upon the garnishee's receipt of such negotiable instrument, unless such instrument is presented to the garnishee for payment by a bona fide holder in due course in which event such sums may be paid in accordance with such instrument to such holder in due course. To effect such attachment or garnishment the Secretary of Revenue shall serve or cause to be served upon the taxpayer and the garnishee a notice as hereinafter provided, which notice may be served by any deputy or employee of the Secretary of Revenue or by any officer having authority to serve summonses or may be served in any manner provided in Rule 4 of the North Carolina Rules of Civil Procedure. The notice shall:~~

- ~~(1) Show the name of the taxpayer, and if known his Social Security number or federal tax identification number and his address;~~
- ~~(2) Show the nature and amount of the tax, and the interest and penalties thereon, and the year or years for which the same were levied or assessed, and~~
- ~~(3) Be accompanied by a copy of this subsection, and thereupon the procedure shall be as follows:~~

~~If the garnishee has no defense to offer or no setoff against the taxpayer, he shall within 10 days after service of said notice, answer the same by sending to the Secretary of Revenue by registered or certified mail a statement to that effect, and if the amount due or belonging to the taxpayer is then due or subject to his demand, it shall be~~

~~remitted to the Secretary with said statement, but if said amount is to mature in the future, the statement shall set forth that fact and the same shall be paid to the Secretary upon maturity, and any payment by the garnishee hereunder shall be a complete extinguishment of any liability therefor on his part to the taxpayer. If the garnishee has any defense or setoff, he shall state the same in writing under oath, and, within 10 days after service of said notice, shall send two copies of said statement to the Secretary by registered or certified mail; if the Secretary admits such defense or setoff, he shall so advise the garnishee in writing within 10 days after receipt of such statement and the attachment or garnishment shall thereupon be discharged to the amount required by such defense or setoff, and any amount attached or garnished hereunder which is not affected by such defense or setoff shall be remitted to the Secretary as above provided in cases where the garnishee has no defense or setoff, and with like effect. If the Secretary shall not admit the defense or setoff, he shall set forth in writing his objections thereto and shall send a copy thereof to the garnishee within 10 days after receipt of the garnishee's statement, or within such further time as may be agreed on by the garnishee, and at the same time he shall file a copy of said notice, a copy of the garnishee's statement, and a copy of his objections thereto in the superior court of the county where the garnishee resides or does business where the issues made shall be tried as in civil actions.~~

~~If judgment is entered in favor of the Secretary of Revenue by default or after hearing, the garnishee shall become liable for the taxes, interest and penalties due by the taxpayer to the extent of the amount over and above any defense or setoff of the garnishee belonging, owing, or to become due to the taxpayer, but payments shall not be required from amounts which are to become due to the taxpayer until the maturity thereof, nor shall more than ten percent (10%) of any taxpayer's salary or wages be required to be paid hereunder in any one month as provided in subdivision (e)(4) of this section. The garnishee may satisfy said judgment upon paying said amount, and if he fails to do so, execution may issue as provided by law. From any judgment or order entered upon such hearing either the Secretary of Revenue or the garnishee may appeal as provided by law. If, before or after judgment, adequate security is filed for the payment of said taxes, interest, penalties, and costs, the attachment or garnishment may be released or execution stayed pending appeal, but the final judgment shall be paid or enforced as above provided. The taxpayer's sole remedies to question his liability for said taxes, interest, and penalties shall be those provided in this Subchapter, as now or hereafter amended or supplemented. If any third person claims any intangible attached or garnished hereunder and his lawful right thereto, or to any part thereof, is shown to the Secretary, he shall discharge the attachment or garnishment to the extent necessary to protect such right, and if such right is asserted after the filing of said copies as aforesaid, it may be established by interpleader as now or hereafter provided by law in cases of attachment and garnishment. In case such third party has no notice of proceedings hereunder, he shall have the right to file his petition under oath with the Secretary at any time within 12 months after said intangible is paid to him and if the Secretary finds that such party is lawfully entitled thereto or to any part thereof, he shall pay the same to such party as provided for refunds by G.S. 105-266.1, and if such~~

~~payment is denied, said party may appeal from the determination of the Secretary under the provisions of G.S. 105-241.4; provided, that in taking an appeal to the superior court, said party may appeal either to the Superior Court of Wake County or to the superior court of the county wherein he resides or does business. The intangibles of a taxpayer shall be paid or collected hereunder only to the extent necessary to satisfy said taxes, interest, penalties, and costs. Except as hereinafter set forth, the remedy provided in this section shall not be resorted to unless a warrant for collection or execution against the taxpayer has been returned unsatisfied: Provided, however, if the Secretary is of opinion that the only effective remedy is that herein provided, it shall not be necessary that a warrant for collection or execution shall be first returned unsatisfied, and in no case shall it be a defense to the remedy herein provided that a warrant for collection or execution has not been first returned unsatisfied.~~

~~This subsection shall be applicable with respect to the wages, salary or other compensation of officials and employees of this State and its agencies and instrumentalities, officials and employees of political subdivisions of this State and their agencies and instrumentalities, and also officials and employees of the United States and its agencies and instrumentalities insofar as the same is permitted by the Constitution and laws of the United States. In the case of State or federal employees, the notice shall be served upon such employee and upon the head or chief fiscal officer of the department, agency, instrumentality or institution by which the taxpayer is employed. In case the taxpayer is an employee of a political subdivision of the State, the notice shall be served upon such employee and upon the chief fiscal officer, or any officer or person charged with making up the payrolls, or disbursing funds, of the political subdivision by which the taxpayer is employed. Such head or chief officer or fiscal officer or other person as specified above shall thereafter, subject to the limitations herein provided, make deductions from the salary or wages due or to become due the taxpayer and remit same to the Secretary until the tax, penalty, interest and costs allowed by law are fully paid. Such deductions and remittances shall, pro tanto, constitute a satisfaction of the salary or wages due the taxpayer.~~ Intangible property that belongs to a taxpayer, is owed to a taxpayer, or has been transferred by a taxpayer under circumstances that would permit it to be levied upon if it were tangible property is subject to attachment and garnishment in payment of a tax that is due from the taxpayer and is collectible under G.S. 105-241.22. Intangible personal property includes bank deposits, rent, salaries, wages, property held in the Escheat Fund, and any other property incapable of manual levy or delivery. A person who is in possession of intangible property that is subject to attachment and garnishment is the garnishee and is liable for the amount the taxpayer owes. The liability applies only to the amount of the taxpayer's property in the garnishee's possession, reduced by any amount the taxpayer owes the garnishee. G.S. 105-242.1 sets out the procedure for attachment and garnishment of intangible property.

No more than ten percent (10%) of a taxpayer's wages or salary is subject to attachment and garnishment. The wages or salary of an employee of the United States, the State, or a political subdivision of the State are subject to attachment and garnishment."

SECTION 30. Article 9 of Chapter 105 of the General Statutes is amended by adding a new section to read:

"**§ 105-242.1. Procedure for attachment and garnishment.**

(a) Notice. – G.S. 105-242 specifies when intangible property is subject to attachment and garnishment. Before the Department attaches and garnishes intangible property in payment of a tax, the Department must send the garnishee a notice of garnishment. The notice must be sent in accordance with the methods authorized in G.S. 105-241.20 or by registered or certified mail. The notice must contain all of the following information:

(1) The taxpayer's name, address, and social security number or federal identification number.

(2) The type of tax the taxpayer owes and the tax periods for which the tax is owed.

(3) The amount of tax, interest, and penalties the taxpayer owes.

(4) An explanation of the liability of a garnishee for tax owed by a taxpayer.

(5) An explanation of the garnishee's responsibility concerning the notice.

(b) Action. – Within 30 days after receiving a notice of garnishment, a garnishee must comply with the garnishment or file a written response to the notice. A written response must explain why the garnishee is not subject to garnishment and attachment. Upon receipt of the written response, the Department must contact the garnishee and schedule a conference to discuss the response or inform the garnishee of the Department's position concerning the response. If the Department does not agree with the garnishee on the garnishee's liability, the Department may proceed to enforce the garnishee's liability for the tax by sending the garnishee a notice of proposed assessment in accordance with G.S. 105-241.9.

(c) Release. – When the Department releases a garnishee from liability, the Department must send the garnishee a letter of release. The letter must identify the taxpayer to whom the release applies and contain the identifying information about the taxpayer that is required under subsection (a) on a notice of garnishment."

SECTION 31. G.S. 105-242(c) reads as rewritten:

"(c) Certificate ~~or Judgment for Taxes.~~ of Tax Liability.~~ In addition to the remedy herein provided, the Secretary of Revenue is authorized and empowered to make a certificate setting forth the essential particulars relating to the said tax, including the amount thereof, the date when the same was due and payable, the person, firm, or corporation chargeable therewith, and the nature of the tax, and under his hand and seal transmit the same to the clerk of the superior court of any county in which the delinquent taxpayer resides or has property; whereupon, it shall be the duty of the clerk of the superior court of the county to docket the said certificate and index the same on the cross index of judgments, and execution may issue thereon with the same force and effect as an execution upon any other judgment of the superior court (said tax shall become a lien on realty only from the date of the docketing of such certificate in the office of the clerk of the superior court and on personalty only from the date of the levy on such personalty and upon the execution thereon no homestead or personal property~~

~~exemption shall be allowed except as provided in subdivision (e)(1) of this section).~~ The Department may file a certificate of tax liability to collect a tax that is owed by a taxpayer and is collectible under G.S. 105-241.22. A certificate of tax liability must state the taxpayer's name and the type and amount of tax owed. If the taxpayer resides in this State or has property in this State, the Department must file the certificate of tax liability with the clerk of the superior court of a county in which the taxpayer resides or has property. If the taxpayer does not reside in this State or have property in this State, the Department must file the certificate of tax liability in Wake County.

The clerk of court must record a certificate of tax liability in the same manner as a judgment. A recorded certificate of tax liability is considered a judgment and is enforceable in the same manner as other judgments. The legal rate of interest set in G.S. 24-1 applies to the principal amount of tax stated on the certificate of tax liability. The tax stated on a certificate of tax liability is a lien on real and personal property from the date the certificate is recorded.

~~Except as provided in G.S. 105-241.2(e) for jeopardy levies, no sale of real or personal property shall be made under any execution issued on a certificate docketed pursuant to the provisions of this subsection before the administrative action of the Secretary of Revenue or the Tax Review Board is completed when a hearing has been requested of the Secretary or a petition for review has been filed with the Tax Review Board, nor shall such sale be made before the assessment on which the certificate is based becomes final when there is no request for a hearing before the Secretary or petition for review by the Tax Review Board. Neither the title to real estate nor to personal property sold under execution issued upon a certificate docketed under this subsection shall be drawn in question upon the ground that the administrative action contemplated by this paragraph was not completed prior to the sale of such property under execution. Nothing in this paragraph shall prevent the sheriff to whom an execution is issued from levying upon either real or personal property pending an administrative determination of tax liability and, in the case of personal property, the sheriff may hold such property in his custody or may restore the execution defendant to the possession thereof upon the giving of a sufficient forthcoming bond. Upon a final administrative determination of the tax liability being had, if the assessment or any part thereof is sustained, the sheriff shall, upon request of the Secretary of Revenue, proceed to advertise and sell the property under the original execution notwithstanding the original return date of the execution may have expired.~~

~~The owner of tangible property seized under this section may request the Secretary to authorize the sale of the property under execution within 60 or more days after the request is made. The Secretary shall authorize the sale unless the Secretary finds that selling the property would not be in the best interests of the State. When property is sold at the request of the owner, the Department shall receive from the sale of the property the administrative expenses it incurred in having the property sold.~~

~~A certificate or judgment in favor of the State or the Secretary of Revenue for taxes payable to the Department of Revenue, whether docketed before or after the effective date of this paragraph, shall be valid and enforceable for a period of 10 years from the date of docketing. When any such certificate or judgment, whether docketed before or~~

~~after the effective date of this paragraph, remains unsatisfied for 10 years from the date of its docketing, the same shall be unenforceable and the tax represented thereby shall abate. Upon the expiration of said 10-year period, the Secretary of Revenue or his duly authorized deputy shall cancel of record said certificate or judgment. Any such certificate or judgment now on record which has been docketed for more than 10 years shall, upon the request of any interested party, be canceled of record by the Secretary of Revenue or his duly authorized deputy; provided, in the event of the death of the judgment debtor or his absence from the State before the expiration of the 10-year period herein provided, the running of said 10-year period shall be stopped for the period of his absence from the State or during the pendency of the settlement of the estate and for one year thereafter, and the time elapsed during the pendency of any action or actions to set aside the judgment debtor's conveyance or conveyances as fraudulent, or the time during the pendency of any insolvency proceeding, or the time during the existence of any statutory or judicial bar to the enforcement of the judgment shall not be counted in computing the running of said 10-year period. And, provided further, that any execution sale which has been instituted upon any such judgment before the expiration of the 10-year period may be completed after the expiration of the 10-year period, notwithstanding the fact that resales may be required because of the posting of increased bids. Provided further, that, notwithstanding the expiration of the 10-year period provided and notwithstanding the fact that no proceedings to collect the judgment by execution or otherwise has been commenced within the 10-year period, the Secretary of Revenue may accept any payments tendered upon said judgments after the expiration of said 10-year period.~~A certificate of tax liability is enforceable for a period of 10 years from the date it is recorded. If the certificate is not satisfied within this period, the remaining liability of the taxpayer is abated and the Department must cancel the certificate. An execution sale initiated before the end of the 10-year period may be completed after the end of this period, regardless of whether resales are required because of the posting of increased bids. The Secretary may accept tax payments made after a certificate has expired, regardless of whether any collection actions were taken before the certificate expired. A taxpayer may waive the 10-year period for enforcement of the certificate for either a definite or an indefinite time.

The 10-year period in which a certificate of tax liability is enforceable is tolled during the following periods:

(1) While the taxpayer is absent from the State. The period is tolled during the taxpayer's absence plus one year after the taxpayer returns.

(2) Upon the death of the taxpayer. The period is tolled while the taxpayer's estate is administered plus one year after the estate is closed.

(3) While an action is pending to set aside a conveyance made by the taxpayer as a fraudulent conveyance.

(4) While an insolvency proceeding against the taxpayer is pending.

(5) During the period of any statutory or judicial bar to the enforcement of the certificate.

(6) The period for which a taxpayer has waived the 10-year period."

SECTION 32. G.S. 105-243 reads as rewritten:

"**§ 105-243. Taxes recoverable by action.**

~~Upon the failure of any corporation to pay the taxes, fees, and penalties prescribed by this Subchapter, the Secretary of Revenue may certify same to the sheriff of the county in which such company may own property, for collection as provided in this Subchapter; and if collection is not made, such taxes or fees and penalties thereon may be recovered in an action in the name of the State, which may be brought in the Superior Court of Wake County, or in any county in which such corporation is doing business, or any county in which such corporation owns property. The Attorney General, on request of the Secretary of Revenue, shall institute such action in the Superior Court of Wake County, or of any such county as the Secretary of Revenue may direct. In any such action it shall be sufficient to allege that the tax, fee, or penalty sought to be recovered is delinquent, and that the same has been unpaid for the period of 30 days after due date.~~ When requested by the Secretary, the Attorney General must bring an action to recover the amount of tax that is due from a taxpayer and is collectible under G.S. 105-241.22. In the action, the taxpayer may not challenge the liability for the tax. A judgment in the action has the same priority as a tax lien. The judgment is not subject to a claim for a homestead exemption. The action must be brought in one of the following:

(1) The Superior Court of Wake County.
(2) The taxpayer's county of residence.
(3) A county where the taxpayer owns real property.
(4) The county in which the taxpayer has its principal place of business.
(5) A court of competent jurisdiction of another state."

SECTION 33. G.S. 105-243.1 reads as rewritten:

"**§ 105-243.1. Collection of tax debts.**

(a) Definitions. – The following definitions apply in this section:

(1) Overdue tax debt. – Any part of a tax debt that remains unpaid 90 days or more after ~~the notice of final assessment was mailed to the taxpayer.~~ it becomes collectible under G.S. 105-241.22. The term does not include a tax ~~debt, however, if~~ debt for which the taxpayer entered into an installment agreement for the tax debt under G.S. 105-237 within 90 days after ~~the notice of final assessment was mailed and~~ the tax debt became collectible, if the taxpayer has not failed to make any payments due under the installment agreement.

(2) Tax debt. – The total amount of tax, penalty, and interest ~~due for which a notice of final assessment has been mailed to a taxpayer after the taxpayer no longer has the right to contest the debt.~~collectible under G.S. 105-241.22.

(b) Outsourcing. – The Secretary may contract for the collection of tax debts owed by nonresidents and foreign entities. At least 30 days before the Department submits a tax debt to a contractor for collection, the Department must notify the taxpayer by mail that the debt may be submitted for collection if payment is not received within 30 days after the notice was mailed.

(c) Secrecy. – A contract for the collection of tax debts is conditioned on compliance with G.S. 105-259. If a contractor violates G.S. 105-259, the contract is

terminated, and the Secretary must notify the contractor of the termination. A contractor whose contract is terminated for violation of G.S. 105-259 is not eligible for an award of another contract under this section for a period of five years from the termination. These sanctions are in addition to the criminal penalties set out in G.S. 105-259.

(d) Fee. – A collection assistance fee is imposed on an overdue tax debt that remains unpaid 30 days or more after the fee notice required by this subsection is mailed to the taxpayer. In order to impose a collection assistance fee on a tax debt, the Department must notify the taxpayer that the fee will be imposed if the tax debt is not paid in full within 30 days after the date the fee notice was mailed to the taxpayer. The Department may not mail the fee notice earlier than 60 days after ~~the notice of final assessment for the tax debt was mailed to the taxpayer.~~ the tax debt becomes collectible under G.S. 105-241.22. The fee is collectible as part of the debt. The Secretary may waive the fee pursuant to G.S. 105-237 to the same extent as if it were a penalty.

The amount of the collection assistance fee is twenty percent (20%) of the amount of the overdue tax debt. If a taxpayer pays only part of an overdue tax debt, the payment is credited proportionally to fee revenue and tax revenue.

(e) Use. – The fee is a receipt of the Department and must be applied to the costs of collecting overdue tax debts. The proceeds of the fee must be credited to a special account within the Department and may be expended only as provided in this subsection. The proceeds of the fee may not be used for any purpose that is not directly and primarily related to collecting overdue tax debts. The Department may apply the proceeds of the fee for the purposes listed in this subsection. The remaining proceeds of the fee may be spent only pursuant to appropriation by the General Assembly. The fee proceeds do not revert but remain in the special account until spent for the costs of collecting overdue tax debts. The Department and the Office of State Budget and Management must account for all expenditures using accounting procedures that clearly distinguish costs allocable to collecting overdue tax debts from costs allocable to other purposes and must demonstrate that none of the fee proceeds are used for any purpose other than collecting overdue tax debts.

The Department may apply the fee proceeds for the following purposes:

(1) To pay contractors for collecting overdue tax debts under subsection (b) of this section.

(2) To pay the fee the United States Department of the Treasury charges for setoff to recover tax owed to North Carolina.

(3) To pay for taxpayer locater services, not to exceed one hundred fifty thousand dollars ($150,000) a year.

(4) To pay for postage or other delivery charges for correspondence directly and primarily relating to collecting overdue tax debts, not to exceed three hundred fifty-three thousand dollars ($353,000) a year.

(5) To pay for operating expenses for Project Collection Tax and the Taxpayer Assistance Call Center.

(6) To pay for expenses of the Examination and Collection Division directly and primarily relating to collecting overdue tax debts.

(f) Reports. – The report of Department activities required by G.S. 105-256 contains information on the Department's efforts to collect tax debts and its use of the proceeds of the collection assistance fee."

SECTION 34. G.S. 105-253(b) reads as rewritten:

"(b) Each responsible officer is personally and individually liable for all of the following:

(1) All sales and use taxes collected by a corporation or a limited liability company upon its taxable transactions.

(2) All sales and use taxes due upon taxable transactions of a corporation or a limited liability company but upon which it failed to collect the tax, but only if the person knew, or in the exercise of reasonable care should have known, that the tax was not being collected.

(3) All taxes due from a corporation or a limited liability company pursuant to the provisions of Articles 36C and 36D of Subchapter V of this Chapter and all taxes payable under those Articles by it to a supplier for remittance to this State or another state.

(4) All income taxes required to be withheld from the wages of employees of a corporation or a limited liability company.

The liability of the responsible officer is satisfied upon timely remittance of the tax by the corporation or the limited liability company. If the tax remains unpaid after it is due and payable, the Secretary may ~~assess the tax against and collect the tax from any responsible officer in accordance with the procedures in this Article for assessing and collecting tax from a taxpayer.~~ proceed to enforce the responsible officer's liability for the tax by sending the responsible officer a notice of proposed assessment in accordance with G.S. 105-241.9. As used in this section, the term "responsible officer" means the ~~president and the treasurer~~ president, treasurer, and chief financial officer of a corporation, the manager of a limited liability company, and any other officer of a corporation or member of a limited liability company who has a duty to deduct, account for, or pay taxes listed in this subsection. Any penalties that may be imposed under G.S. 105-236 and that apply to a deficiency also apply to an assessment made under this section. ~~The provisions of this Article apply to an assessment made under this section to the extent they are not inconsistent with this section.~~

The period of limitations for assessing a responsible officer for unpaid taxes under this section expires one year after the expiration of the period of limitations for assessment against the corporation or limited liability company."

SECTION 35. The caption for G.S. 105-256 reads as rewritten:

"**§ 105-256. ~~Reports~~ Publications prepared by Secretary of Revenue.**"

SECTION 36. G.S. 105-256(a) reads as rewritten:

"(a) ~~Reports.~~ Publications. – The Secretary shall prepare and publish the following:

…

(9) A final decision of the Secretary in a contested tax case. The Secretary must redact identifying taxpayer information from a final decision prior to publication."

SECTION 37. G.S. 105-258.1(a) reads as rewritten:

"(a) Scope. – This section applies to in-person interviews between a taxpayer and an officer or employee of the Department relating to the determination or collection of a tax, other than an in-person interview concerning any of the following:

(1) A criminal investigation.

(2) The determination or collection of a tax imposed by Article 2D of this Chapter.

~~(3) The assessment under G.S. 105-241.1(g) of a tax whose collection is in jeopardy.~~

(4) ~~The levy or execution under G.S. 105-241.2(e) of an assessment whose collection is in jeopardy.~~A jeopardy assessment and collection."

SECTION 38. G.S. 105-259(b) reads as rewritten:

"(b) Disclosure Prohibited. – An officer, an employee, or an agent of the State who has access to tax information in the course of service to or employment by the State may not disclose the information to any other person unless the disclosure is made for one of the following purposes:

(1) To comply with a court ~~order~~ order, an administrative law judge's order in a contested tax case, or a law.

…."

SECTION 39. G.S. 105-262(a) reads as rewritten:

"(a) The Secretary of Revenue may adopt rules needed to administer a tax collected by the Secretary or to fulfill another duty delegated to the Secretary. ~~The Tax Review Board shall review a new rule or a change to a rule before it is filed in the North Carolina Administrative Code.~~ G.S. 150B-1 and Article 2A of Chapter 150B of the General Statutes set out the procedure for the adoption of rules by the Secretary."

SECTION 40. G.S. 105-449.39 reads as rewritten:

"**§ 105-449.39. Credit for payment of motor fuel tax.**

Every motor carrier subject to the tax levied by this Article is entitled to a credit on its quarterly report for tax paid by the carrier on fuel purchased in the State. The amount of the credit is determined using the flat cents-per-gallon rate plus the variable cents-per-gallon rate of tax in effect during the quarter covered by the report. To obtain a credit, the motor carrier must furnish evidence satisfactory to the Secretary that the tax for which the credit is claimed has been paid.

If the amount of a credit to which a motor carrier is entitled for a quarter exceeds the motor carrier's liability for that quarter, the ~~Secretary must refund the excess to the motor carrier in accordance with G.S. 105-266(a)(3).~~excess is refundable in accordance with G.S. 105-241.7."

SECTION 41. G.S. 105-449.119 reads as rewritten:

"**§ 105-449.119. ~~Hearing on~~ Review of civil penalty assessment.**

A person who denies liability for a penalty imposed under this Part must pay the penalty ~~under protest~~ and ~~make a written demand to the Department of Revenue for a refund. The written demand must be made within 30 days after the penalty is imposed and must explain why the person is not liable for the penalty. Upon receiving a demand for a refund, the Secretary must schedule a hearing on the matter before an employee or~~

~~an agent of the Department. The hearing must be held within 30 days after receiving the written demand for a refund. If, after the hearing, the Department determines that the person was not liable for the penalty, the amount collected must be refunded. If, after the hearing, the Department determines that the person was liable for the penalty, the person paying the penalty may appeal the imposition of the penalty in accordance with G.S. 105-241.2, 105-241.3, and 105-241.4.~~ file a request for a Departmental review of the penalty. The request must be filed within the time set in G.S. 105-241.11 for requesting a Departmental review of a proposed assessment. The procedures in Article 9 of this Chapter for review of a proposed assessment apply to the review of the penalty. The date the penalty was imposed is considered the date the notice of proposed assessment was delivered to the taxpayer."

SECTION 42. Article 3 of Chapter 150B of the General Statutes is amended by adding the following new section:

"**§ 150B-31.1. Contested tax cases.**

(a) Application. – This section applies only to contested tax cases. A contested tax case is a case involving a disputed tax matter arising under G.S. 105-241.15. To the extent any provision in this section conflicts with another provision in this Article, this section controls.

(b) Simple Procedures. – The Chief Administrative Law Judge may limit and simplify the procedures that apply to a contested tax case involving a taxpayer who is not represented by an attorney. An administrative law judge assigned to a contested tax case must make reasonable efforts to assist a taxpayer who is not represented by an attorney in order to assure a fair hearing.

(c) Venue. – A hearing in a contested tax case must be conducted in Wake County, unless the parties agree to hear the case in another county.

(d) Law Enforcement Reports. – A report of a law enforcement agency is admissible without testimony from personnel of the law enforcement agency.

(e) Confidentiality. – The record, proceedings, and decision in a contested tax case are confidential until the final decision is issued in the case."

SECTION 43. G.S. 150B-45 reads as rewritten:

"**§ 150B-45. Procedure for seeking review; waiver.**

(a) Procedure. – To obtain judicial review of a final decision under this Article, the person seeking review must file a petition within 30 days after the person is served with a written copy of the decision. The petition must be filed as follows:

(1) Contested tax cases. – A petition for review of a final decision in a contested tax case arising under G.S. 105-241.15 must be filed in the Superior Court of Wake County.

(2) Other final decisions. – A petition for review of any other final decision under this Article must be filed in the Superior Court of Wake County or in the superior court of the county where the person resides.

~~The person seeking review must file the petition within 30 days after the person is served with a written copy of the decision.~~

(b) Waiver. – A person who fails to file a petition within the required time waives the right to judicial review under this Article. For good cause shown, however, the superior court may accept an untimely petition."

SECTION 44. In the General Statutes, references to the following statutes repealed by this act are deleted and substituted as provided in this section. The Revisor of Statutes is authorized to change the references in accordance with this section.

(1) References to the following statutory provisions repealed by this act are substituted with a reference to G.S. 105-241.21:
   a. G.S. 105-241.1(i).
   b. G.S. 105-241.1 in G.S. 105-160.4, 105-187.10, and 150B-2.
   c. G.S. 105-266 in G.S. 105-266.2, 105A-5, and 105A-8.

(2) References to former G.S. 105-241.1(g) and G.S. 105-241.2(e) are substituted with a reference to G.S. 105-241.23.

SECTION 45. The Revenue Laws Study Committee is directed to study whether any legislative changes should be made regarding the use and scope of class actions to challenge the constitutionality of a tax in light of the decision reached by the North Carolina Supreme Court in Dunn v. State of North Carolina. The Committee must report its findings, along with any legislative recommendations, to the 2007 General Assembly, 2008 Regular Session.

SECTION 46. This act does not require the establishment of new positions or the appropriation of funds for those positions. The Office of the Attorney General must report on or before January 1, 2009 to the Revenue Laws Study Committee and to the Fiscal Research Division of the North Carolina General Assembly concerning the staffing needs of the Revenue Section as the result of tax hearings being conducted at the Office of Administrative Hearings.

SECTION 47. G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate.

In the General Assembly read three times and ratified this the 2nd day of August, 2007.

s/ Beverly E. Perdue
President of the Senate

s/ Joe Hackney
Speaker of the House of Representatives

s/ Michael F. Easley
Governor

Approved 12:41 p.m. this 30th day of August, 2007

IN THE NORTH CAROLINA GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

* *

NORTH CAROLINA DEPARTMENT OF REVENUE,	)	
	)	
Petitioner,	)	
	)	
VS.	)	Wake County
	)	22 CVS 1162
PHILIP MORRIS USA, INC.,	)	
	)	
Respondent.	)	

* *

TRANSCRIPT of MOTIONS, Volume 1 of 1

Pages 1 - 70

Wednesday, November 16, 2022

* *

Transcript of proceedings in the General Court of Justice, Superior Court Division, N.C. Business Court, Raleigh, North Carolina, at the November 16, 2022 Session, before the Honorable Julianna Theall Earp, Judge Presiding.

Jennifer W. Lloyd, RPR
Official Court Reporter
Post Office Box 622
Carrboro, NC 27510

particular circumstances of the plaintiff. The remedy employed by the ALJ here clearly indicates that this is a facial challenge, or at least should be treated as such by the -- by the OAH.

In this action, Philip Morris requested a determination that the Department failed to act as required by law, and reversal of the final determination on the basis of the application of the statute to Philip Morris as written unlawfully discriminated against its multistate business structure in violation of the Dormant Commerce Clause. That remedy requested may appear to be limited to Philip Morris, but Philip Morris's facts are not unique, and the analysis applies equally to anyone under similar circumstances.

By arguing that the statute is unconstitutional as applied, because the challenge provision does not allow Philip Morris to take the deduction, Philip Morris is in actuality challenge -- attacking the constitutionality of the statute.

THE COURT: Well, below, it would appear that the Department argued that this was a facial challenge to constitutionality, and therefore, under 105-241.17, the OAH couldn't hear. In your briefing to this Court, you appear to be arguing that it isn't constitutional -- the challenge is constitutional no matter what you call it, facial or

as-applied; in neither circumstance can the OAH hear the matter. Which position are you taking today?

MS. MORGAN: With respect to this case, regardless of how this case is -- is characterized, it is the Department's position that the OAH does not have the jurisdiction to hear this particular action because the remedy necessary to grant Philip Morris the relief sought to reverse the assessment is, in effect, a remedy that's unavailable to the Office of Administrative Hearings. It's a remedy only available to courts. That necessary remedy effectively rewrites the statute and creates a deduction that would otherwise have been unavailable.

THE COURT: So you're asking the Court to base the decision on the remedy that the OAH provided as opposed to a read of 105-241.17?

MS. MORGAN: Yes. I think the request the Department is making is twofold. So based on the remedy, it's the Department's position that this is, in reality, a facial challenge. And even if it were treated as an as-applied challenge, it's really an as-applied challenge in facial clothing -- or facial challenge in as-applied clothing, excuse me. It's really -- because -- because of the remedy employed by the Court, the effect has -- has a fallout or the effect of a facial challenge; and therefore, the OAH lacked the jurisdiction to do so. So it is a

14:20 1 OAH. I think this is a real question --
14:20 2 THE COURT: But you're not backing away from the
14:20 3 position you took in your brief?
14:20 4 MS. MORGAN: No, Your Honor, I am not -- or we are
14:20 5 not backing away from that position. I think that, you
14:20 6 know, the -- my intent here is that, you know, I want to
14:20 7 make sure that I refine and illustrate for you the points
14:20 8 that were not well made in the brief, first. But also, I
14:20 9 will say it's the -- the position of the North Carolina
14:21 10 Department of Justice that as-applied or facial challenges
14:21 11 under no circumstances are within the purview of the OAH.
14:21 12 Constitutional issues are a question for courts.
14:21 13 THE COURT: Do you cite that to me in your
14:21 14 briefing, the DOJ's position?
14:21 15 MS. MORGAN: I do not, Your Honor, but I did want
14:21 16 to say that because it is -- the position of the Department
14:21 17 of Revenue is slightly more nuanced, slices it a little bit
14:21 18 thinner. And I think that, you know, the Department of
14:21 19 Revenue's position is that it depends. It's a circumstance
14:21 20 where it would depend. In this circumstance, whether this
14:21 21 case is as-applied or facial, this case is a situation where
14:21 22 the OAH should be dismissed because the remedy was outside
14:21 23 of the authority and power of an ALJ in order to grant the
14:21 24 relief that was sought.
14:21 25 THE COURT: Okay.

14:27 1 schools. They said as-applied to themselves, but the Court
14:27 2 of Appeals examined it and looked at the remedy and said,
14:27 3 the only remedy that we could possibly give for this is to
14:27 4 completely revise the statute. And -- and the Court was --
14:27 5 the Court even noted that they were without jurisdiction to
14:27 6 do that, but this was certainly a -- a facial challenge.
14:27 7 THE COURT: Okay. Did I understand you to say
14:27 8 that the Department of Revenue has not taken a single
14:28 9 position -- that is, a united position -- on whether
14:28 10 105-241.17 is ambiguous or not? Let me be clearer. There
14:28 11 are five conditions, of course, for the filing of a
14:28 12 constitutional challenge, one being that the Office of
14:28 13 Administrative Hearings dismisses the petition for lack of
14:28 14 jurisdiction because the sole issue is the constitutionality
14:28 15 of the statute and not the application of the statute. So
14:28 16 the last clause, and not the application of the statute,
14:28 17 does the Department of Revenue take a position with respect
14:28 18 to the interpretation of that part of the statute?
14:28 19 MS. MORGAN: So I think that the Department of
14:28 20 Revenue has, in the past, said that -- or kind of operated
14:28 21 with the understanding they're taking for granted that an
14:28 22 as-applied challenge -- certain types of as-applied
14:28 23 challenges, the specific ones that I've gone through, may be
14:28 24 within the purview of the OAH because the OAH rules
14:29 25 contemplate consideration of constitutional principles.

law challenges.

THE COURT: But that's a group of lawyers who sat down and wrote what they thought the finance law change meant. What do I do about the law that says I'm not at liberty to accept the understanding of any individual as to legislative intent?

MS. HOBART: The -- I think it's very important that this -- these changes in the procedures were a longtime coming, and they were the subject of much, much debate, studying, lobbying, and reports. The people who wrote that report, that was the understanding of the committee meetings that occurred in this case.

I'm familiar with the Milk Commission case, and what that means is you cannot take a particular senator or representative and ask that particular senator or that particular staff person, you know, what does the statute mean. But I do believe that it is indicative and sheds light on what was the understanding and the intent of the General Assembly.

THE COURT: Has there ever been a case like this one, where the issue of whether the OAH had jurisdiction to hear an as-applied challenge was squarely before the OAH and the Court -- and then later the Court?

MS. HOBART: The -- the first one that I'm aware of that involved a tax case was the FirstCity Funding case.

MS. HOBART: Yes, Your Honor. It is.

THE COURT: Okay. And that, you think, is in 150B-23 as opposed to 33?

MS. HOBART: I believe that is in 150B-23. I believe that is also in the administrative rules that the OAH adopted regarding its jurisdiction. I think that's 3.0127 where it talks about the ALJ must fully resolve all issues in the case, and in so doing, shall apply statutes, rules, common law, constitutional principles.

THE COURT: Okay. Ms. Hobart, anything else?

MS. HOBART: Just one minute, Your Honor.

(Pause in the proceedings.)

MS. HOBART: I guess the only other point I would make is -- I don't want to retread old ground, but we are spending a lot of time on this issue, and it seems to me at the end of the day, that I'm going to be standing here and Ms. Morgan is going to be standing here, maybe you'll get assigned the case, maybe someone else will be assigned the case. But one of these days, one of these days, we will be in this Court arguing about whether or not that statute can be constitutionally applied to Philip Morris. And it seems to be a waste of judicial resources and, frankly, our resources to make us start that process completely new because when it comes to this -- the issue before this Court is on de novo review. The Court can do whatever it wants.

15:20 1 You're not bound by anything Judge Nelson did or said. And
15:20 2 if we have to bring a new action, it's going to be in the
15:20 3 exact same procedural posture. So we're just anxious to get
15:20 4 a resolution on the merits. And I, just as a practical
15:20 5 matter, am not sure what the difference is to the Department
15:20 6 whether we argue this before you on judicial review or we're
15:21 7 forced to file a new complaint. Thank you.
15:21 8 THE COURT: I understand. Thank you.
15:21 9 Yes, ma'am. Any rebuttal?
15:21 10 MS. MORGAN: Thank you, Your Honor. A few things.
15:21 11 First, I want to -- I want to make sure to, like -- to bring
15:21 12 the focus back to -- to the issue at hand here, which is
15:21 13 whether dismissal was appropriate out of the OAH or not,
15:21 14 whether the OAH had subject matter jurisdiction to issue the
15:21 15 final decision. And so kind of bringing it back around to
15:21 16 that, you know, I do want to talk about 105-241.17 because I
15:21 17 think that certain -- that, you know, there's a lot of --
15:21 18 there's been a lot of discussion about the legislative
15:21 19 history. But the opening clause of that -- of that statute
15:21 20 a lot of people -- like, it seems to be disregard. And so I
15:22 21 want to make sure to remind the Court that the statute
15:22 22 reads, a taxpayer who claims that a tax statute is
15:22 23 unconstitutional may bring a civil action in the Superior
15:22 24 Court of Wake County to determine the taxpayer's liability
15:22 25 under that statute if all of the conditions in this section

CONTENT OF ADDENDUM

Quad Graphics, Inc. v. N.C. Dep't of Revenue,
19 REV 00334 (2020)..... Add. 1-10

Quad Graphics, Inc. v. N.C. Dep't of Revenue
2021 NCBC 37,
WL 2584282, at *2 (N.C. Super. Ct. 2021) ..... Add. 11-25

N.C. Dep't of Revenue v. Graybar Electric Co., Inc.,
2019 NCBC 2,
WL 148422, at *9 (N.C. Super. Ct. 2019) ..... Add. 26-36

Crocker v. Griffin,
204 N.C. App. 210,
694 S.E. 2d 523,
WL 1961258, at *5 (2010) ..... Add. 37-43

FILED
OFFICE OF ADMINISTRATIVE HEARINGS
06/24/2020 12:59 PM

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 REV 00334

Quad Graphics Inc Petitioner, v. NC Department of Revenue Respondent.	**FINAL DECISION**

Upon consideration of Respondent's Motion for Summary Judgment, accompanying brief and exhibits, Petitioner's Motion for Summary Judgment, Respondent's Response to Petitioner's Motion for Summary Judgment, Petitioner's Response to Respondent's Motion for Summary Judgment, all accompanying exhibits to such motions and responses, pursuant to N.C. Gen. Stat. § 1A-1, Rule 56 of the North Carolina Rules of Civil Procedure, and for good cause shown, the undersigned hereby **GRANTS** Summary Judgment for Respondent as follows:

APPEARANCES

For Petitioner: Douglas W. Hanna, Graebe Hanna & Sullivan, PLLC
Michael J. Bowen, Akerman, LLP
Attorneys for Petitioner

For Respondent: Matthew H. Sommer,
Terence D. Friedman
Assistant Attorneys General
North Carolina Department of Justice

ISSUE

Whether Petitioner's sales of printed materials from September 1, 2009 through December 31, 2011 were subject to North Carolina sales tax under N.C. Gen. Stat. § 105-164.1, *et. seq.*?

BRIEF OVERVIEW OF UNDISPUTED FACTS

While Findings of Fact are not appropriate in a grant of summary judgment, the undersigned provides a brief overview of the undisputed facts in this matter to provide context for the undersigned's analysis and ruling. *See, e.g.*, *Hyde Ins. Agency, Inc. v.*

Dixie Leasing Corp., 26 N.C. App. 138, 142 (1975). *See also* N.C. Gen. Stat. § 150B-34(e).

Petitioner was an S-Corporation and commercial printer engaged in the production and sale of printed books, magazines, catalogs, and other items ("printed materials"), which included delivery of printed materials to addresses in North Carolina. Upon receiving orders for and producing printed materials, Petitioner would deliver the printed materials to the United States Postal Service or some other common carrier at a site outside North Carolina for delivery to either customers in North Carolina or to some third-party recipients with North Carolina addresses. The addresses of third-party recipients were provided to Petitioner by its customers via mailing lists, which identified the recipients and their addresses. Customers paid for printed materials regardless of whether printed materials were shipped to the customers in North Carolina or to third-party recipients in North Carolina.

While Petitioner's corporate headquarters was located in Wisconsin, Petitioner employed sales representatives throughout the United States. Beginning in September 2009, Petitioner employed a sales representative in North Carolina. Petitioner's sales representative in North Carolina specifically solicited the sale of tangible personal property to customers both inside and outside of North Carolina.

In 2011, Respondent conducted a sales and use tax audit related to Petitioner's business activities within North Carolina for the period January 1, 2007 through December 31, 2011. On November 12, 2015, Respondent issued a Notice of Proposed Sales and Use Tax Assessment finding Petitioner liable for uncollected and unremitted sales tax resulting from sales of print materials for the period September 1, 2009 through December 31, 2011. ("sales at issue"). Respondent determined that Petitioner had a sales tax nexus for the period at issue based upon the physical presence of its sales representative in North Carolina. The proposed Assessment included, among other things, the sales at issue in this case.

Petitioner appealed the Notice of Assessment through Respondent's Departmental review process. During that review, Respondent removed some sales and adjusted the proposed assessment to reflect those changes. On November 30, 2018, Respondent issued a Notice of Final Determination upholding the imposition of uncollected and unremitted sales tax resulting from Petitioner's sales of printed materials during the period at issue. Respondent found that Petitioner was a retailer engaged in business in North Carolina as it maintained a resident employee who solicited sales and serviced customer accounts in this State. *See* N.C. Gen. Stat. §§ 105-164.4, 105-164.4B. Respondent also found that:

> Petitioner failed to establish with proper documentation that its customers took possession of the Print Media outside North Carolina or that it had been placed into storage outside of North Carolina. As such, the sourcing of Taxpayer's sales of Print Media delivered into North Carolina for storage,

use or consumption is governed by the sourcing principles included in N.C. Gen. Stat. § 105-164.4B.

(Notice of Final Determination) In this Notice, Respondent concluded that because the print media was received by Petitioner's customers or their designee in North Carolina, the sales of such print media are sourced to this State under N.C. Gen. Stat. § 105-164.4B(a)(2) and (d)(2).

On January 29, 2020, Petitioner appealed the Notice of Final Determination and filed a petition to the Office of Administrative Hearings alleging Respondent deprived Petitioner of property, and ordered it to pay a fine or civil penalty AND exceeded its jurisdiction, acted erroneously and failed to act as required by law or rule in issuing the Notice of Final Determination as:

I. The disputed transactions are not subject to North Carolina retail sales or use tax because all relevant aspects of the disputed transactions took place outside North Carolina,

II. The Assessment of North Carolina Sales and Use Tax violates the Due Process and Commerce Clauses of the United States Constitution, and

III. The specific transactions included in the assessment should be excluded or are otherwise exempt from the North Carolina Sales and Use Tax.

(Petition) It is undisputed that Petitioner is no longer pursing Claim III in its petition.

STANDARD OF REVIEW

"An Administrative Law Judge may [r]ule on all prehearing motions that are authorized by G.S. 1A-1, the [North Carolina] Rules of Civil Procedure." N.C. Gen. Stat. § 150B-33(b)(3a); S*ee* 26 NCAC 03 .0101(a) (specifically adopting the North Carolina Rules of Civil Procedure in contested cases at the Office of Administrative Hearings).

Summary judgment, under Rule 56(c) of the North Carolina Rules of Civil Procedure is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." The party moving for summary judgment "has the burden of establishing the lack of any triable issue of fact. His papers are carefully scrutinized and all inferences are resolved against him." *Kidd v. Early*, 289 N.C. 343, 352, 222 S.E.2d 392, 399 (1976). As both parties have moved for summary judgment in this matter, both parties acknowledge, and the undersigned determines, that there is no genuine issue as to any material fact in this contested case.

CONCLUSIONS OF LAW

1. This matter is subject to dismissal pursuant to N.C. Gen. Stat. §§ 1A-1, Rule 56 of the North Carolina Rules of Civil Procedure, 150B-33(b)(3a), and 26 NCAC 03 .0101(a). This Tribunal has subject matter jurisdiction over this matter and personal jurisdiction over the parties.

2. "A proposed assessment of the Secretary is presumed to be correct." N.C. Gen. Stat. § 105-241.9(a).

3. During the period at issue, North Carolina imposed a sales tax on the gross receipts from a retailer's sales at retail of tangible personal property if the retailer had a constitutional nexus with North Carolina and the sales were sourced to North Carolina. *See* N.C. Gen. Stat. §§ 105-164.3(9), 105-164.4(a), 105-164.4(a)(1), 105-164.4B, and 105-164.8. (The relevant portions of the Revenue statutes at issue in this contested case, including N.C. Gen. Stat. § 105-164.1, *et seq.*, are from 2010 and will, therefore, be used in this Final Decision unless specifically stated otherwise.)

I. The Sales at Issue Were Taxable in North Carolina

A. Petitioner was a retailer making sales at retail of tangible personal property

4. A "retailer" was "[a] person engaged in the business of . . . [m]aking sales at retail, offering to make sales at retail, or soliciting sales at retail of tangible personal property, digital property, or services for storage, use, or consumption in this State." N.C. Gen. Stat. § 105-164.3(35)(a).

5. A "person" was as "[a]n individual . . . limited liability company, a corporation . . . or another group acting as a unit" by reference to N.C. Gen. Stat. § 105-164.3(26) in N.C. Gen. Stat. § 105-228.90(5).

6. Under N.C. Gen. Stat. § 105-164.3(46), "tangible personal property" was defined as "personal property that may be seen, weighed measured, felt, or touched or is in any other manner perceptible to the senses." "Direct mail," a particular type of tangible personal property relevant to the case at hand, was defined by N.C. Gen. Stat. § 105-164.3(7c) as:

> printed material delivered or distributed by the United States Postal Service or other delivery service to a mass audience or to addresses on a mailing list provided by the purchaser or at the direction of the purchaser when the cost of the items is not billed directly to the recipients.

7. A "sale" was [t]he transfer for consideration of title or possession of tangible personal property or digital property or the performance for consideration of a service." N.C. Gen. Stat. § 105-164.3(36). Additionally, a "sale at retail" or "retail sale" was "[t]he sale, lease, or rental for any purpose other than for resale, sublease, or subrent." N.C.

Gen. Stat. § 105-164.3(34). There is no dispute that the printed materials in the sales at issue were tangible personal property and the printed materials shipped directly to the third-party recipients in North Carolina were "direct mail."

8. Any person maintaining "permanently or temporarily . . . any representative, agent, sales representative, or solicitor operating in this State in the selling or delivering" of tangible personal property was "engaged in business" in North Carolina. N.C. Gen. Stat. § 105-164.3(9)(a). It is undisputed that Petitioner employed a sales representative in North Carolina whose duties were the solicitation of sales to customers located both inside and outside of North Carolina during the period at issue. As a result, Petitioner was "engaged in business," as defined by N.C. Gen. Stat. § 105-164.3(9)(a), during the period at issue.

9. Applying the above statutory definitions to the undisputed facts in this case, the undersigned concludes that Petitioner's sales of printed materials were "sales," that the printed materials were "tangible personal property," that there was a "transfer of title for consideration," that the printed materials were "stored, used, and consumed" in North Carolina, and that Petitioner was a "person" who was "engaged in business" in North Carolina during the period at issue. As a result, Respondent was a "retailer" as defined in N.C. Gen. Stat. § 105-164.3(35)(a) and was obligated to collect and remit tax on all of its sales sourced to North Carolina. N.C. Gen. Stat. §§ 105-164.8, 105-164.4B.

B. Petitioner had a sufficient constitutional nexus with North Carolina

10. Generally, there are two types of potential constitutional challenges to a statute, facial and as applied. In asserting a facial constitutional challenge, the proponent must "show that there are no circumstances under which the statute might be constitutional." *Beaufort County Bd. of Educ. v. Beaufort County Bd. of Com'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009). In contrast, "[a]n as-applied constitutional challenge contests whether the statute can be constitutionally applied to a particular defendant, even if the statute is otherwise generally enforceable." *State v. Packingham*, 368 N.C. 380, 383, 777 S.E.2d 738, 743 (2015), *rev'd and remanded on other grounds*, 137 S. Ct. 1730 (2017).

11. "It is a well-settled rule that a statute's constitutionality shall be determined by the judiciary" and not an administrative tribunal or entity. *Matter of Redmond by & through Nichols*, 369 N.C. 490, 493, 797 S.E.2d 275, 277 (2017) (quoting *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 670, 509 S.E.2d 165, 174 (1998)).

12. Similar to other administrative bodies, such as the Industrial Commission and the Utilities Commission, the Office of Administrative Hearings is an "administrative agency created by the legislature . . . [and] has not been given jurisdiction to determine the constitutionality of legislative enactments" despite its power to conduct hearings, make decisions, and issue orders. *Matter of Redmond by & through Nichols*, 369 N.C. 490, 493, 797 S.E.2d 275, 277 (2017) (emphasis added). Similarly, the Office of Administrative Hearings is "not a court with general implied jurisdiction but primarily is an

administrative agency of the state" that is "granted judicial power as is necessary to perform the duties required of it by the law which it administers." *Id*. (citing *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 137, 337 S.E.2d 477, 483 (1985) (discussing the limited jurisdiction of the Industrial Commission)).

13. Petitioner raises arguments alleging that Respondent's actions against Petitioner violates the Due Process Clause of the 14th Amendment and the Commerce Clause. While this Tribunal is barred from concluding and assessing the constitutionality of the relevant sales tax statutes in this matter, the undersigned may, however, analyze constitutional principles as applied to Petitioner in considering the propriety of Respondent's imposition of uncollected and unremitted sales tax resulting from the sales of printed materials during the period at issue.

14. In *South Dakota v. Wayfair*, 138 S. Ct. 2080, the United States Supreme Court explained that the substantial nexus requirement contained within the Commerce Clause is "closely related" to the due process requirement that there be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax[.]" *Wayfair*, 138 S. Ct. at 2093 (emphasis added) (internal quotation marks and citation omitted). This standard requires only that there be substantial nexus between the state and the person *or* the state and the property *or* the state and the transaction. Nothing in this standard suggests that only the state in which the transfer of title or possession occurs may tax the transaction.

15. Rather, in *Wayfair*, the Supreme Court expressly noted that this substantial nexus requirement is met simply when a taxpayer "avails itself of the substantial privilege of carrying on business in that jurisdiction." *Id*. at 2099 (internal quotation marks and citations omitted). Therefore, as was the case in *Wayfair*, this standard is met even when there is only a sufficient connection between a state and the property subject to the transaction being taxed.

16. Here, there was a sufficient connection between both North Carolina and Petitioner, through its resident sales representative in North Carolina, and North Carolina and the printed materials' delivery into and use, storage, and consumption in North Carolina. In addition to shipping tangible personal property directly into this State, far in excess of the $100,000 threshold contemplated in *Wayfair,* Petitioner had a physical presence by way of its sales representative located in North Carolina.

17. Moreover, to the extent that any such nexus with the state is required between both the person and the transaction, the holding in *Wayfair* implies that such a requirement is met even when the destination of the tangible personal property that is the subject of the transaction is the sole connection between the state seeking to impose a tax and the transaction. In this case, it is undisputed that the printed materials in the sales at issue were delivered directly to North Carolina. Accordingly, North Carolina was well within it its rights under the Due Process Clause and the Commerce Clause to impose sales tax on these transactions in which the printed materials were shipped directly to North Carolina for storage, use, and consumption in this State.

18. Because Petitioner was a retailer with a constitutional nexus to North Carolina and the sales at issue were properly sourced to this State, Respondent correctly and constitutionally assessed Petitioner for unpaid sales tax on the sales at issue.

II. The Sales at Issue Were Properly Sourced to North Carolina

19. Sourcing is used to assign a location for where a transaction occurred, so that it may be taxed in the appropriate jurisdiction. North Carolina is a classic destination-based sales and use tax state as set forth in N.C. Gen. Stat. § 105-164.4B. In a destination-based sales and use tax state, a sale is sourced to, to deemed to have occurred in, the location where the product is delivered.

20. North Carolina had two relevant provisions under its sourcing statute that apply to the sales at issue. First, N.C. Gen. Stat. § 105-164.4B(a)(2) specifically stated that: "When a purchaser receives a product at a location specified by the purchaser and the location is not a business location of the seller, the sale is sourced to the location where the purchaser receives the product."

21. Second, N.C. Gen. Stat. § 105-164.4B(d)(2)(b) applied to direct mail and stated that direct mail was "sourced to the location where the property is delivered" when "the purchaser provides the seller with information to show the jurisdictions to which the direct mail is to be delivered."

22. The undisputed facts show that Petitioner shipped the sales at issue directly to customers located in North Carolina or directly to third-party recipients in North Carolina based on mailing lists provided by its customers. The shipments directly to customers, without contention, fall within N.C. Gen. Stat. § 105-164.4B(a)(2) as sourced to North Carolina because North Carolina was the location where the customers received the printed materials.

23. Regarding shipments to third-party recipients, those shipments fall squarely within N.C. Gen. Stat. § 105-164.4B(d)(2)(b) because the customers provided Petitioner, via the mailing lists, the information showing the jurisdictions to which the printed materials were to be delivered. In the case of the sales at issue, those were all delivered to North Carolina.

24. Based upon the application of the above statues to the undisputed facts, Respondent properly sourced the sales at issue delivered directly to the customers in North Carolina to the "location where the purchaser receive[d] the product," which was North Carolina. N.C. Gen. Stat. § 105-164.4B(a)(2). Respondent also correctly sourced the portion of the sales at issue that were shipped directly to third-party recipients, *i.e.*, direct mail, "to the location where the property [was] delivered," which was also North Carolina, because "the purchaser provide[d] the seller with information to show the jurisdictions to which the direct mail is to be delivered," which were all in North Carolina. N.C. Gen. Stat. § 105-164.4B(d)(2)(b).

25. The sales at issue were therefore properly sourced to North Carolina, and Petitioner was required to remit tax on those transactions.

26. Applying the plain language of the applicable sales tax statutes set forth *supra*, Petitioner had a constitutional nexus with North Carolina and made taxable sales of tangible personal property to North Carolina but failed to collect and remit sales tax on these sales during the period at issue. Respondent did not deprive Petitioner of property when it issued its Notice of Final Determination, and did not exceed its jurisdiction, did not act erroneously and did not fail to act as required by law or rule in issuing the Notice of Final Determination.

27. As there was no genuine issue of material fact and because Respondent's proper application of the applicable sales tax statutes resulted in the sales at issue being taxable in North Carolina, Respondent is entitled to summary judgment as a matter of law.

FINAL DECISION

Since there is no genuine issue of material fact and Respondent is entitled to summary judgment as a matter of law, the undersigned hereby **GRANTS** Respondent's Motion for Summary Judgment, pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, N.C. Gen. Stat. § 1A-1, and hereby **DISMISSES** this contested case with prejudice.

NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the Administrative Procedure Act of North Carolina, N.C. Gen. Stat. § 150B-1 *et. seq*., and N.C. Gen Stat. § 105-241.16, any party aggrieved by the Final Decision may seek judicial review by filing a Petition for Judicial Review in the Superior Court of Wake County and in accordance with the procedures for a mandatory business case set forth in N.C. Gen. Stat. § 7A-45.4(b) through (f). **Before filing a petition for judicial review, a taxpayer must pay the amount stated in the Notice of Final Determination, plus applicable interest, which continues to accrue until the tax is paid.** N.C. Gen. Stat. § 105-241.21.

The party seeking review must file the petition within 30 days after being served with a written copy of the Final Decision. In conformity with 26 N.C. Admin. Code 3.0102, which incorporates the provisions of electronic service as defined in 26 N.C. Admin. Code 3.0501, **the Certificate of Service attached to this Final Decision shows the date of service on the parties.**

N.C. Gen. Stat. § 150B-46 describes the contents of the Petition for Judicial Review and requires service of the petition on all parties. Because the Office of Administrative Hearings is required to file the official record in the contested case under

review, **the party seeking judicial review must send a copy of the Petition for Judicial Review to the Office of Administrative Hearings when the judicial review is initiated.**

This the 24th day of June, 2020.

Melissa Owens Lassiter
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 24th day of June, 2020.

Jerrod Godwin
Administrative Law Judge Assistant
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2021 WL 2584282

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of North Carolina,
Wake County.
Business Court.

QUAD GRAPHICS, INC., Petitioner,
v.
NORTH CAROLINA DEPARTMENT OF REVENUE, Respondent.

20 CVS 7449
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June 23, 2021

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Prior Version Held Unconstitutional as Applied
N.C. Gen. Stat. Ann. § 105-164.4B

THIS MATTER is before the Court on Quad Graphics, Inc.'s ("Petitioner") First Amended Petition for Judicial Review. ("Amended Petition for Judicial Review," ECF No. 9.) Pursuant to § 105-241.16 of the North Carolina General Statutes ("N.C.G.S."), Petitioner seeks review of the June 24, 2020 Final Decision of the North Carolina Office of Administrative Hearings ("OAH") ("Final Decision," Rec., at pp. 938–47). [1] On February 2, 2021, the Court held a hearing on the Amended Petition for Judicial Review.

THE COURT, having considered the Petition, the briefs and supplemental briefs filed in support of and in opposition to the Petition, the official record of proceedings in the OAH, the arguments of counsel at the hearing, the applicable law, and other appropriate matters of record, concludes that the Petition should be GRANTED and the Final Decision should be REVERSED.

Attorneys and Law Firms

Graebe Hanna & Sullivan, PLLC by Douglas W. Hanna and Akerman, LLP by Michael Bowen for Petitioner Quad Graphics, Inc.

The North Carolina Department of Justice by Terence Friedman and Matthew Sommer for Respondent North Carolina Department of Revenue.

ORDER AND OPINION ON FIRST AMENDED PETITION FOR JUDICIAL REVIEW

McGuire, Judge.

I. FACTS AND PROCEDURAL BACKGROUND

***1** 1. The facts giving rise to this lawsuit are not in dispute. Petitioner is an S-Corporation headquartered in Sussex, Wisconsin. Petitioner is engaged in the business of the commercial printing of books, magazines, catalogs, and items for direct mail ("printed materials") to customers throughout the United States. (Rec., at pp. 192–93, 200.) Petitioner sold printed materials to customers in North Carolina and to customers who had printed materials delivered to third-party recipients with North Carolina addresses ("direct mail") during the period September 1, 2009 through December 31, 2011 (the "Sales at Issue"). (*Id.* at pp. 245, 551–56.) Petitioner's customers provided Petitioner with the addresses for the direct mail recipients in North Carolina via mailing lists. (*Id.* at pp. 200–01, 244.)

2. It is undisputed that Petitioner received the orders for the Sales at Issue from a customer, produced the printed materials at facilities located outside of North Carolina, and then delivered the printed materials to the United States Postal Service ("USPS") or another common carrier at sites outside of North Carolina. [2] (*Id.* at p. 224.) The USPS or common carrier would, in turn, deliver the printed materials to either the customers or the third-party direct mail recipients inside North Carolina. (*Id.* at pp. 200–01, 244.) The contracts between Petitioner and its customers stated that title to the printed materials, and risk of loss, passed from Petitioner to the customers when the printed materials were deposited on the carrier's shipping dock. [3] (*Id.* at pp. 326, 335, 684–85.)

3. In August 2009 Petitioner hired a North Carolina resident, Edward Waters ("Waters"), as a sales representative. Waters "solicited orders for printed materials from North Carolina customers[.]" (*Id.* at pp. 245, 260, 555.) Waters did not have authority to accept or approve orders, as all orders were approved and accepted at Petitioner's headquarters in Wisconsin. (*Id.* at p. 244.) Prior to hiring Waters, Petitioner had no employees nor any other physical presence in North Carolina. (*Id.* at pp. 202, 224, 239.)

4. In or around 2011, Respondent North Carolina Department of Revenue (the "Department") notified Petitioner of its intent

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to conduct an audit related to Petitioner's business activities within North Carolina. (*Id.* at p. 480.) On November 12, 2015, the Department issued a Notice of Sales and Use Tax Assessment to Petitioner for uncollected and unremitted sales tax arising from sales of printed materials to North Carolina customers for the period January 1, 2007 to December 31, 2011 (the "Initial Assessment"). (*Id.* at p. 635.) Petitioner appealed the Initial Assessment by filing a request for Departmental Review. (*Id.* at p. 43.)

***2** 5. During the Departmental Review, the Department received additional information from Petitioner and concluded that certain sales should be excluded from the Initial Assessment. (*Id.*) Specifically, the Department removed those sales shipped to North Carolina customers for which Petitioner provided sufficient documentation demonstrating that the transactions were sales for resale by those customers. (*Id.*) The Department also removed those sales that occurred before Petitioner hired Waters in August 2009.[4] (*Id.*) The Department adjusted the Proposed Assessment to reflect these changes, and on November 30, 2018 issued a Notice of Final Determination. ("NOFD," Rec., at pp. 686–93; upholding the assessment of sales tax on the Sales at Issue.)

6. Petitioner appealed the NOFD by filing a Petition for Contested Tax Case with the OAH. (*Id.* at pp. 5–12.) Petitioner and the Department both moved for summary judgment, and on June 24, 2020, the OAH issued its Final Decision granting summary judgment in favor of the Department, denying Petitioner's motion for summary judgment, and upholding the assessment of sales tax on the Sales at Issue. (*Id.* at pp. 938–947.) The OAH concluded that the Petitioner was a "retailer" as defined under N.C.G.S. § 105-164.3(35)(a) (2010)[5] (*Id.* at p. 942), and that the Sales at Issue were properly sourced to North Carolina under N.C.G.S. §§ 105-164.4B(a)(2) and (d)(2)(b) (2010). (*Id.* at pp. 944–45.) In addition, while acknowledging that she was "barred" from ruling on Petitioner's constitutional challenges to the NOFD, the administrative law judge ("ALJ") nevertheless opined that the physical presence of Petitioner's sales representative in North Carolina created a sufficient constitutional nexus with the State to support the State's imposition of sales tax on the Sales at Issue.[6] (*Id.* at pp. 942–44.)

7. On July 24, 2020, Petitioner timely filed its Petition for Judicial Review of the Final Decision pursuant to N.C.G.S. §§ 105-241.16 and 7A-45(b)–(f). (ECF No. 3.) On the same day, the case was designated as a mandatory complex business case, and assigned to the Honorable Louis A. Bledsoe, III, Chief Business Court Judge. (ECF Nos. 1–2.) On August 20, 2020, Petitioner filed the Amended Petition for Judicial Review. (ECF No. 9.)

8. On September 24, 2020, the parties filed the stipulated official record of the proceedings in the Office of Administrative Hearings. (Stipulation Regarding Contents of Record, ECF No. 26; Official Record, ECF Nos. 27–36.)

9. On October 2, 2020, the Court issued an Order and Opinion on various motions filed by Petitioner and the Department which, among other things, denied the Department's motion to dismiss the Amended Petition for Judicial Review. (Ord. and Op. on Respd.'s Mot. to Dism. Petition, Respd.'s Mot. to Stay, and Petitioner's Mot. for Ext. Time to Serve Resp. with Pet. For Jud. Rev., ECF No. 41.)[7]

***3** 10. On October 26, 2020, Petitioner filed its Brief in Support of Petition for Judicial Review. ("Brief in Support," ECF No. 42.) On November 30, 2020, the Department filed its Response in Opposition to Petitioner's Petition for Judicial Review on the Merits. ("Response Brief," ECF No. 43.) On December 10, 2020, Petitioner filed its Reply Brief. ("Reply Brief," ECF No. 45.)

11. On January 6, 2021, this matter was reassigned to the undersigned. (Reassignment Ord., ECF No. 46.) The parties came before the Court for a hearing on the Amended Petition for Judicial Review on February 2, 2021.

12. On May 27, 2021, the Court issued a Notice to Provide Supplemental Briefing. (ECF No. 49.) On June 11, 2021, Petitioner and the Department filed supplemental briefs. (Respondent's Suppl. Br., ECF No. 50; Petitioner's Suppl. Br., ECF No. 51.)

13. The matter is now ripe for review.

II. LEGAL STANDARD

14. Petitioner appeals the Final Decision granting summary judgment in favor of the Department. "A party aggrieved by the final decision in a contested case commenced at the Office of Administrative Hearings may seek judicial review of the decision in accordance with Article 4 of Chapter 150B of the General Statutes." N.C.G.S. § 105-241.16. Under Chapter 150B, the task before this Court is to "determine whether the

petitioner is entitled to the relief sought in the petition based on [a] review of the final decision and the official record." N.C.G.S. § 150B-51(c).

15. "In reviewing a final decision allowing ... summary judgment, the court may enter any order allowed by ... Rule 56" of the North Carolina Rules of Civil Procedure. N.C.G.S. § 150B-51(d). "Appeals arising from summary judgment orders are decided using a *de novo* standard of review." *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 257, 794 S.E.2d 785 (2016) (citation omitted). "Under the *de novo* standard of review, the [Court] 'consider[s] the matter anew[ ] and freely substitut[es] its own judgment for' [that of the lower court]." *Id.*, 369 N.C. 250, 257, 794 S.E.2d at 257 (alterations in original) (citation omitted).

16. Under North Carolina law, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c). A genuine issue is "one that can be maintained by substantial evidence." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829 (2000). A material fact is one that "would constitute or would irrevocably establish any material element of a claim or defense." *Abner Corp. v. City Roofing & Sheetmetal Co.*, 73 N.C. App. 470, 472, 326 S.E.2d 632 (1985). Summary judgment is appropriate if "the facts are not disputed and only a question of law remains." *Wal-Mart Stores East v. Hinton,* 197 N.C. App. 30, 37, 676 S.E.2d 634 (2009) (citation omitted).

17. Further, with respect to the standards applicable to this Court's consideration of constitutional challenges, our appellate courts have held that "[a] law is presumed constitutional until the contrary is shown and the burden is on the party claiming that the law is unconstitutional to show why it is unconstitutional as applied to him." *Perry v. Perry*, 80 N.C. App. 169, 176, 341 S.E.2d 53 (1986).

III. ANALYSIS

18. In this appeal, Petitioner raises two arguments. First, Petitioner contends that the OAH erroneously held that Petitioner was a "Retailer" under the provisions of N.C.G.S. § 105-164.3(35)(a) (2010) that was required to pay *sales* taxes to North Carolina on the Sales at Issue under the Act. (*Id.* at pp. 6–12.) Petitioner argues that "this set of facts forms the basis for *use* tax liability for the customers of Petitioner" but "not a retail *sales* tax assessment."[8] (*Id.*, at p. 2 (emphasis in original).)

***4** 19. Second, Petitioner argues that the Department's assessment of sales taxes on the Sales at Issue is unconstitutional under the Due Process Clause and the Commerce Clause of the United States Constitution. (*Id.* at pp. 12–22.) Both of Petitioner's arguments are grounded in its position that although the printed materials were sold to customers for use or consumption in North Carolina, it is undisputed that title and possession of the printed materials took place outside the State. Petitioner contends that since title and possession passed outside of North Carolina, the "sales" occurred outside of North Carolina.

20. The Court will first analyze Petitioner's claim that the OAH misapplied the provisions of the Act in deciding that Petitioner is a "retailer" subject to North Carolina's sales tax, and second, the Court will analyze whether the imposition of sales tax on the Sales at Issue comports with the requirements of the United States Constitution.

A. OAH's conclusion that Petitioner was a "Retailer" under N.C.G.S. § 105-164.3(35) (2010)

21. Determination of Petitioner's statutory argument will require the Court to interpret the relevant and overlapping provisions of the Act regarding the sales and use taxes that were in effect during the relevant time period. The Supreme Court of North Carolina summarized the basic principles used by our courts when interpreting the language in a statute as follows:

> [q]uestions of statutory interpretation are ultimately questions of law for the courts .... The principal goal of statutory construction is to accomplish the legislative intent. The best indicia of that intent are the language of the statute, the spirit of the act and what the act seeks to accomplish. The process of construing a statutory provision must begin with an examination of the relevant statutory language. It is well settled that where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute

> using its plain meaning. In other words, if the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning.

Wilkie v. City of Boiling Spring Lakes, 370 N.C. 540, 547, 809 S.E.2d 853 (2018) (cleaned up); *see also N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641 (2009) ("When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment.").

22. "Usually, words of a statute will be given their natural, approved, and recognized meaning." *Wilkie*, 370 N.C. at 550, 809 S.E.2d 853. "Courts should give effect to the words actually used in a statute and should neither delete words used nor insert words not used in the relevant statutory language during the statutory construction process." *Midrex Techs.*, 369 N.C. at 258, 794 S.E.2d 785 (cleaned up). The court should "give every word of the statute effect, presuming that the legislature carefully chose each word used." *N.C. Dep't of Corr.*, 363 N.C. at 201, 675 S.E.2d 641.

23. Finally, special rules of construction apply where the statute at issue is one concerning taxation. Accordingly, "[t]ax statutes are to be strictly construed against the State and in favor of the taxpayer." *Wal-Mart Stores East, Inc.*, 197 N.C. App. at 42, 676 S.E.2d 634 (internal citations omitted). "If a taxing statute is susceptible to two constructions, any uncertainty in the statute or legislative intent should be resolved in favor of the taxpayer." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513 (2001).

***5** 24. There are several statutory provisions relevant to the determination of Petitioner's first argument. The Act imposes a privilege tax on the net taxable sales or gross receipts of "tangible personal property" by a "retailer." N.C.G.S. § 105-164.4 (2010). [9] Under the Act, a "retailer" is defined, in pertinent part, as follows:

> A person engaged in the business of any of the following:
>
> a. Making sales at retail, offering to make sales at retail, or soliciting sales at retail of tangible personal property, digital property, or services for storage, use or consumption in this State.

N.C.G.S. § 105-164.3(35)(a) (2010).

25. The Act further defines various terms within the definition of "retailer." A "person" is defined as "[a]n individual, ... a limited liability company, a corporation, ... or another group acting as a unit." *Id.* at § 105-164.3(26) (referring to N.C.G.S. § 105-228.90 (2010)). A "sale" is defined as "[t]he transfer for consideration of title or possession of tangible personal property or digital property or the performance for consideration of a service." *Id.* at § 105-164.3(36) (2010). A "sale at retail" or "retail sale" is "[t]he sale, lease, or rental for any purpose other than for resale, sublease, or subrent." *Id.* at § 105-164.3(34) (2010). "Tangible personal property" is defined as "personal property that may be seen, weighed, measured, felt, or touched or is in any other manner perceptible to the senses" *Id.* at § 105-164.3(46) (2010), which includes "direct mail," defined as "printed material delivered or distributed by the [USPS] or other delivery service to a mass audience or to addresses on a mailing list by the purchaser or at the direction of the purchaser when the cost of the items is not billed directly to the recipients." *Id.* at § 105-164.3(7c) (2010). A retailer is "engaged in business" in North Carolina if it "permanently or temporarily" maintains "any representative, agent, sales representative, or solicitor operating in this State in the selling or delivering" of tangible personal property. *Id.* at § 105-164.3(9)(a) (2010).

26. Here, it is undisputed that Petitioner is a "person" (Rec., at pp. 192, 248); that the Sales at Issue involve "tangible personal property" or "direct mail" (*Id.*, 370 N.C. 540, 547, 809 S.E.2d at p. 553); that the Sales at Issue were "sales" as defined in N.C.G.S. § 105-164.3(36) (*Id.*, 369 N.C. 250, 257, 794 S.E.2d at p. 276); that Petitioner "engaged in business" in North Carolina by having a resident sales representative in North Carolina selling its products; and that the printed materials were stored, used, and consumed in this State (ECF No. 42, at p. 11).

27. Nevertheless, Petitioner argues that the OAH improperly held that Petitioner was a "retailer" under § 105-164.3(35)(a) (2010) because Petitioner did not make the Sales at Issue in North Carolina. Petitioner first argues that the Act defines a "sale" as "the transfer for consideration of title or possession of tangible personal property." (ECF No. 42,

at p. 8.) Petitioner contends that it is undisputed that under the terms of its agreements with its customers, title and possession of the printed materials occurred when Petitioner delivered the printed materials to the USPS or other common carrier outside of North Carolina for delivery to customers and third-party recipients in North Carolina. [10] (*Id.* at p. 10.)

***6** 28. Petitioner next argues that in order to be a "retailer" under § 105-164.3(35) a person must make sales "in this State," and because the transfer of title and possession to the printed materials took place outside of North Carolina, Petitioner cannot be a "retailer" under § 105-164.3(35). (ECF No. 42, at p. 9; ECF No. 45, at p. 3.) In other words, under Petitioner's interpretation, in order to be classified as a "retailer" under § 105-164.3(35), it must be making sales in which transfer of title or possession of the tangible personal property occurs in North Carolina.

29. In response, the Department contends that "it is without question that Petitioner is a 'retailer' " under § 105-164.3(35). (ECF No. 43, at p. 13.) Specifically, the Department argues that Petitioner attempts to impermissibly "expand[ ] the definition of 'sale' to require that transfer of title and possession occur in the state before [North Carolina] can impose sales tax on the transaction," which is "inconsistent with the General Assembly's intent that [North Carolina] be a destination-based sales tax state[.]" (*Id.* at p. 15.) In support of this argument, the Department cites to § 105-164.4B, which "expressly provides the principles for determining 'where to source *the sale* of a product.' " (*Id.* (emphasis in original) (citing to N.C.G.S. § 105-164.4B(a) (2010)).) The Department also cites to § 106-164.8, which imposes, *inter alia*, obligations on a retailer to collect sales and use tax in certain circumstances where sales are contracted or accepted outside North Carolina with the intent that they be brought into North Carolina for storage, use, or consumption in this State. (*Id.* at p. 16) (citing N.C.G.S. § 105-164.8(a)(2), (4), (6) (2010).)

30. The Court has closely considered the arguments raised by both parties and concludes that Petitioner's contention that the term "in this State", as used in § 105-164.3(35), requires that transfer of title or possession must take place within North Carolina in order for a person to be considered a "retailer" is untenable. First, and most significantly, the Act imposes both a *sales* and a *use* tax on retailers. In other words, a retailer, as defined by N.C.G.S § 105-164.3(35), includes persons making sales of tangible personal property that is used, consumed, or stored in North Carolina whether or not the sale occurs inside North Carolina.

31. In addition, a plain reading of the sentence at issue makes clear that the term "for storage, use, or consumption *in this State*" applies to the language in the phrase in which it is situated and does not limit the terms "[m]aking sales at retail, offering to make sales at retail, or soliciting sales at retail" in the first phrase in the sentence. *See* N.C.G.S. § 105-164.3(35) (emphasis added). "Ordinary rules of grammar apply when ascertaining the meaning of a statute[.]" *Winkler v. N.C. State Bd. of Plumbing*, 261 N.C. App. 106, 111, 819 S.E.2d 105 (2018). The "last antecedent rule" is one such example. *See HCA Crossroads Residential Ctrs. v. N.C. Dep't of Human Resources, etc.*, 327 N.C. 573, 578, 398 S.E.2d 466 (1990); *Wilkie*, 370 N.C. at 546–49, 809 S.E.2d 853; *Novant Health, Inc. v. Aetna U.S. Healthcare of the Carolinas, Inc.*, 2001 NCBC LEXIS 1, at *12, 2001 WL 34054420 (N.C. Super. Ct. Mar. 8, 2001); *R.R. Friction Prods. Corp. v. N.C. Dep't of Revenue*, 2019 NCBC LEXIS 13, at *28, 2019 WL 856295 (N.C. Super. Ct. Feb. 21, 2019), *aff'd per curiam*, 374 N.C. 208, 839 S.E.2d 314 (2020).

32. Under the last antecedent rule, "relative and qualifying words, phrases, and clauses ordinarily are to be applied to the word or phrase immediately preceding and, unless the context indicates a contrary intent, are not to be construed as extending to or including others more remote." *HCA Crossroads Residential Ctrs.*, 327 N.C. at 578, 398 S.E.2d 466. Here, applying the term "in this State" to its last antecedent in the sentence, the statute expands the scope of the definition of "retailer" to include persons making sales of tangible personal property outside of North Carolina where that property will be used, consumed, or stored within North Carolina. It does not limit "retailer" only to persons making sales within North Carolina.

***7** 33. In addition, the definition of "retailer" must be read in conjunction with the other provisions of the Act. *See Huntington Props., LLC v. Currituck Cty.*, 153 N.C. App. 218, 224, 569 S.E.2d 695 (2002) ("Portions of the same statute dealing with the same subject matter are to be considered and interpreted as a whole, and in such case it is the accepted principle of statutory construction that every part of the law shall be given effect if this can be done by any fair and reasonable intendment.") (cleaned up). Section 105-164.6, titled "Complimentary use tax," expressly provides the authority for North Carolina to collect a use tax from retailers on tangible personal property sold outside

of North Carolina for use, consumption, or storage in North Carolina. Section 105-164.6 provides, in pertinent part, as follows:

> (a) Tax. – An excise tax at the applicable rate set in [N.C.]G.S. [§] 105-164.4 is imposed on the products listed below. The applicable rate is the rate and maximum tax, if any, that would apply to the sale of a product. A product is subject to tax under this section only if it is subject to tax under [N.C.]G.S. [§] 105-164.4.
>
> > (1) Tangible personal property or digital property purchased inside *or outside* this State for storage, use, or consumption in this State.

N.C.G.S. § 105-164.6 (2010) (emphasis added). The logical construction of these two separate sections of the Act leads to the conclusion that the definition of "retailer" does not include the requirement that a retailer's "sales" occur solely "in this State."

34. Section 105-164.8 also lends support to the Court's construction of the definition of "retailer." That section provides, in pertinent part, as follows:

> A retailer is required to collect the tax imposed by this Article notwithstanding any of the following:
>
> ...
>
> (2) That the purchaser's order or the contract of sale is made or closed by acceptance or approval outside this State, or before any tangible personal property or digital property that is part of the order or contract enters this State.
>
> ...
>
> (4) That the property is mailed to the purchaser in this State or a point outside this State or delivered to a carrier outside this state f.o.b. or otherwise and directed to the purchaser in this State regardless of whether the cost of transportation is paid by the retailer or by the purchaser.
>
> ...
>
> (6) Any combination in whole or in part of any two or more of the foregoing statements of fact, if it is intended that the property purchased be brought into this State for storage, use, or consumption in this State.

N.C.G.S. §§ 105-164.8(a)(2), (4), (6) (2010).

35. These provisions directly address a retailer's obligation to collect taxes under the precise circumstances present here, where a seller transfers title or possession of the products to North Carolina purchasers at a location outside of North Carolina on F.O.B. terms. Again, these requirements are not consistent with Petitioner's construction of N.C.G.S. § 105-164.3(35) (2010).

36. Therefore, the Court concludes that the OAH correctly found Petitioner to be a "retailer" within the meaning of N.C.G.S. § 105-164.3(35) (2010).

B. Constitutional Arguments

37. Petitioner next argues that North Carolina's assessment of *sales* tax on the Sales at Issue—where it is undisputed that title and possession transferred to North Carolina purchasers and third-party recipients *outside* of the State—is unconstitutional under the Commerce Clause in light of the United States Supreme Court's holding in *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 64 S.Ct. 1023, 88 L.Ed. 1304 (1944) (precluding sales tax liability on Commerce Clause grounds where out-of-state goods were delivered by common carrier into the state and title and possession to the goods transferred to purchaser outside of the taxing state) (further analyzed infra). (ECF No. 42, at pp. 12–22; ECF No. 45, at pp. 4–12.) [11] The Department, of course, argues that the Sales at Issue were properly sourced to North Carolina under N.C.G.S. § 105-164.4B (2010), and that "it is readily apparent that N.C.'s sales tax statutes meet the constitutional requirements under ... the Commerce Clause[.]" (ECF No. 43, at pp. 20–24.)

***8** 38. Preliminarily, the Court will address whether the Commerce Clause issue poses either a facial or an as-applied challenge to North Carolina's sales and use tax statutes. The Supreme Court of North Carolina has held:

> [a]n as-applied challenge contests whether the statute can be constitutionally applied to a particular defendant, even if the statute is otherwise generally enforceable. A facial challenge maintains that no constitutional applications of the statute exist, prohibiting its enforcement in any context. The

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> constitutional standards used to decide either challenge are the same.

State v. Packingham, 368 N.C. 380, 383, 777 S.E.2d 738 (2015). Although Petitioner does not expressly label its constitutional challenges as either as-applied or facial, it does state that

> *[i]n this case*, the Department assessed sales tax to the Petitioner based on the fact that the property was used – or enjoyed – by Petitioner's customers in North Carolina. The assessment in this case violates the Commerce Clause because it imposes a sales tax on transactions – the passage of title and possession – occurring wholly outside North Carolina.

(ECF No. 9, at p. 2 (emphasis added).) Accordingly, the Court interprets Petitioner's constitutional argument as an "as-applied" challenge and will assess whether the Department's application of North Carolina's then-applicable sales and use tax statutes to the Sales at Issue was constitutional under the Commerce Clause.

39. To reach its decision, the Court need only answer one question: is the holding in *Dilworth* the controlling law. At the request of the Court, the parties submitted supplemental briefing on this issue. (ECF Nos. 50 and 51.) Before directly addressing this question, the Court will first provide necessary background.

i. The Department's sourcing of the Sales at Issue to North Carolina

40. Here, the Department in the NOFD and the OAH in the Final Decision found that the Sales at Issue were properly sourced to North Carolina under N.C.G.S. § 105-164.4B (2010) and, therefore, concluded that the State properly assessed a sales tax on Petitioner for the Sales at Issue. (Rec., at pp. 17, 944–45.) This sourcing statute provides, in relevant part, as follows:

> (a) General Principles – The following principles apply in determining where to source the sale of a product.
>
> ...
>
> (2) Delivery to a specified address –When a purchaser receives a product at a location specified by the purchaser ..., the sale is sourced to the location where the purchaser receives the product.

N.C.G.S. § 105-164.4B(a)(2) (2010). The sourcing principles also provide that "direct mail ... is sourced to the location where the property is delivered" where "the purchaser provides the seller with information to show the jurisdictions to which the direct mail is to be delivered." N.C.G.S. § 105-164.4B(d)(2) (2010).

41. Under the language in §§ 105-164.4B(a)(2) and (d)(2), the Sales at Issue are sourced to the location where the purchaser "receives" the printed materials, or the address where the printed materials are "delivered." Petitioner contends that the printed materials are "receive[d]" or "delivered" at the location where title and possession transfers, which in the case of the Sales at issue, was a location outside North Carolina. (ECF No. 45, at pp. 3–4.) The Department contends that the printed materials are "received" or "delivered" at their ultimate destination, which in the case of the Sales at Issue, was North Carolina. (ECF No. 43, at p. 20.) While framed as statutory arguments, the parties' arguments regarding N.C.G.S. § 105-164.4B have constitutional implications. If Petitioner's Commerce Clause argument prevails, the Department's reading of the statute would lead to an unconstitutional application against Petitioner for the imposition of sales tax on the Sales at Issue.

***9** 42. While neither "receives" nor "delivered" is defined in the Act, our Supreme Court has stated:

> [t]he cardinal principal of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act.

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> Even to avoid a serious doubt the rule is the same.

In re Dairy Farms, 289 N.C. 456, 465, 223 S.E.2d 323 (1976) (citation and internal quotation marks omitted) (emphasis added); *see also State v. T.D.R.*, 347 N.C. 489, 498, 495 S.E.2d 700 ("Where one of two reasonable constructions of a statute will raise a serious constitutional question, it is well settled that our courts should adopt the construction that avoids the constitutional question."); *Appeal of Arcadia Dairy Farms, Inc.*, 289 N.C. 456, 465–66, 223 S.E.2d 323 (applying the same principle to an as-applied challenge to the North Carolina constitution). Thus, the Court inevitably must determine whether the Department's interpretation of N.C.G.S. § 105-164.4B (2010) to source the Sales at Issue to North Carolina comports with the Commerce Clause.

ii. Commerce Clause

43. The Commerce Clause of Article Three of the United States Constitution authorizes Congress to "regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3. Along with its affirmative application, the Commerce Clause also includes a "negative sweep" which "prohibits certain state actions that interfere with interstate commerce." *Quill Corp v. North Dakota*, 504 U.S. 298, 309, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992). Under the so-called "dormant" Commerce Clause, in order for a state to impose a tax on an interstate transaction, the tax must (1) be "applied to an activity with a substantial nexus with the taxing state"; (2) be "fairly apportioned"; (3) "not discriminate against interstate commerce"; and (4) be "fairly related to the services provided by the state." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977).

44. There are two considerations in determining whether a "substantial nexus" exists between a state and the tax it wishes to impose: a "personal nexus" (*i.e.*, a nexus between the state and the taxpayer) and a "transactional nexus" (*i.e.*, a nexus between the state and the activity being taxed). Hayes R. Holderness, *Navigating 21st Century Tax Jurisdiction*, 79 MD. L. REV. 1, 7–18 (2019); *see also* R. Rosen & Marc D. Bernstein, *State Taxation of Corporations: The Evolving Danger of Attributional Nexus*, 41 TAX EXECUTIVE 533, 534 (1989) (referring to the concepts as "presence nexus" and "transactional nexus"); Walter Hellerstein, *Jurisdiction to Tax Income and Consumption in the New Economy: A Theoretical and Comparative Perspective*, 38 GA. L. REV. 1, 3 (2003) (referring to the concepts as "enforcement jurisdiction" and "substantive jurisdiction"); *see also MeadWestvaco Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 25, 128 S.Ct. 1498, 170 L.Ed.2d 404 (2008) ("Where, as here, there is no dispute that the taxpayer has done some business in the taxing State, the inquiry shifts from *whether* the State may tax to *what* it may tax" (emphasis added)); *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 778, 112 S.Ct. 2251, 119 L.Ed.2d 533 (1992) ("[A]lthough our modern ... jurisprudence rejects a rigid, formalistic definition of minimum connection, we have not abandoned the requirement that, in the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax."); *American Bus USA Corp. v. Dep't of Rev.*, 151 So. 3d. 67 (Fl. Ct. App. 2014) (finding that the taxpayer had a nexus with Florida, but holding that the taxing statute as applied to the taxpayer violated the nexus mandate of *Complete Auto*; that is, the "activity" must have a nexus with the taxing state).

10** 45. Here, Petitioner concedes that it has a personal nexus with North Carolina. (ECF No. 45, at p. 6.) Nevertheless, Petitioner argues that this is "only half of the constitutional inquiry. The remaining dispositive question ... is whether North Carolina has a constitutionally sufficient nexus ***with the disputed transactions." (*Id.* (emphasis in original).) Specifically, Petitioner contends "the controlling transactional nexus cases" of *Dilworth* and *General Trading Co. v. State Tax Commission of Iowa*, 322 U.S. 335, 64 S.Ct. 1028, 88 L.Ed. 1309 (1944) render North Carolina's transactional nexus with the Sales at Issue insufficient to impose a sales tax on the Sales at Issue. (ECF No. 45, at p. 5; ECF No. 42, at pp. 18–22.) In response, the Department denies that there is a transactional nexus requirement under the Commerce Clause (ECF No. 43, at p. 22), and further argues in its supplemental brief that *Dilworth* is no longer good law (ECF No. 50, at p. 2). To assess these arguments, the Court must analyze and determine the continuing vitality of *Dilworth* and its companion case, *General Trading*.

iii. Dilworth and General Trading

46. In *Dilworth*, the United States Supreme Court considered whether Arkansas could assess a *sales* tax on a Tennessee corporation for certain transactions between the company and residents of Arkansas. 322 U.S. at 327–28, 64 S.Ct. 1023. The corporation had no physical presence in Arkansas and

was not authorized to do business in Arkansas. *Id.* at 328, 64 S.Ct. 1023. Orders from Arkansas residents were made "through solicitation in Arkansas by a traveling salesman domiciled in Tennessee, by mail or telephone." *Id.* The orders required acceptance by the corporation's office in Memphis, Tennessee. *Id.* The corporation's products were shipped by delivery to a carrier in Tennessee, and title passed to the purchaser "in Memphis" upon delivery of the products to the carrier. *Id.* The Supreme Court of Arkansas held that imposition of sales tax on these transactions by Arkansas was precluded by the Commerce Clause. *Id.* at 327, 64 S.Ct. 1023. The United States Supreme Court affirmed, stating:

> we would have to destroy both business and legal notions to deny that under the circumstances of the sale – the transfer of ownership – was made in Tennessee. For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction.
>
> ...
>
> A sales tax is a tax on the freedom of purchase .... A use tax is a tax on the enjoyment of that which was purchased. In view of the differences in the basis of these two taxes and the differences in the relation of the taxing state to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of goods sold, involves an assumption of power by a state which the Commerce Clause was meant to end.

Id. at 330.

47. Conversely, in *General Trading*, Iowa imposed a *use* tax on goods purchased from a Minnesota company by Iowa residents. 322 U.S. at 336, 64 S.Ct. 1028. The Iowa statute at issue required "every retailer maintaining a place of business in Iowa to collect the use tax from the purchaser." *Id.* (cleaned up). The company had no physical presence in Iowa. *Id.* at 337, 64 S.Ct. 1028. "The property on which the use tax was laid was sent to Iowa as a result of orders solicited by traveling salesmen sent into Iowa from [the company's] Minnesota headquarters. The orders were always subject to acceptance in Minnesota whence the goods were shipped into Iowa by common carriers or the post." *Id.* The Iowa Supreme Court held that the company "was a 'retailer maintaining a place of business in this state' within the meaning of the Iowa statute, ... [and] that Iowa had not exceeded its powers in the imposition of this use tax on Iowa purchasers, and that collection could validly be made" from the company. *Id.* The United States Supreme Court agreed, and held that Iowa's use tax did not violate the Commerce Clause, concluding that

> [t]he tax is what it professes to be -- a non-discriminatory excise laid on all personal property consumed in Iowa. The property is enjoyed by an Iowa resident partly because the opportunity is given by Iowa to enjoy property no matter whence acquired. The exaction is made against the ultimate consumer -- the Iowa resident who is paying taxes to sustain his own state government. To make the distributor the tax collector for the State is a familiar and sanctioned device.

***11** *Id.* at 338.

48. Thus, in *Dilworth* and in *General Trading* the states imposed different taxes (*i.e.*, sales versus use) and the Court reached different results, with the only significant difference being that in *Dilworth*, Arkansas did not have a sufficient transactional nexus with the sales where title to the products transferred outside of Arkansas, while in *General Trading*, Iowa clearly had a sufficient nexus to tax the instate use of the products by Iowa residents.

49. Relying on these precedents, Petitioner summarizes its argument as follows:

> [t]he facts of this case are substantially indistinguishable from the pertinent facts in *Dilworth* and are in direct contrast to those in *General Trading Co*. and *Excel [Inc. v. Clayton,* 269 N.C. 127, 152 S.E.2d 171 (1967)]. [12] In *Dilworth*, as in this case, though orders were solicited in the taxing state, all orders for tangible personal property were accepted and approved outside the taxing state, and legal title and possession of the tangible personal property passed to the purchasers

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> outside the taxing state. In *Dilworth* and in this case, the tax assessed was a sales tax – not a use tax. There is simply no constitutionally significant distinction between *Dilworth* and the facts of this case. *Dilworth* has not been overruled by the Court and remains the law of the land.

(ECF No. 42, at p. 22 (cleaned up).) The Court agrees with Petitioner that, under *Dilworth*, "a state sales tax survives scrutiny under the Commerce Clause only where the purchase of tangible personal property – *i.e.*, the transfer of ownership from the seller to buyer – takes place in the taxing state." (ECF No. 51, at p. 1) (hereinafter referred to as the "*Dilworth* formalism.") If the *Dilworth* formalism remains good law, then the sales tax imposed on the Sales at Issue in this case is unconstitutional.

iv. Arguments as to whether Dilworth *remains good law*

50. First, Petitioner argues that the United States Supreme Court has "consistently upheld" the *Dilworth* formalism. (ECF No. 51, at p. 1.) Specifically, Petitioner cites to *Oklahoma Tax Comm'n v. Jefferson Lines*, 514 U.S. 175, 186–87, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995) (citing favorably to *Dilworth*, stating "we [have] held that a sales tax could not validly be imposed if the purchaser already had obtained title to the goods as they were shipped from outside the taxing State into the taxing State by common carrier"); *Itel Cont. Int'l Corp. v. Huddleston,* 507 U.S. 60, 69–75, 113 S.Ct. 1095, 122 L.Ed.2d 421 (1993) (explaining that "Tennessee's sales tax is imposed upon the 'transfer of title or possession,' " and that this tax "on a discrete transaction occurring within the state" does not implicate Foreign Commerce Clause concerns [13]); *Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 9, 106 S.Ct. 2369, 91 L.Ed.2d 1 (1986) (recognizing there is "no threat of multiple international taxation ... since the tax is imposed only upon the sale of fuel, a discrete transaction which occurs within one national jurisdiction only"); *American Oil Co. v. Neill*, 380 U.S. 451, 457–58, 85 S.Ct. 1130, 14 L.Ed.2d 1 (1965) (citing favorably to *Dilworth*, stating that "this Court has struck down taxes directly imposed on or resulting from out-of-state sales which were held to be insufficiently related to activities within the taxing state, despite the fact that the vendor knew that the goods were destined for use in that State").

***12** 51. Second, Petitioner addresses the United States Supreme Court's most recent sales and use tax decision, *South Dakota v. Wayfair, Inc.*, —— U.S. ——, 138 S. Ct. 2080, 201 L.Ed.2d 403 (2018). (ECF No. 51, at p. 3.) Specifically, Petitioner argues that "[t]he core holding in *Dilworth* ... was not presented to – or discussed by – the *Wayfair* Court." (*Id.* at p. 4, 106 S.Ct. 2369.)

52. On the other hand, the Department argues that the United States Supreme Court "implicitly" overruled *Dilworth* in its decision in *Complete Auto*. (ECF No. 50, at p. 2.) Specifically, the Department argues that:

> [i]n place of the semantic distinctions [between a sales tax and use tax expressed in *Dilworth*] the Court offered a four-part test for evaluating the constitutionality of a tax .... Thus, *Complete Auto* articulated a succinct standard by which to test the constitutionality of a tax while explicitly eschewing the *Spector* [14] rule and its rationale, which encapsulated the *Dilworth* understanding of the Commerce Clause. Nothing in the *Complete Auto* standard turned on semantic distinctions between *sales* taxes and *use* taxes. Relying on *Dilworth* as binding precedent would introduce an anachronism into modern state tax jurisprudence by reintroducing a formal interpretation of the Commerce Clause long abandoned by the Court.

(ECF No. 50, at p. 7.) Further, the Department argues that *Wayfair* did not expressly address *Dilworth* because "it was already effectively abandoned under *Complete Auto.*" (*Id.* at pp. 10–11, 97 S.Ct. 1076.)

a. Complete Auto

53. The Court is not persuaded that *Complete Auto* "implicitly" overruled *Dilworth* formalism. First, *Complete*

Auto is neither a sales tax case, nor a nexus case. Its importance is that (1) it established an analytical framework for Commerce Clause cases, on which every case since has relied, *see* 430 U.S. at 279, 97 S.Ct. 1076; and (2) it rejected the *Spector* rule that a state tax on the "privilege of doing business" is necessarily unconstitutional in the context of interstate commerce. *Id.* at 288–89, 97 S.Ct. 1076.

54. Accordingly, the Court acknowledges that, to the extent *Dilworth* posits that taxation on interstate commerce is per se unconstitutional, *Complete Auto* and other cases have clearly overruled that aspect of its holding. However, the Supreme Court's rejection of the *Spector* rule in *Complete Auto* did not explicitly overrule *Dilworth's* holding that to meet the transactional nexus requirement under the Commerce Clause, a state *sales* tax must only be imposed on sales where the transfer of title or possession occurs within the taxing state. This position is consistent with conclusions reached by commentators. *See* Paul J. Hartman, *Federal Limitations on State and Local Taxation* § 11.4 (2d ed.) (Supp. Nov. 2020) (acknowledging that the Court in *Complete Auto* "abandoned the position that any tax found by the Court to be imposed on interstate commerce is a per se violation of the commerce clause" but "[u]nless the Court changes its ideas about what constitutes a sufficient nexus for sales tax purposes of the taxed event to the taxing state, apparently the *Dilworth* holding will remain"); Richard D. Pomp, *Wayfair: It's Implications and Missed Opportunities*, 58 WASH. U. J. L. & POL'Y 1, 53 (2019) ("[T]here is, however, another aspect of *Dilworth*. The whole transaction, starting with solicitation in Arkansas and ending with the consumer having possession of the goods in Arkansas, constituted interstate commerce, which, under the jurisprudence of the day, could not be taxed. That part of the opinion was clearly overturned by subsequent cases. But still left open is the constitutional definition of where a sale takes place.").

b. Wayfair

***13** 55. With respect to *Wayfair*, the Court is similarly unpersuaded that its holding has any effect on the *Dilworth* formalism. In *Wayfair*, the United States Supreme Court considered "when an out-of-state seller can be required to collect and remit [a South Dakota sales] tax" and "reconsidere[d] the scope and validity of the physical presence rule mandated by" *National Bellas Hess v. Dep't of Rev.*, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967) and *Quill*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91, under the Commerce Clause. [15] 138 S. Ct. at 2088.

56. South Dakota enacted a statute which "require[d] out-of-state sellers to collect and remit sales tax 'as if the seller had a physical presence in the state' " if the seller "on an annual basis, deliver[s] more than $100,000 of goods or services into the State or engage[s] in 200 or more separate transactions for the delivery of goods or services into the State." *Id.* at 2089 (quoting S.B. 106 at ¶¶ 3, 5, 8(10)). S.B. 106 expressly excluded the retroactive application of this new tax requirement for out-of-state sellers. *Id.*

57. South Dakota filed a declaratory judgment action against on-line retailers Wayfair, Inc., Overstock.com, Inc., and Newegg, Inc., none of which had any employees or real estate in South Dakota, "seeking a declaration that the requirements of [S.B. 106] are valid and applicable to respondents[.]" *Id.* The South Dakota Supreme Court affirmed a lower court's decision that S.B. 106 was unconstitutional due to respondents' lack of physical presence in South Dakota, reasoning that "*Quill* has not been overruled [and] remains the controlling precedent on the issue of Commerce Clause limitations on interstate collection of sales and use taxes." *Id.* (quoting 901 N.W.2d 754, 761 (S.D. 2017)).

58. On review, the United States Supreme Court first acknowledged that

> [u]nder this Court's decisions in *Bellas Hess* and *Quill*, South Dakota may not require a business to collect its sales tax if the business lacks a physical presence in the State. Without that physical presence, South Dakota must rely on its residents to pay the use tax owed on their purchases from out of state sellers.

Id. at 2088. However, the Court ultimately vacated and remanded the decision of the South Dakota Supreme Court, overruling the *Bellas Hess* and *Quill* physical presence rule, and upholding the constitutionality of S.B. 106. *Id.* at 2098–2100. In the absence of the bright-line physical presence rule, the Court relied on the first prong of the *Complete Auto* test, which "simply asks whether the tax applies to an activity with a substantial nexus with the taxing state." *Id.* Further,

the Court stated, "a substantial nexus is established when the taxpayer [or collector] 'avails itself of the subsequent privilege of carrying on business' in that jurisdiction." *Id.* at 2099 (citation omitted).

***14** 59. As applied to S.B. 106, the Court in *Wayfair* held that the statute's applicability thresholds require a "quantity of business [that] could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota." *Id.* at 2099. Accordingly, in the case of Wayfair, Inc., Overstock.com, Inc., and Newegg, Inc. —all entities for which S.B. 106 was applicable—the Court held that the Commerce Clause tax "nexus is clearly sufficient based on both the economic and virtual contacts respondents have with the State." *Id.*

60. Notably, as pointed out by Petitioner, the *Wayfair* Court did not have reason to consider any questions regarding whether there existed a transactional nexus between South Dakota and the sales being taxed because the parties "agree[d] that South Dakota has the authority to tax these transactions." *Id.* at 2092. [16] Accordingly, the Court concludes that *Wayfair* does not overrule the *Dilworth* formalism. Again, this Court's conclusion is in line with conclusions reached by commentators. *See* Adam Themmesch, Darien Shanske, & David Gamage, *Wayfair: Sales Tax Formalism and Income Tax Nexus*, STATE TAX NOTES 975, 976 (Sept. 3, 2018) (stating that the *Wayfair* Court "certainly did not explicitly overrule" the "*Dilworth* formalism" and "uncertainty involving this issue leads us to conclude that the better course for states would be to continue to abide by *Dilworth* formalism and to enact economic nexus standards through their use tax systems"); Richard D. Pomp, *Wayfair: Its implications and Missed Opportunities*, 58 WASH. U. J.L. & POL'Y 1, 51–56 (2019) (opining that "[p]ost-*Wayfair* legislation should ... clarif[y] that it is the use tax that remote vendors are being asked to collect and not the sales tax" as to avoid "a potential problem" created by the holdings in *Dilworth* and *General Trading*); Hayes R. Holderness, *Navigating 21st Century Tax Jurisdiction*, 79 MD. L. REV. 1, 13–24 (2019) (surveying the transactional nexus requirement since *Dilworth* and explaining that "the decision and the parties [in *Wayfair*] focused on the personal nexus issue" and "did little with respect to the transactional nexus doctrine").

c. State Courts and Dilworth

61. In further support of its arguments, Petitioner cites to a number of state court cases which have adhered to the Court's holding in *Dilworth*. *See Lamtec v. Dep't of Revenue*, 151 Wash.App. 451, 215 P.3d 968, 971 (Wash. Ct. App. 2009) (holding that *Dilworth* applies solely to transaction-based taxes (*i.e.,* sales taxes) and not gross receipts/activity-based taxes such as the Business & Occupation tax imposed on a New Jersey corporation); *TA Operating Corp. v. Fla. Dep't of Revenue*, 767 So. 2d. 1270, 1275 (Fla. Dist. Ct. App. 2000) (relying on *Dilworth* and holding fuel shipped "F.O.B. Brunswick, Georgia" was not subject to Florida's fuel tax); *World Book, Inc. v. Mich. Dep't of Treasury*, 459 Mich. 403, 412, 590 N.W.2d 293 (1999) (relying on *Dilworth* and holding that where a Michigan taxpayer was "through selling" (*i.e.*, title and possession passed to buyers outside the State), the sales were subject to Michigan use tax, and not sales tax); *Bloomingdale Bros. v. Chu*, 70 N.Y.2d 218, 519 N.Y.S.2d 347, 513 N.E.2d 233, 234 (N.Y. 1987) ("[T]he ultimate destination of the goods is not necessarily the location of a particular sale [citing *Dilworth*]. Delivery may occur before the merchandise reaches its final destination. Delivery, in the sense that physical custody is transferred, may take place several times during the course of a transaction, but it is only that delivery which transfers control of the merchandise for consideration which marks a taxable event [(citations omitted)]."); *Sears, Roebuck and Co. v. Lindley*, 70 Ohio St.2d 249, 436 N.E.2d 1029, 1032 (Ohio 1982) (holding that *Dilworth* precluded the imposition of Ohio sales tax on newspaper inserts printed outside Ohio and mailed into Ohio, with title and possession passing outside Ohio).

***15** 62. In support of its contrary argument, the Department cites to state court cases which have treated *Dilworth* as obsolete. *See Arizona Dep't of Revenue v. Care Computer Sys., Inc.*, 197 Ariz. 414, 4 P.3d 469, 471 (Ariz. Ct. App. 2000) (rejecting the argument that a "transaction privilege tax requires a higher level of nexus with the taxing state than does a use tax" reasoning that "[t]his argument is based on cases that were decided when state taxes on interstate commerce were *per se* unconstitutional," referring to *Dilworth*, *Freeman*, and *Spector*); *Greenscapes Home & Garden Prods. v. Testa*, 129 N.E.3d 1060, 1071 (Ohio Ct. App. 2019) (explaining that "[*Dilworth*] was decided at a time when ... state taxes on interstate commerce were per se unconstitutional" and that "[i]n *Complete Auto*, the U.S. Supreme Court overruled this line of cases and upheld a privilege on doing business tax on gross receipts from interstate commerce."); *Baker & Taylor, Inc. v. Kawafuchi*, 82

P.3d 804, 815 (Haw. 2004) (holding the same and declining to find *Dilworth* determinative).

63. Petitioner, on the other hand, argues that *Care Computer* and *Greenscapes* "are of limited relevance" to this case due to the fact that (a) they both involve gross-receipts-based taxes—not sales taxes (ECF No. 51, at pp. 9–12); citing to *Lamtec*, 215 P.3d at 971 and *Ford Motor Co. v. City of Seattle*, 160 Wash.2d 32, 156 P.3d 185, 190 (Wash. 2007) (holding *Dilworth* irrelevant where the tax involved is not a sales tax, but rather a business and occupation tax on the privilege of doing business in the taxing jurisdiction); and (b) both *Care Computer* and *Greenscapes* misinterpret *Complete Auto* as a rejection of the holding in *Dilworth*. (ECF No. 51, at p. 12.)

64. Both parties make compelling arguments regarding the impact of *Dilworth*, *Complete Auto*, and *Wayfair* on this case. The Court has thoroughly reviewed the parties' arguments, the relevant court decisions, and other persuasive authorities, and concludes that (a) *Complete Auto* did not overrule the *Dilworth* formalism; (b) *Wayfair* did not overrule the *Dilworth* formalism; and, therefore (c) the *Dilworth* formalism remains the law of the land. Absent contrary authority from the United States Supreme Court, the Court concludes that the principles set forth in *Dilworth* are controlling, and finds that North Carolina does not have a sufficient transactional nexus with the Sales at Issue under the Commerce Clause to impose *sales* tax on the Sales at Issue.

65. Therefore, the OAH's finding that the Sales at Issue were properly sourced to North Carolina under N.C.G.S. § 105-164.4B (2010) giving North Carolina authority to impose sales tax on those transactions is unconstitutional as applied to Petitioner and should be REVERSED. The Sales at Issue lacked a sufficient transactional nexus to North Carolina under the Commerce Clause of the United States Constitution since it is undisputed that title to the Sales at Issue passed to the purchasers and third-party recipients outside of North Carolina. [17]

IV. CONCLUSION

THEREFORE, IT IS ORDERED that the Final Decision is REVERSED and summary judgment is hereby entered in favor of Petitioners.

SO ORDERED, this the 23rd day of June, 2021.

All Citations

Not Reported in S.E. Rptr., 2021 WL 2584282, 2021 NCBC 37

Footnotes

1 The Official Record on Judicial Review is filed in 10 parts on the electronic docket at ECF Nos. 27–36, each part consisting of 100 pages. For example, Official Record Part 1 (ECF No. 27) contains pages 1–100 of the Official Record on Judicial Review; Official Record Part 2 (ECF No. 28) contains pages 101–200; and so on. Hereinafter, ECF Nos. 27–36 are referred to as the "Rec.".

2 Petitioner did not have a printing facility in North Carolina until 2013 when it purchased the assets of a company called Vertis. (Rec., at p. 224.)

3 This type of contractual shipping arrangement is commonly referred to as Free On Board or Freight On Board Shipping Point ("FOB Shipping").

4 The Department determined that, prior to Petitioner's hiring of its resident sales representative in North Carolina, Petitioner did not have a sufficient sales tax nexus with North Carolina. (Rec., at p. 641.)

5 For purposes of this Order and Opinion, the Court refers to the provisions of the North Carolina Sales and Use Tax Act (the "Act") in effect during the period September 1, 2009 through December 31, 2011. The Court's use of the present tense in discussing these statutes is not intended to mean that the discussion applies to the current version of the statute to the extent the statute has been amended effective after December 31, 2011.

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6 It is well established that in North Carolina, constitutional questions must be resolved by the courts and not by the State's administrative agencies. *In re Redmond*, 369 N.C. 490, 493, 797 S.E.2d 275 (2017).

7 The Court also granted Petitioner's Motion for Extension of Time to Serve Respondent with Petition for Judicial Review (ECF No. 20) and denied the Department's Motion to Stay (ECF No. 13). (ECF No. 41, at ¶ 22.)

8 The North Carolina Sales and Use Tax Act "imposes a use tax on items purchased outside the state and thus not subject to [sales] tax, which are brought into the state for 'storage use and consumption' here." *In re Assessment of Additional North Carolina & Orange County Use Taxes*, 312 N.C. 211, 215, 322 S.E.2d 155 (1984), *appeal dismissed*, 472 U.S. 1001, 105 S. Ct. 2693, 86, 86 L.Ed.2d 710 L. Ed. 2d (1985); *see also* N.C.G.S. § 105-164.6 (2010). The Department is not seeking to assess a use tax on the Sales at Issue.

9 The Act also clarifies that a "Complimentary use tax" at the same rate that applies to the *sale* of a product under § 105-164.4 is imposed where property is purchased *outside* the State for "storage, use, or consumption in this State." N.C.G.S. § 105-164.6 (2010). "A product is subject to [a complimentary use tax] only if it is subject to tax under [§] 105-164.4." *Id.*

10 The undisputed facts show that Petitioner delivered its printed materials to USPS or other common carrier "F.O.B." at the point of shipment. North Carolina has held that such terms mean that title to the shipped goods transfers at the place of shipment. *Duke Power Co. v. Clayton*, 274 N.C. 505, 516–517, 164 S.E.2d 289 (1968); *Petrus Machinery, Inc. v. Radiator Specialty Co.*, 257 N.C. 85, 86, 125 S.E.2d 367 (1962) ("Where the contract of sale provides for a sale f.o.b. the point of shipment, the title is generally held to pass, in the absence of a contrary intention between the parties, at the time of the delivery of the goods for shipment at the point designated.").

11 Petitioner also brought a Due Process Clause challenge; however, the Court need only address Petitioner's Commerce Clause argument to reach its decision.

12 In *Excel*, the Supreme Court of North Carolina addressed whether certain purported interstate transactions were subject to sales tax. 269 N.C. 127, 152 S.E.2d 171 (1967). Notably, the Court found that because the out-of-state purchasers arranged for pickup of the products "f.o.b. Lincolnton," North Carolina, the products "were delivered to [the purchasers] in North Carolina, the taxing jurisdiction." *Id.*, 269 N.C. 127, 152 S.E.2d at 134. Accordingly, the Court held that North Carolina's assessment of a sales tax on the transaction did not violate the Commerce Clause. (*Id.*)

13 The Foreign Commerce Clause requires satisfaction of the same *Complete Auto* factors assessed in dormant Commerce Clause analysis. *See Itel Containers*, 507 U.S. at 72, 113 S.Ct. 1095.

14 Referring to *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951), where the Court made state taxation of interstate transactions *per se* unconstitutional. *See also*, *Freeman v. Hewitt*, 329 U.S. 249, 67 S.Ct. 274, 91 L.Ed. 265 (1946) (invalidating a state's gross receipt tax on interstate sales of securities under the same rationale).

15 The physical presence rule originated in *Bellas Hess*, where the Court held that in order for a tax to pass muster under the Due Process Clause or the Commerce Clause, the taxpayer must have a physical presence in the taxing jurisdiction. 386 U.S. at 758–60, 87 S.Ct. 1389 ("[T]he Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail."). Later, in *Quill*, the Court overruled *Bellas Hess* to the extent it "indicated that the Due Process Clause requires a physical presence for the imposition of duty to collect a use tax ... as superseded by developments in the law of due process." *Id.* at 308, 112 S.Ct. 1904.

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However, with respect to the Commerce Clause, the *Quill* Court held that the physical presence "bright-line rule" remained good law. *Id.* at 312–319, 112 S.Ct. 1904.

16 The Supreme Court's Opinion does not indicate whether title to the products sold by Wayfair to the South Dakota residents passed inside or outside of South Dakota.

17 Again, the Court emphasizes that its conclusion on this "as applied" challenge—that the Department's sourcing of the Sales at Issue to North Carolina under N.C.G.S. § 105-164.4B (2010) is unconstitutional—is not intended to apply to any later enacted revised versions of the statute.

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2019 WL 148422

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of North Carolina,
WAKE COUNTY.
BUSINESS COURT.

N.C. DEPARTMENT OF REVENUE, Petitioner,
v.
GRAYBAR ELECTRIC COMPANY, INC., Respondent.

17 CVS 13902
|
January 9, 2019

***1** 1. **THIS MATTER** presents for decision whether dividends deducted on a corporation's federal corporate income tax return under the dividends-received deduction ("DRD") of section 243 of the Internal Revenue Code (the "Code") constitute "income not taxable" for purposes of calculating the corporation's net economic loss ("NEL") deduction under N.C. Gen. Stat. § 105-130.8(a) (repealed 2014) [1] for North Carolina corporate income tax purposes. Secondary to this issue is whether reducing NEL deductions by subtracting deducted dividends violates either the United States or North Carolina Constitution.

2. Petitioner North Carolina Department of Revenue (the "Department") filed its Petition for Judicial Review (the "Petition") on November 17, 2017 seeking reversal of the Office of Administrative Hearings' ("OAH") Final Decision (the "Final Decision") entering summary judgment in favor of Respondent Graybar Electric Company, Inc. ("Graybar").

3. The Court held a hearing on the Petition on April 19, 2018, at which both parties were represented by counsel. After considering the Petition, the parties' briefs in support of and in opposition to the Petition, the relevant evidence of record, and the arguments of counsel made at the April 19, 2018 hearing, the Court, for the reasons set forth below, hereby **REVERSES** the Final Decision and **REMANDS** to the OAH with instructions to enter summary judgment in favor of the Department.

Attorneys and Law Firms

North Carolina Attorney General, by Special Deputy Attorney General Tenisha S. Jacobs, for Petitioner N.C. Department of Revenue.

Parker Poe Adams & Bernstein LLP, by James Greene, Kay Miller Hobart, and Ray Stevens, for Respondent Graybar Electric Company, Inc.

ORDER AND OPINION ON PETITION FOR JUDICIAL REVIEW

Bledsoe, Chief Judge.

I.

FACTUAL AND PROCEDURAL BACKGROUND

4. The material facts of this matter are not in dispute.

5. Graybar is a New York corporation headquartered in St. Louis, Missouri. (R. at 8, ECF No. 20.) The company distributes electrical, communications, and data networking products throughout the United States and is authorized to do business in North Carolina. (R. at 8; *see* R. at 218–19, ECF No. 22.) Graybar files as a "C" corporation for both federal and North Carolina state income tax purposes. (R. at 8.)

6. Graybar is the parent corporation of several wholly owned subsidiaries, including Graybar Services, Inc. ("Graybar Services"), an Illinois corporation, and Commonwealth Controls Corporation ("Commonwealth"), a Missouri corporation. (R. at 8.) Both Graybar Services and Commonwealth are taxed as "C" corporations for federal income tax purposes. (R. at 8.) Graybar Services has filed North Carolina corporate income tax returns since 1998. (R. at 329, ECF No. 25.)

7. In 2007, Graybar Services paid Graybar a dividend of $400,000,000. (*See* R. at 172.) In 2008, Commonwealth paid Graybar a dividend of $1,000,000. (*See* R. at 173.) Both of these dividends (each a "Dividend," and collectively, the "Dividends") were paid from the respective subsidiary's earnings and profits. (R. at 8.)

8. In 2007 and 2008, the years it received the Dividends, Graybar filed for federal corporate income tax purposes as a consolidated group that included Graybar Services and Commonwealth. (*See* R. at 782.) North Carolina generally does not allow consolidated tax returns but instead requires a corporation to determine its State net income as if it filed a federal return as a separate entity. (R. at 782.) These "as if"

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federal returns are commonly referred to as pro forma federal corporate income tax returns. (R. at 782.)

***2** 9. Graybar included the Dividends on its 2007 and 2008 pro forma federal corporate income tax returns and deducted the Dividends from the amounts it reported as federal taxable income. (*See* R. at 188, 192, 203, 209.) Specifically, Graybar claimed a DRD under section 243 of the Code for the Dividends it had received from its subsidiaries and deducted 100 percent of the Dividends on Line 29(b), "Special Deductions," in its federal corporate income tax returns. (*See* R. at 182, 192, 203, 209.)

10. Because Graybar was doing business in North Carolina in the tax years 2007 and 2008, it filed a series of North Carolina "C" corporation tax returns reporting its liability for State corporate income and franchise taxes. (R. at 603–04; *see* R. at 648–66.) North Carolina levies a corporate income tax on "State net income," which is based on a corporation's federal taxable income. (R. at 36, ECF No. 21.) Graybar's calculation of its corporate income tax for each of its North Carolina corporate income tax returns reflected the amount of federal taxable income *after* the Dividends were deducted on Line 29(b) of the federal tax returns. (R. at 603–04; *see* R. at 648–66.) Ultimately, Graybar reported its State net income as zero for 2007 and 2008 because it offset its taxable income with substantial NELs it sustained in prior years dating back to 2001. (R. at 605; *see* R. at 648–66.)

11. The Department audited Graybar in 2015. (R. at 605.) After the audit, the Department determined that Graybar underreported its corporate income tax liability for the tax years 2008, 2012, and 2013 because it improperly calculated its NEL deductions. (R. at 35.) The Department concluded that Graybar had failed to reduce the NEL it carried forward to the tax years 2007 and 2008 by the income attributable to the Dividends received. (R. at 605.) The Department reasoned that "[b]efore a [NEL] brought forward may be deducted, ... [the NEL] must be reduced by any current-year nontaxable income[.]" (R. at 9.) Because the Dividends were deducted from Graybar's federal gross income to derive its federal taxable income, the Department concluded that the Dividends constituted "current-year nontaxable income." (R. at 9.)

12. The Department accordingly reduced the NELs that Graybar reported in 2007 and 2008 by the apportioned amount of the Dividends received,[2] and as a result, concluded that Graybar did not have a NEL for those two years. (R. at 605.) The elimination of the NEL for tax years 2007 and 2008 increased Graybar's State corporate income tax liability for 2008, 2012, and 2013. (R. at 605–06.) Based on the new NEL calculation, the Department proposed assessments against Graybar for the tax years 2008, 2012, and 2013, (R. at 6), in the total amount of $380,835.97, inclusive of additional State taxes, penalties, and interest, (R. at 35).

13. On September 16, 2015, Graybar timely filed with the Department a request for review concerning the proposed assessment of additional State taxes, penalties, and interest. (R. at 6.) In June 2016, the Department issued a Notice of Final Determination upholding the assessment, (R. at 35–39), citing N.C. Gen. Stat. § 105-130.8(a)(3), which provides that a NEL from a prior year can be deducted from income in a succeeding year, "only to the extent that the loss carried forward from the prior year exceeds any income not taxable" received in the succeeding year. The Department found that the Dividends received constituted "income not taxable," and thus that Graybar was required to reduce its NEL deductions by the amount of the Dividends apportioned to North Carolina. (R. at 37–38.)

***3** 14. Following receipt of the Notice of Final Determination, Graybar filed a contested case with the OAH on August 10, 2016, alleging that "the Department improperly reduced [Graybar's] net economic loss carryovers" by the amounts attributable to the Dividends. (R. at 27–34.) Graybar argued that its Dividend income was not "income not taxable" and that a reduction of its NELs was unconstitutional under both the North Carolina and United States Constitutions. (R. at 30–33.) Both parties moved for summary judgment on June 9, 2017. (R. at 4.)

15. By a Final Decision issued on October 16, 2017, the OAH entered summary judgment for Graybar, holding that the Dividends were "taxable as a matter of law" and were "not 'income not taxable.' " (R. at 4–23, 14.) The OAH further noted its agreement with Graybar's contention that "the Department's position created a double taxation on the same income" in violation of the North Carolina Constitution. (R. at 21.)

16. On November 14, 2017 the Department filed the Petition in Wake County Superior Court, seeking reversal of the OAH's Final Decision and the entry of summary judgment in favor of the Department. The matter was subsequently designated as a complex business case by the Chief Justice of the Supreme Court of North Carolina and assigned to the undersigned. The Department and Graybar each submitted

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briefs in support of and opposition to the Petition, each seeking the entry of summary judgment in its favor. On April 19, 2018, the Court held a hearing on the Petition, at which both parties were represented by counsel. The Petition is now ripe for resolution.

II.

LEGAL STANDARD

17. When the trial court "exercises judicial review over an agency's final decision, it acts in the capacity of an appellate court." *Meza v. Div. of Soc. Servs.*, 364 N.C. 61, 75, 692 S.E.2d 96, 105 (2010) (quoting *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 662, 599 S.E.2d 888, 896 (2004)).

18. Chapter 150B of the North Carolina General Statutes provides that "[t]he court reviewing a final [agency] decision may affirm the decision or remand the case for further proceedings." N.C. Gen. Stat. § 150B-51(b). "In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record." *Id.* § 150B-51(c).

19. The Department appeals the Final Decision of the OAH granting summary judgment in favor of Graybar. "Appeals arising from summary judgment orders are decided using a *de novo* standard of review." *Midrex Techs. v. N.C. Dep't of Revenue*, 369 N.C. 250, 257, 794 S.E.2d 785, 791 (2016). Under the *de novo* standard of review, the Court will "consider[ ] the matter anew and freely substitute[ ] its own judgment" for that of the OAH. *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895 (quoting *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)). "In reviewing a final decision allowing ... summary judgment, the court may enter any order allowed by ... Rule 56" of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 150B-51(d).

20. Under Rule 56, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to ... judgment as a matter of law." N.C. R. Civ. P. 56(c). A genuine issue is "one that can be maintained by substantial evidence." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). A material fact is one that "would constitute or would irrevocably establish any material element of a claim or defense." *Abner Corp. v. City Roofing & Sheetmetal Co.*, 73 N.C. App. 470, 472, 326 S.E.2d 632, 633 (1985). Summary judgment is appropriate if "the facts are not disputed and only a question of law remains." *Wal-Mart Stores E. v. Hinton*, 197 N.C. App. 30, 37, 676 S.E.2d 634, 638 (2009) (quoting *Carter v. W. Am. Ins. Co.*, 190 N.C. App. 532, 536, 661 S.E.2d 264, 268 (2008)). Thus, where, as here, the material facts are undisputed on appeal, "a summary disposition of the claims is proper and appropriate." *Technocom Bus. Sys. v. N.C. Dep't of Revenue*, 2011 NCBC LEXIS 1, at *12, 2011 WL 1675057 (N.C. Super. Ct. Jan. 4, 2011).

***4** 21. Graybar, as the "taxpayer claiming a deduction," must bring itself "within the statutory provisions authorizing the deduction." *Wal-Mart Stores E.*, 197 N.C. App. at 54–55, 676 S.E.2d at 651 (quoting *Ward v. Clayton*, 5 N.C. App. 53, 58, 167 S.E.2d 808, 811 (1969)).

III.

ANALYSIS

22. North Carolina imposes a tax on the "State net income of every C Corporation doing business in this State[.]" N.C. Gen. Stat. § 105-130.3. "State net income" is based on a "taxpayer's federal taxable income as determined under the Code, adjusted as provided in G.S. 105-130.5[.]" *Id.* § 105-130.2(15). Under the Code, federal taxable income "means gross income minus the deductions allowed by [the Code]." I.R.C. § 63(a). Although the Code identifies dividends as an item of gross income, *id.* § 61(a)(7), the DRD allowed under section 243 of the Code authorizes a corporation to deduct "100 percent" of the dividends it receives from "a member of the same affiliated group[,]" *id.* § 243(a)(3), (b)(1)(A). Because dividends deducted under the DRD are not included in a corporation's federal taxable income, such dividends are likewise not included in a corporation's State net income.

23. As noted, a corporation's State net income is subject to certain adjustments set forth in section 105-130.5. N.C. Gen. Stat. § 105-130.2(15). One such adjustment authorizes a deduction for "[l]osses in the nature of net economic losses sustained by the corporation in any or all of the 15 preceding years pursuant to the provisions of G.S. 105-130.8." *Id.* § 105-130.5(b)(4). In turn, the now-repealed section 105-130.8

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provided that a corporation that sustained a NEL in any or all of the preceding fifteen income years was permitted to apply the NEL as a deduction from income in a succeeding taxable year. *Id.* § 105-130.8(a). Such deductions, however, were limited by section 105-130.8(a)(3), which provided in relevant part as follows:

> Any net economic loss of prior years brought forward and claimed as a deduction in any income year may be deducted from net income of the year only to the extent that the loss carried forward from the prior years exceeds any *income not taxable under this Part* received in the same year in which the deduction is claimed[.]

Id. § 105-130.8(a)(3) (emphasis added). The purpose of this NEL provision was to provide "some measure of relief to the corporation that has incurred economic misfortune." *Id.* § 105-130.8(a)(1).

24. Here, Graybar deducted from its gross income the Dividends received pursuant to the DRD and claimed those deductions to arrive at the amounts reported on Line 30 of its 2007 and 2008 federal corporate income tax returns as its federal taxable income. For purposes of its North Carolina corporate income tax returns, Graybar reported the amounts reflected on Line 30 of its federal returns as its "federal taxable income," and this figure became the starting point for the calculation of Graybar's State net income. As a result, the Dividends, deducted from gross income to determine federal taxable income, were not included in the amounts that comprised Graybar's State net income. Graybar ultimately reported its State net income as zero for 2007 and 2008 because Graybar's substantial NELs from prior years were greater than Graybar's apportioned federal taxable income as reflected on its North Carolina corporate income tax returns. In calculating its NELs, Graybar did not reduce its losses by the amount of the Dividends received (i.e., it did not treat the Dividends as "income not taxable" under section 105-130.8(a)(3)).

A. Income Not Taxable

***5** 25. In the proceeding below, the OAH concluded that the Dividends were not "income not taxable" for purposes of the NEL provision then in effect. The OAH specifically concluded, and Graybar argues here, that the Dividends were not "income not taxable" because they do not fall within either of the two categories of income specifically referenced in N.C. Gen. Stat. § 105-130.8(a)(5):

> For purposes of this section, any income item deductible in determining State net income under the provisions of G.S. 105-130.5 and any nonapportionable income not allocable to this State under the provisions of G.S. 105-130.4 *shall be considered* as income not taxable under this Part. The amount of the income item considered income not taxable under this Part is determined after subtracting related expenses for which a deduction was allowed under this Part.

Id. § 105-130.8(a)(5) (emphasis added).

26. The OAH agreed with Graybar's contention that section 105-130.8(a)(5) must be read as limiting "income not taxable" to include only the two categories of income specifically identified therein. Because it is undisputed that the Dividends fall into neither category, Graybar contends that summary judgment was appropriately entered in its favor.

27. "In matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished." *Elec. Supply Co. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). The General Assembly's intent "is first ascertained from the plain words of the statute." *Id.*

28. Applying this standard, the Court concludes that section 105-130.8(a)(5) is exemplary—not exclusive or exhaustive. As noted by the OAH, "the language of § 105-130.8(a)(5) does not contain any indicia that the General Assembly intended that section to be an exhaustive list of all types of income that would be considered as 'income not taxable.' " (R. at 11.) Indeed, the statute's plain words do not purport to provide a complete list or otherwise limit "income not taxable" to only the types of income referenced therein. It does not use words or phrases like "means," "shall mean,"

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"exclusively," "solely," "only," or "limited to," and instead simply declares that two types of income "shall be considered as income not taxable." N.C. Gen. Stat. § 105-130.8(a)(5); *see Pipe Line Cases*, 234 U.S. 548, 559–60 (1914) (interpreting statutory phrase "shall be considered" as not narrowing statute's reach); *Lynch v. PPG Indus.*, 105 N.C. App. 223, 225, 412 S.E.2d 163, 165 (1992) ("The statutory language, 'include but not be limited to,' clearly indicates, however, that the legislature did not intend an exclusive list."); *cf. Evans v. Diaz*, 333 N.C. 774, 779–80, 430 S.E.2d 244, 246–47 (1993) (finding "a long and specific list" that was "obviously intended to be" exhaustive to constitute a complete list).

29. Moreover, had the legislature intended the statute to be exclusive, it could have done so.[3] This is especially true in light of the North Carolina Supreme Court's decision in *Dayco Corp. v. Clayton*, 269 N.C. 490, 153 S.E.2d 28 (1967), a decision issued four months before section 105-130.8 was enacted that addressed the meaning of "income not taxable" for purposes of the substantially similar NEL provisions in the predecessor statute. *Id.* at 497–98, 153 S.E.2d at 33; *see Kornegay Family Farms LLC v. Cross Creek Seed, Inc.*, 370 N.C. 23, 29, 803 S.E.2d 377, 381 (2017) ("[T]he legislature is always presumed to act with full knowledge of prior and existing law and ... where it chooses not to amend a statutory provision that has been interpreted in a specific way, we may assume that it is satisfied with that interpretation." (quoting *Polaroid Corp. v. Offerman*, 349 N.C. 290, 303, 507 S.E.2d 284, 294 (1998))).

***6** 30. In *Dayco*, our Supreme Court considered whether dividend income allocable to states other than North Carolina constituted "income not taxable" for State income tax purposes under N.C. Gen. Stat. § 105-147(9)(d) (repealed 1967), the substantially similar predecessor statute to section 105-130.8.[4] *Dayco Corp.*, 269 N.C. at 497, 153 S.E.2d at 32–33. The Supreme Court concluded that because such income is not allocable to North Carolina, it is not subject to tax by North Carolina. *Id.* at 498, 153 S.E.2d at 33. The taxpayer argued that even though this income was not taxed by North Carolina, it was subject to tax in other states and thus was taxable income. *Id.* at 497, 153 S.E.2d at 33. The Supreme Court disagreed, concluding that " 'taxable income' clearly means income on which the State of North Carolina, by the Revenue Act, levies a tax" and that "[a]ll other income is 'income not taxable.' " *Id.* at 498, 153 S.E.2d at 33; *see also Aberfoyle Mfg. Co. v. Clayton*, 265 N.C. 165, 171–73, 143 S.E.2d 113, 118–19 (1965) (holding that a liquidating distribution, while not taxable income, was nonetheless "income not taxable" because it increased the corporation's assets and was not taxed by the State).

31. Applying the definition set forth in *Dayco*, the Court concludes that the Dividends Graybar received are "income not taxable" under section 105-130.8(a)(3). Graybar deducted the Dividends from its gross income pursuant to the Code's DRD, and the Dividends were thus excluded from Graybar's federal taxable income and, consequently, its State net income. As a result, the Dividends were not income upon which the State levied a tax.

32. In its Final Decision, the OAH distinguished *Dayco* on the ground that it applied to dividend income allocable to other states, not, as here, dividend income apportioned to North Carolina. The Court disagrees with the OAH's interpretation of *Dayco*. By clearly defining "income not taxable" under a substantially similar statute as income on which the State does not levy a tax, the Supreme Court has, at a minimum, offered persuasive authority and forecast its view of the proper interpretation of "income not taxable" under section 105-130.8(a)(3) and, at most, provided the rule of decision in this case.

33. When interpreting tax statutes, any "ambiguities ... are resolved in favor of taxation." *Home Depot U.S.A., Inc. v. N.C. Dep't of Revenue*, 2015 NCBC LEXIS 103, at *19 (N.C. Super. Ct. Nov. 6, 2015) (quoting *Aronov v. Sec'y of Revenue*, 323 N.C. 132, 140, 371 S.E.2d 468, 472 (1988)). Although the Court does not find section 105-130.8 to be ambiguous, should the Supreme Court decide otherwise, this Court notes that its statutory interpretation limiting "income not taxable" to the two categories listed in subsection 105-130.8(a)(5) will permit a broader range of income to offset NEL deductions, a result in favor of taxation. *See Bodford v. N.C. Dep't of Revenue*, 2013 NCBC LEXIS 18, at *13, 2013 WL 4505136 (N.C. Super. Ct. Apr. 10, 2013) ("The court is to construe strictly any statute providing for a deduction and resolve ambiguities in favor of taxation.").

***7** 34. The OAH also rested its conclusion on the fact that the Dividends were "deductions," rather than "exclusions," stating that because "[n]o exemption or exclusion prevented the Dividends from being included in income on either the federal or North Carolina returns[,] ... the Dividends are not 'income not taxable.' " (R. at 19.) The OAH concluded, and Graybar argues here, that "income not taxable" under section 105-130.8 should be read to mean income items excluded from gross income altogether (i.e., items that were never

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within the State's authority to tax) and does not include income that the State had the authority to tax, including items first included in, and then removed from, gross income by the claiming of a deduction (like the Dividends here).

35. The OAH's focus on the Dividends' status as "deductions" and not "exclusions" is misplaced. Under *Dayco*, the determinative issue is whether the State actually levied a tax on the item of income, not whether the State had the authority to do so. The Dividends were deducted from Graybar's federal taxable income pursuant to the DRD and were not included in its State net income. Because the Dividends are income on which the State did not levy a tax, the Dividends were "income not taxable" under section 105-130.8(a)(3).

36. The Court finds further support for its conclusion in the stated policy aims motivating the passage of section 105-130.8. *See Elec. Supply Co.*, 328 N.C. at 656, 403 S.E.2d at 294 ("Courts also ascertain legislative intent from the policy objectives behind a statute's passage and the consequences which would follow from a construction one way or another." (internal quotation marks omitted)). As expressed in the statute, the NEL provisions were intended to address a corporation's "net economic situation" in order to provide relief to corporations that "incurred economic misfortune." N.C. Gen. Stat. § 105-130.8(a)(1). The Court concludes that the legislature likely did not intend for over $14,000,000 in allocable income to be disregarded in determining a corporation's "net economic situation" for purposes of providing relief based on a corporation's "economic misfortune." *See Aberfoyle Mfg. Co.*, 265 N.C. at 172, 143 S.E.2d at 119 (reducing NEL deduction where liquidating distribution increased taxpayer's assets by over $4,000,000).

37. The Court's conclusion is also buttressed by the Department's published guidance. The Department is required to administer the State's tax laws. N.C. Gen. Stat. § 143B-219. The Secretary of Revenue (the "Secretary") is authorized to publish guidance and bulletins interpreting the laws administered by the Department. N.C. Gen. Stat. § 105-264. The Supreme Court of North Carolina has explained that "[a]n interpretation by the Secretary is *prima facie* correct" and that the Secretary's interpretation of "the relevant statutory language is important and must be given 'due consideration.' " *Midrex Techs.*, 369 N.C. at 260, 794 S.E.2d at 793; *see Carolina Photography, Inc. v. Hinton*, 196 N.C. App. 337, 339, 674 S.E.2d 724, 725 (2009) ("A rule, *bulletin*, or directive promulgated by the Secretary of Revenue which interprets [laws administered by the Department] is *prima facie* correct[.]" (emphasis added)).

38. During the years at issue here, the Secretary published a series of bulletins interpreting section 105-130.8 and, in particular, the meaning of "income not taxable" under the statute (the "Bulletins"). (*See* R. at 735–52.) In particular, the Bulletins for taxable years 2007 and 2008 define "income not taxable" as "any income that has been deducted in computing State net income under G.S. 105-130.5, any nonapportionable income that has been allocated directly to another state under G.S. 105-130.4, and *any other income* that is not taxable under State law. (*See Dayco Corporation v. Clayton.*)." (R. at 738 (emphasis added).) Thus, in addition to referencing the two categories of income identified in section 105-130.8(a)(5), the Bulletins also explicitly referenced, and adopted the holding in *Dayco*.

***8** 39. Although the OAH found that the Bulletins were "entitled to some deference," the OAH concluded, and Graybar argues here, that the Bulletins are not controlling and misinterpret section 105-130.8.[5] (R. at 11.) Graybar contends that the Court should instead rely upon a 1965 opinion of the North Carolina Attorney General. That opinion, which was issued two years before the Supreme Court's *Dayco* decision, opined that the interpretation of "income not taxable" depended on the "distinction between income excludable from gross income and income deductible from gross income." (Resp't's Br. Ex. 1 [hereinafter "AG Opinion"], ECF No. 30.) The Attorney General concluded:

> [s]ince interest and dividends are both items of gross income subject to taxation ..., all such income would be considered TAXABLE INCOME notwithstanding the fact that a portion of such interest and dividends may qualify as deductions from gross income ... in determining the taxpayer's net taxable income.

(AG Opinion 3.) As Graybar points out, other states have followed this same approach. *See Rosemary Props., Inc. v. McColgan*, 177 P.2d 757, 763 (Cal. 1947) ("Since the gross income and specified deductions are the factors included in arriving at the net income, the conclusion is unavoidable that it is gross income that is included in the measure of

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the tax."); *Yaeger v. Dubno*, 449 A.2d 144, 147 (Conn. 1982) (concluding " 'dividends taxable for federal income tax purposes' means gross dividends as defined under Code, without regard to federal adjustments").

40. Upon careful review, however, the Court concludes that the Attorney General's opinion is of limited value here, particularly when compared to the Department's Bulletins, because the opinion was issued before the Supreme Court's decision in *Dayco*. Indeed, the Court's research has not disclosed, and Graybar has not cited, any judicial or administrative decisions relying upon the Attorney General's opinion. Moreover, while the Department's Bulletins are presumed to be *prima facie* correct, *see Carolina Photography, Inc.*, 196 N.C. App. at 339, 674 S.E.2d at 725, the Attorney General's opinion on tax matters is merely advisory, *see In re Va.-Carolina Chem. Corp.*, 248 N.C. 531, 538, 103 S.E.2d 823, 828 (1958), and our appellate courts have admonished that "[w]hile opinions of the Attorney General are entitled to 'respectful consideration,' such opinions are not compelling authority[,]" *McLaughlin v. Bailey*, 240 N.C. App. 159, 167–68, 771 S.E.2d 570, 577 (2015) (quoting *Williams v. Alexander Cty. Bd. of Educ.*, 128 N.C. App. 599, 602, 495 S.E.2d 406, 408 (1998)). As a result, the Court concludes that, as between the two, the Department's guidance, rather than the Attorney General's opinion, is the more persuasive and further supports the Court's conclusion that the Dividends Graybar received constituted "income not taxable" for purposes of section 105-130.8.

41. Finally, the OAH found, and Graybar argues here, that the Bulletins did not provide the public with notice of the Department's interpretation that dividends deducted under the DRD are "income not taxable" for purposes of section 105-130.8(a)(3). The Court disagrees. The Department's Bulletins interpreting the NEL provision explicitly state that "income not taxable" includes "any other income that is not taxable under State law" and cite *Dayco* for support. Because *Dayco* provides that "income not taxable" includes any income on which the State does not levy a tax, the Court concludes that the Bulletins afforded the public, including Graybar, adequate notice of the Department's interpretation. [6]

***9** 42. For each of these reasons, therefore, the Court concludes that the Dividends deducted pursuant to the DRD, I.R.C. § 243(a)(3), are "income not taxable" under section 105-130.8(a)(3), that Graybar has failed to bring itself within the statutory provisions authorizing the NEL deduction calculation it seeks, and that the OAH's contrary conclusion should be reversed.

B. Constitutionality

43. In light of the OAH's determination that the Dividends were not "income not taxable" for purposes of section 105-130.8, the OAH concluded that it was "not necessary to rule on [Graybar's] constitutional argument." (R. at 18.) Nevertheless, the OAH noted its agreement with Graybar's contention that "the Department's position creates a double taxation on the same income" in violation of the North Carolina Constitution's Just and Equitable Clause. (R. at 18.) Graybar agrees with this conclusion and argues in addition that this alleged double taxation violates the Law of the Land Clause in the North Carolina Constitution and the Due Process Clause contained in the Fourteenth Amendment of the United States Constitution. (*See* Resp't's Br. 20–22.) The Court concludes that these applied constitutional challenges are properly before the Court for determination. *See* N.C. Gen. Stat. § 150B-51(d) ("In reviewing a final decision allowing ... summary judgment, the court may enter any order allowed by ... Rule 56.").

44. As an initial matter, our appellate courts have held that "[a] law is presumed constitutional until the contrary is shown and the burden is on the party claiming that the law is unconstitutional to show why it is unconstitutional as applied to him." *Perry v. Perry*, 80 N.C. App. 169, 176, 341 S.E.2d 53, 58 (1986).

45. The Just and Equitable Clause of the North Carolina Constitution provides that "[t]he power of taxation shall be exercised in a just and equitable manner[.]" N.C. Const. art. V, § 2(1). The provision operates to limit the State's taxing power and protects the public against abusive tax policies. *IMT, Inc. v. City of Lumberton*, 366 N.C. 456, 461–62, 738 S.E.2d 156, 159 (2013). The tension between the State's constitutional authority to tax and the Just and Equitable Clause "must be resolved in a manner that protects the citizenry from unjust and inequitable taxes while preserving legislative authority to enact taxes without exposing the State or its subdivisions to frivolous litigation." *Id.* at 461, 738 S.E.2d at 159. In determining whether a tax is just and equitable, courts should look to factors such as, among others, whether the tax was uniformly applied, exemptions from alternative taxes, and the size of the taxing jurisdiction. *Id.* at 461–62, 738 S.E.2d at 159–60 (citing *Nesbitt v. Gill*, 227 N.C. 174, 179–80, 41 S.E.2d 646, 650–51 (1947)).

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46. Challenges under the Just and Equitable Clause must be determined on a case-by-case basis, *id.* at 463, 738 S.E.2d at 160, and legislative action "will not be held invalid as violative of the Constitution unless it so appears beyond a reasonable doubt[,]" *Nesbitt*, 227 N.C. at 181, 41 S.E.2d at 651. "And when there is reasonable doubt as to the validity of a statute, such doubt will be resolved in favor of its constitutionality." *Id.* "The 'power of taxation is very largely a matter of legislative discretion' and ... 'in respect to the method of apportionment as well as the amount, it only becomes a judicial question in cases of palpable and gross abuse.' " *Smith v. City of Fayetteville*, 220 N.C. App. 249, 256, 725 S.E.2d 405, 411 (2012) (quoting *E. B. Ficklen Tobacco Co. v. Maxwell*, 214 N.C. 367, 372, 199 S.E. 405, 409 (1938)).

***10** 47. The Law of the Land Clause provides that "[n]o person shall be denied the equal protection of the laws," and shall not be "taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. Our courts have held that the clause is "interpreted to be analogous with the [United States Constitution's] Fourteenth Amendment 'due process of law' clause." *City of Asheville v. State*, 192 N.C. App. 1, 44, 665 S.E.2d 103, 133 (2008). "These clauses have been consistently interpreted to permit the state, through the exercise of its police power, to regulate economic enterprises provided the regulation is rationally related to a proper governmental purpose." *Id.* Accordingly, the Court's analysis of the Law of the Land Clause and the Due Process Clause for present purposes diverges into a two-fold inquiry: "(1) Does the regulation have a legitimate objective? and (2) If so, are the means chosen to implement the objective reasonable?" *Id.*

48. Here, the OAH concluded, and Graybar argues now, that the substantial Dividend paid to Graybar by Graybar Services was subject to double taxation because Graybar Services paid taxes on the earnings and profits from which it paid the Dividend to Graybar and thereafter the State taxed these same monies by determining the Dividend to be "income not taxable" under the NEL provision. [7]

49. Notably, it has long been held that nothing in either the United States Constitution or the North Carolina Constitution prevents the State from imposing double taxation, provided the tax is imposed without arbitrary distinctions. *See, e.g.*, *Illinois C. R. Co. v. Minnesota*, 309 U.S. 157, 164 (1940) ("[T]he Fourteenth Amendment no more forbids double taxation than it does doubling the amount of a tax; short of confiscation or proceedings unconstitutional on other grounds." (internal quotation marks omitted)); *Jamison v. Charlotte*, 239 N.C. 682, 693–94, 80 S.E.2d 904, 913 (1954) (citing North Carolina cases to similar effect); *see also, e.g.*, *Swiss Oil Corp. v. Shanks*, 273 U.S. 407, 413 (1927) ("[T]he Fourteenth Amendment does not require uniformity of taxation, nor forbid double taxation." (citations omitted)); *Charlotte Coca-Cola Bottling Co. v. Shaw*, 232 N.C. 307, 309, 59 S.E.2d 819, 821 (1950) ("Double taxation, as such, is not prohibited by the Constitution, and is not invalid if the rule of uniformity is observed."); *Sabine v. Gill*, 229 N.C. 599, 603, 51 S.E. 2d 1, 3 (1948) ("[D]ouble taxation, even within the State, is not *ipso facto* necessarily obnoxious to the Constitution when the intention to impose it is clear and it is free from discriminatory features, however odious to the taxpayer.").

***11** 50. Here, assuming without deciding that the State's determination concerning "income not taxable" results in double taxation, [8] the Court concludes that Graybar has failed to show that its tax burden resulting from the State's determination—i.e., the reduction of Graybar's NEL deductions by the apportioned amount of the Dividends received—is the product of discriminatory or arbitrary taxation or otherwise derives from an abusive or unreasonable taxation scheme in violation of the North Carolina or United States Constitution. The Department's interpretation of "income not taxable" is based on the Supreme Court's holding in *Dayco*, a holding the legislature elected not to overturn or modify in its 1967 statutory amendment, and a position the Department has publicly announced and implemented for at least twenty years, including during the taxable years at issue. There is no evidence that the Department's interpretation has been applied inconsistently, arbitrarily, or discriminatorily or that the Department has identified Graybar for adverse treatment relative to other similarly situated taxpayers. Moreover, the Department's interpretation is reasonable and consistent with section 105-130.8's legitimate and stated purpose "to grant some measure of relief to the corporation that has incurred economic misfortune" and to afford that relief based on the "net economic situation of the corporation." N.C. Gen. Stat. § 105-130.8(a)(1).

51. In short, the Department's interpretation does not cause section 105-130.8 to be unfair, unreasonable, arbitrary, or abusive, and Graybar's constitutional challenges must therefore be rejected. *See Aronov*, 323 N.C. at 136–39,

371 S.E.2d at 470–72 (holding that requiring a taxpayer to reduce North Carolina carryover losses by non-North Carolina income did not violate the Due Process Clause or the Law of the Land Clause, in part, because "[d]eductions are privileges, not rights"); *cf. IMT, Inc.*, 366 N.C. at 462, 738 S.E.2d at 160 (holding unconstitutional a 59,900% minimum tax increase for promotional sweepstake companies).

IV.

CONCLUSION

52. Based on the foregoing, the Court hereby **REVERSES** the Final Decision and **REMANDS** with instructions to the OAH to enter summary judgment in favor of the Department.

SO ORDERED, this the 9th day of January, 2019.

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Footnotes

1 The provisions of this statute were in effect during the years at issue here. The General Assembly has since modified the statute, effective for the tax years beginning on and after January 1, 2015.

2 It is undisputed that the Dividends constituted North Carolina apportionable income under the then current version of N.C. Gen. Stat. § 105-130.4 during the tax years at issue. While the Dividends totaled $400,000,000 in 2007 and $1,000,000 in 2008, the amount apportioned to North Carolina for state income tax purposes was $14,194,000 and $34,465, respectively. (R. at 9.)

3 The language chosen in other subsections within section 105-130.8 suggests that the General Assembly did not intend for section 105-130.8(a)(5) to contain an exhaustive list. "When a legislative body includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that the legislative body acts intentionally and purposely in the disparate inclusion or exclusion." *N.C. Dep't of Revenue v. Hudson*, 196 N.C. App. 765, 768, 675 S.E.2d 709, 711 (2009) (internal quotation marks, alteration, and citation omitted). While the General Assembly provided a clearly exhaustive definition for "net economic loss," *see* N.C. Gen. Stat. § 105-130.8(a)(2) ("The net economic loss for any year *means* the amount by which allowable deductions for the year other than prior year losses exceed income from all sources in the year including any income not taxable under this Part." (emphasis added)), the same cannot be said of section 105-130.8(a)(5).

4 N.C. Gen. Stat. § 105-147(9)(d) provided, in relevant part, as follows:

> Any net economic loss of a prior year or years brought forward and claimed as a deduction in any income year may be deducted from taxable income of the year only to the extent that such carry-over loss from the prior year or years shall exceed any income not taxable under this article received in the same year in which the deduction is claimed, except that in the case of taxpayers required to apportion to North Carolina their net apportionable income, as defined in this article, only such proportionate part of the net economic loss of a prior year shall be deductible from the income taxable in this State as would be determined by the use of the apportionment ratio computed under the provisions of G.S. 105-134 or of subsection (c) of G.S. 105-142, as the case may be, for the year of such loss.

N.C. Gen. Stat. § 105-147(9)(d)(3) (repealed 1967).

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5 The OAH concluded that the Department's reliance on the Bulletins was misguided because (i) the Dividends were not "income not taxable" under *Dayco* (i.e., because *Dayco* involved dividend income allocable to other states), (ii) in any event, section 105-130.8(a)(5) provided a "statutory definition" of "income not taxable" that does not encompass the Dividends, and (iii) the Bulletins did not give notice that a DRD deduction "converts taxable dividends into 'income not taxable.' " (R. at 11–12.)

6 Graybar also points to case law holding that where the only authority for an agency's interpretations of the law is its litigation position in a particular case, "that interpretation may be viewed skeptically on judicial review." *See Cashwell v. Dep't of State Treasurer, Ret. Sys. Div.*, 196 N.C. App. 80, 89, 675 S.E.2d 73, 78 (2009) (quoting *Rainey v. N.C. Dep't of Pub. Instruction*, 361 N.C. 679, 681, 652 S.E.2d 251, 252 (2007)). The Bulletins at issue here, however, were published for the 2007 and 2008 tax years, seven years before the Department conducted its audit and seven years before Graybar formally requested a review of the Department's proposed assessments. In fact, this same interpretation appears in Bulletins dating back to at least 1999. (*See* R. at 751–52.) Graybar's argument on this point is thus unpersuasive. *See Cashwell*, 196 N.C. App. at 89, 675 S.E.2d at 78 ("[I]f the agency's interpretation of the law is not simply a 'because I said so' response to the contested case, then the agency's interpretation should be accorded ... deference[.]" (quoting *Rainey*, 361 N.C. at 681, 652 S.E.2d at 252–53)).

7 It is worth noting that Graybar, Graybar Services, and Commonwealth are all structured as "C" corporations for federal income tax purposes and that "double taxation" is a common, widely accepted, and permissible feature of this form of business organization. As explained by one federal circuit court:

> A C corporation is a corporate entity that is required to pay taxes on the income it earns. If a C corporation decides to issue dividends to its shareholders, the shareholders must pay income tax on these dividends. This arrangement exposes shareholder dividends to double taxation—a C corporation's income is taxed at the corporate level and the portion of the C corporation's income that is passed on to shareholders is taxed again at the shareholder level.

Crumpton v. Stephens, 715 F.3d 1251, 1253 n.2 (11th Cir. 2013); *see Crowder Constr. Co. v. Kiser*, 134 N.C. App. 190, 194, 517 S.E.2d 178, 182 (1999) ("As a 'C' corporation, the Company paid corporate income tax on its earnings, and its shareholders paid income taxes on any dividends received by them.").

The DRD permits a corporation to deduct the dividends it receives from a subsidiary to avoid double taxation in this context. The policy considerations motivating the DRD deduction, however, are different from those justifying an NEL deduction. *Compare* H.R. Rep. No. 708, 72d Cong., 1st Sess., 12 (1932) (legislative history of 26 U.S.C. § 243(a)(1) reflecting a Congressional policy against double taxation of income by permitting dividends received deductions to corporations on "the theory that a corporate tax has already been paid upon the earnings out of which the dividends are distributed"), *with* N.C. Gen. Stat. § 105-130.8(a)(1) (affording relief for corporations suffering "economic misfortune" based on "net economic situation of the corporation"), *and Aberfoyle Mfg. Co.*, 265 N.C. at 171, 143 S.E.2d at 118 ("The General Assembly was under no constitutional or other legal compulsion to permit a net economic loss or losses deduction for a corporation from taxable income in a subsequent year or years. It enacted the carry-over provisions of [the predecessor statute] purely as a matter of grace, gratuitously conferring a benefit but limiting such benefit to the net economic loss of the taxpayer after deducting therefrom the allocable portion of such taxpayer's nontaxable income." (internal quotation marks omitted)).

8 The parties dispute whether the Department's treatment has resulted in double taxation. Graybar argues that the income from which the larger Dividend was paid was taxed twice, first when it was earned by Graybar's subsidiary, Graybar Services, and again when the Graybar could not offset its NEL deduction by that Dividend. The Department argues that the Dividend income was not initially taxed to Graybar because Graybar Services, which filed separately from Graybar, paid corporate income tax on the Dividend, not

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Graybar, and that the Dividend, once received by Graybar, was not taxed. The Court need not resolve this dispute to determine Graybar's constitutional challenges.

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Court of Appeals of North Carolina.

Renee CROCKER, Joy Waldrop, Julie Sprouse, Renee Roof, Plaintiffs,
v.
Carson GRIFFIN, individually and as Director of the Transylvania County Department of Social Services and Transylvania County Department of Social Services and Transylvania County, a Body Politic, Defendants.

No. COA09-1000.
|
May 18, 2010.

West KeySummary

1 **Damages** Other Particular Cases

Supervisor's alleged conduct did not rise to the level of outrageousness necessary to support employees' claim of intentional infliction of emotional distress. Although supervisor allegedly was unpleasant toward employees through yelling, shouting, or saying insulting or demeaning things, this conduct was not so outrageous or extreme as to go beyond all possible bounds of decency.

***1** Appeal by plaintiffs from order entered 21 April 2009 by Judge A. Robinson Hassell in Transylvania County Superior Court. Heard in the Court of Appeals 3 December 2009.

Attorneys and Law Firms

Donald H. Barton, for plaintiff appellants.

Womble, Carlyle, Sandridge & Rice, PLLC, by Sean F. Perrin, for defendant appellees.

Opinion

ROBERT N. HUNTER, JR., Judge.

Plaintiffs Renee Crocker, Joy Waldrop, Julie Sprouse, and Renee Roof (collectively "plaintiffs") appeal from orders dismissing their claims for: (1) intentional infliction of emotional distress, (2) negligent infliction of emotional distress, and (3) negligent supervision and retention. We conclude that the trial court was correct in dismissing the plaintiffs' complaint under Rule 12 of the North Carolina Rules of Civil Procedure, on the bases of failure to state a claim, lack of subject matter jurisdiction, and public official immunity. Accordingly, we affirm the trial court's order.

I. FACTUAL AND PROCEDURAL BACKGROUND

In their complaint, plaintiffs allege the following. Plaintiffs were employees of Transylvania County Department of Social Services, Protective Services Division ("DSS"). Defendant Carson Griffin ("Griffin") was plaintiffs' supervisor and director while they were employed by DSS.

In the course of their respective employments, plaintiffs allege that from 1993 to 2008, Griffin committed the following acts:

a. As to the Plaintiff Rene Crocker, berating her in front of fellow employees.

b. Criticizing the Plaintiffs['] work performance in the presence of other DSS employees.

c. Assigning a[n] inordinate number of cases to the Plaintiffs making it extremely difficult if not impossible to meet State mandated requirements with regard to Plaintiffs['] case load of abused and neglect[ed] complaints and other assigned tasks.

d. On one occasion, informing the Plaintiff Crocker that she was to have 10 cases on her desk by 10:OO a.m. the next morning after the Plaintiff had returned from such leave.

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a. Threatening to "write up" the Plaintiff Crocker, if she did not complete the task. Then when Plaintiff Crocker tried to work after her assigned work time to complete the task demanded that she leave the premises "*now* ".

b. Causing stress, anxiety, and depression to the Plaintiffs causing them to seek and receive medical treatment for conditions created by the actions of the Defendant, Griffin.

c. As to Plaintiff Julie Sprouse, while she [was] pregnant with her daughter, Defendant Griffin assigned her an unusually heavy case load making it difficult for her to meet State mandated requirements with regard to her cases.

d. Causing stress and anxiety to the Plaintiffs, proximately causing each Plaintiff to seek and obtain medical treatment and medication.

e. Upon Plaintiff Sprouse's return to work after seeking and receiving medical help, continued the extreme treatment of the Plaintiff Sprouse, who could not continue the previously prescribed medication because of her pregnancy.

***2** f. Causing the Plaintiff Sprouse such stress and anxiety during her pregnancy with her daughter, that she was placed on bed rest by her physician but continued to receive work calls at home while she was on medical leave from Louise Koontz, her program director, but Plaintiff Sprouse believes were at the instigation and direction of Defendant Griffin.

g. Caused the Plaintiff Sprouse to quit her job after her maternity leave in August of 2006 to take a job in the school system at a large decrease in pay.

h. Plaintiff Sprouse requested, to return to DSS, and applying for a position at DSS with Adult Services, Defendant Griffin yelled at the Plaintiff and told her she "had a lot of nerve applying for another job when she had just come back," Defendant Griffin then demanded that Plaintiff Sprouse execute a writing that she was not interested in the job she applied for, placing Plaintiff Sprouse under a verbal threat of termination if she did not do what Defendant Griffin demanded.

i. This incident caused such stress and anxiety to Plaintiff Sprouse that she was required to seek medical treatment and be placed on medication for stress and anxiety.

j. Placed work loads well in excess of State mandated standards on the Plaintiff Sprouse that required workdays and case loads that created on one occasion, a work load of 102 hours for "on call" work. When Plaintiff turned in her time sheet Defendant Griffin came down the hall screaming at Plaintiff Sprouse, waving Plaintiff Sprouse's time sheet and screaming at her "*what is this* ", "*what is this* ", "*you just wait* ", expressing her displeasure in having to pay the Plaintiff for this extra work time created by the excessive case load assigned to Plaintiff Sprouse by Defendant Griffin.

k. Creating such stress and anxiety by Defendant Griffin's assigned workload to Plaintiff and her behavior towards Plaintiff, the Plaintiff Sprouse could not eat or sleep and was placed on medication and ultimately forced to resign her position on April 23, 2008.

l. As to Plaintiff Joy Waldrop, flying into rages, stating demeaning things to Plaintiff such as "*wipe that smirk off your face* " and "*wipe that fake smile off your face* ".

m. Screamed at the Plaintiff Waldrop in the DSS hallway in the presence of the other employees.

n. Screamed at Plaintiff Waldrop with her door open so as to allow fellow employees to hear her berate the Plaintiff.

o. Screamed at Plaintiff Waldrop so loudly within the hearing of fellow employees such that a fellow employee, on one particular occasion, was preparing to call 911.

p. So threatening in her actions towards Plaintiff Waldrop to cause the Plaintiff to believe Defendant was going to physically assault her.

q. Physically snatching reports from Plaintiff Waldrop's hands.

r. Told the Plaintiff Waldrop she had people "watching her" and "reporting to" the Defendant Griffin.

s. Telling the Plaintiff Waldrop that workers in her unit didn't like her, didn't respect her, were talking behind her back, criticizing her and that she "better watch them because they were 'doing things' to try to bring her and the agency down".

***3** t. Set up special rules and demands for Plaintiff Waldrop in her work that were not required for

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the supervisors, and excluded Plaintiff Waldrop from management team meetings and other events, such as a breakfast meeting at a local restaurant, to which all other supervisors were invited.

u. As to other workers in Transylvania County DSS, verbally attacking workers until they cried, were upset and shaking. Defendant Griffin would then refuse to allow the person to leave her office. Ordering them to "*sit down* ", "*take you[r] hands from your face* ", "*look me in the eye* " then she would berate them for crying.

v. Caused fear in other workers with her rage and bullying behavior.

w. The actions of the Defendant Griffin caused the Plaintiff Waldrop to have anxiety, trouble sleeping and eating, hyperventilating, difficulty focusing on work. Plaintiff Waldrop was forced to seek medical treatment and was diagnosed with situational depression and placed on medication. Plaintiff Waldrop was required to seek and obtain therapy as well.

x. As to Defendant Griffin's actions and behavior towards other DSS workers, Plaintiff Waldrop observed them shaking, crying, and so upset they left work, sought medical treatment and therapy, obtaining medication for anxiety. Defendant Griffin kept employees in constant fear of being fired, humiliated or verbally attacked by Defendant Griffin in the presence of others.

All plaintiffs, except for Renee Crocker, resigned their positions with DSS as a result of Griffin's conduct. Plaintiffs claim that they suffered periods of unemployment, lack of job benefits, and extreme emotional distress such as depression and anxiety.

Plaintiffs allege that DSS and Transylvania County are liable under the doctrine of *respondeat superior* because Griffin's conduct was reported to officers, employees, agents, and commissioners of Transylvania County and DSS. According to plaintiffs, Transylvania County and DSS did not respond or react to the reports of Griffin's conduct.

On 9 February 2009, plaintiffs filed a complaint against DSS, Transylvania County, and Griffin in her individual and official capacities (collectively "defendants"). The complaint pled causes of action for negligent infliction of emotional distress ("NIED"), intentional infliction of emotional distress ("IIED"), and negligent supervision and retention.

Pursuant to Rule 12, defendants filed a motion to dismiss the complaint on 19 February 2009 and an amended motion to dismiss the complaint on 26 March 2009 alleging: (1) plaintiffs' complaint failed to state claims upon which relief could be granted; (2) Public Official Immunity barred plaintiffs' NIED claim against Griffin in her individual capacity; and (3) the trial court lacked subject matter jurisdiction over the NIED claim.

On 21 April 2009, the trial court entered an order granting defendants' Rule 12 motion to dismiss in its entirety. The trial court concluded in particular: (1) plaintiffs failed to state a claim for IIED upon which relief could be granted; (2) the trial court lacked subject matter jurisdiction over the NIED claim; (3) public official immunity barred plaintiffs' NIED claim against Griffin individually; and (4) plaintiffs failed to state a claim for negligent supervision and retention upon which relief could be granted. Plaintiffs thereafter filed a timely notice of appeal.

II. STANDARD OF REVIEW AND JURISDICTION

***4** The standard of review on appeal of an order granting a motion to dismiss pursuant to Rule 12(b)(1) and (6) is *de novo. Burgin v. Owen,* 181 N.C.App. 511, 512, 640 S.E.2d 427, 428 (2007); *Fuller v. Easley,* 145 N.C.App. 391, 395, 553 S.E.2d 43, 46 (2001). Under *de novo* review, this Court " 'considers the matter anew and freely substitutes its own judgment for that of the [trial court].' " *State v. Merrill,* 191 N.C.App. 131, 134, 664 S.E.2d 565, 567 (2008) (citation omitted).

In reviewing a Rule 12(b)(6) dismissal *de novo,* we examine the record to see "whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true." *Burgin,* 181 N.C.App. at 512, 640 S.E.2d at 428. Dismissal for failure to state a claim is appropriate where either:

> (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact

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> that necessarily defeats the plaintiff's claim.

Wood v. Guilford Cty., 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002).

Because the trial court's order disposed of all of plaintiffs' claims, jurisdiction is proper in this Court pursuant to N.C. Gen.Stat. § 7A-27(b) (2009).

III. ANALYSIS

A. IIED

Plaintiffs argue the trial court erred in dismissing their claim for IIED for failure to state a claim pursuant to N.C.R. Civ. P. 12(b)(6) (2009). We disagree.

In North Carolina, IIED requires a showing of extreme and outrageous conduct, "which is intended to cause and does cause[,]" severe emotional distress. *Dickens v. Puryear,* 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981). Extreme and outrageous conduct is conduct " 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community[.]' " *Hogan v. Forsyth Country Club Co.,* 79 N.C.App. 483, 493, 340 S.E.2d 116, 123 (1986) (citation omitted). " 'The liability clearly does not extend to mere insults, indignities, [and] threats[.]' " *Wagoner v. Elkin City Schools' Bd. of Education,* 113 N.C.App. 579, 586, 440 S.E.2d 119, 123 (1994) (citations omitted). As a general rule, " 'it is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to support a claim of intentional infliction of emotional distress.' " *Thomas v. Northern Telecom, Inc.,* 157 F.Supp.2d 627, 635 (M.D.N.C.2000) (citation omitted). The determination of whether conduct is extreme and outrageous is a matter of law. *Wilson v. Bellamy,* 105 N.C.App. 446, 468, 414 S.E.2d 347, 359 (1992).

Here, plaintiffs allege that Griffin committed a series of acts constituting extreme and outrageous conduct. However, the allegations in the complaint merely provide, generally, that Griffin caused plaintiffs emotional distress through yelling, shouting, or saying insulting or demeaning things to plaintiffs.

***5** We considered similar allegations to be insufficient in *Hogan v. Forsyth Country Club.* In *Hogan,* one plaintiff alleged that one of the defendant's supervisors "screamed and shouted at her, called her names, interfered with her supervision of waitresses under her charge, and on one occasion threw menus at her." *Hogan,* 79 N.C.App. at 493, 340 S.E.2d at 122-23. Another plaintiff alleged that a different supervisor

> refused to grant her a pregnancy leave of absence, directed her to carry objects such as trash bags, vacuum cleaners, and bundles of linen weighing more than 10 pounds. He cursed at her on one occasion. When she requested, on 10 July 1983, to be allowed to leave work to go to the hospital, Brennan refused to grant permission. When she left without his permission, he terminated her from employment.

Id. at 494, 340 S.E.2d at 123.

In this case, as in *Hogan,* Griffin's conduct does not go beyond all possible bounds of decency. Even assuming plaintiffs' allegations as true, Griffin was, at worst, an unpleasant supervisor toward plaintiffs. As a result, these acts standing alone are not so extreme or outrageous as to support a claim for IIED. *See also Daniel v. Carolina Sunrock Corp.,* 110 N.C.App. 376, 382, 430 S.E.2d 306, 310 (Evidence insufficient for extreme and outrageous conduct where, *inter alia,* other employees "took notes on plaintiff's activities, counted and screened plaintiff's personal phone calls, ... inspected the contents of plaintiff's desk while she attended her father's funeral, moved plaintiff to a smaller office with no phone and no heat, and made harassing phone calls to ... plaintiff and ... plaintiff's sister-in-law and mother."), *reversed in part on other grounds,* 335 N.C. 233, 436 S.E.2d 835 (1993).

Because the first element of IIED is not satisfied, plaintiffs do not have a claim upon which relief can be granted, and therefore, the order to dismiss was properly entered. This assignment of error is overruled.

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B. NIED

Plaintiffs argue that the trial court erred by dismissing their NIED claims against DSS and Transylvania County for lack of subject matter jurisdiction on the ground that it "was barred by the exclusivity provisions of the North Carolina Workers' Compensation Act." We conclude that this issue is not properly before this Court.

Plaintiffs' brief completely fails to address the potential applicability of the Workers' Compensation Act as to their NIED claim, and instead plaintiffs devote their argument to the North Carolina State Tort Claims Act. This argument is problematic, because no argument regarding the State Tort Claims Act was raised at trial. As a result, plaintiffs' assignment of error as to this issue fails to state any legal basis for their assertion that the trial court erred in dismissing their NIED claim for lack of subject matter jurisdiction. N.C.R.App. P. 10(b)(1) (2009) (revised July 2, 2009); *see also State v. Sharpe,* 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) ("[W]here a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount [.]' ") (quoting *Weil v. Herring,* 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)).

***6** We are unable to discern why plaintiffs have addressed their argument toward the North Carolina State Tort Claims Act instead of the Workers' Compensation Act in brief. We note that "mental or psychological illness may be a compensable injury if it has occurred as a result of an accident arising out of and in the course of the claimant's employment." *Pitillo v. N.C. Dep't of Envtl. Health & Natural Res.,* 151 N.C.App. 641, 645, 566 S.E.2d 807, 811 (2002); *see also Jordan v. Central Piedmont Community College,* 124 N.C.App. 112, 119, 476 S.E.2d 410, 414 (1996) ("We conclude that as long as the resulting disability meets statutory requirements, mental, as well as physical impairments, are compensable under the Act."). However, plaintiffs' brief does not address how the trial court erred in determining that the injuries alleged here are compensable under the Workers' Compensation Act. Additionally, plaintiffs cite no authority to support their argument that the trial court erred dismissing the NIED claim for lack of subject matter jurisdiction. Since plaintiffs have failed to argue or provide authority to support their argument, we deem this issue abandoned. [1] N.C.R.App. P. 28(b)(6) (2009). This assignment of error is dismissed.

C. Public Official Immunity

Plaintiffs argue the trial court erred by dismissing plaintiffs' claim for NIED against Griffin in her individual capacity under the public official immunity doctrine. We disagree.

"When a governmental worker is sued individually, or in his or her personal capacity, our courts distinguish between public employees and public officers in determining negligence liability." *Hare v. Butler,* 99 N.C.App. 693, 699, 394 S.E.2d 231, 236 (1990). "Public officials are distinct from public employees in that officers perform discretionary actions requiring deliberation, decision and judgment, while employees perform ministerial duties that are absolute and certain." *Dempsey v. Halford,* 183 N.C.App. 637, 640, 645 S.E.2d 201, 204-05 (2007). "A public official may not be held individually liable for mere negligence, but may only be liable where her conduct is *malicious, corrupt, or outside the scope of her authority.*" *Dalenko v. Wake Cty. Dep't of Human Servs.,* 157 N.C.App. 49, 56, 578 S.E.2d 599, 603-04 (2003) (emphasis added).

" 'As a general rule it is presumed that a public official in the performance of his official duties "acts fairly, impartially, and in good faith and in the exercise of sound judgment or discretion, for the purpose of promoting the public good and protecting the public interest." ' " *Greene v. Town of Valdese,* 306 N.C. 79, 82, 291 S.E.2d 630, 632 (1982) (citations omitted). "Evidence offered to meet or rebut the presumption of good faith must be sufficient by virtue of its reasonableness, not by mere supposition. It must be factual, not hypothetical; supported by fact, not by surmise." *Dobson v. Harris,* 352 N.C. 77, 85, 530 S.E.2d 829, 836 (2000). "[A] conclusory allegation that a public official acted willfully and wantonly should not be sufficient, by itself, to withstand a Rule 12(b)(6) motion to dismiss. The facts alleged in the complaint must support such a conclusion." *Meyer v. Walls,* 347 N.C. 97, 114, 489 S.E.2d 880, 890 (1997). Thus, to overcome the presumption of good faith in favor of a public official, the burden is on the plaintiff to offer a sufficient forecast of evidence to establish a *prima facie* showing that the public official's actions were malicious, corrupt, or outside the official's scope of authority. *Epps v. Duke University,* 122 N.C.App. 198, 205, 468 S.E.2d 846, 851-52 (1996).

***7** Here, Griffin is the director of Transylvania County DSS, and she is immune as a public official from claims of mere negligence brought against her in her individual capacity.

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Meyer v. Walls, 122 N.C.App. 507, 516-17, 471 S.E.2d 422, 429 (1996) (DSS directors entitled to public official immunity), *reversed in part on other grounds,* 347 N.C. 97, 489 S.E.2d 880 (1997); *Hare,* 99 N.C.App. at 700, 394 S.E.2d at 236 (same). In order to overcome the presumption of good faith provided by the public official immunity doctrine, plaintiffs here must demonstrate that Griffin's conduct was malicious, corrupt, or outside the scope of her authority. *Epps,* 122 N.C.App. at 205, 468 S.E.2d at 851-52.

In their complaint, plaintiffs do not allege that Griffin's conduct was corrupt or outside the scope of her authority as a supervisor. We therefore examine plaintiffs' allegations to see whether adequate facts have been pled to show that Griffin's actions were malicious.

"A defendant acts with malice when [1] he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty *and* [2] which he *intends* to be prejudicial or injurious to another." *In re Grad v. Kaasa,* 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984) (emphasis added). An act is wanton if it is done with a "wicked purpose" or with "reckless indifference to the rights of others." *Id.* (quotations marks and citation omitted). " 'General malice is wickedness, a disposition to do wrong, a black and diabolical heart, regardless of social duty and fatally bent on mischief.' ... 'Particular malice is ill-will, grudge, desire to be revenged on a particular person.' " *State v. Long,* 117 N.C. 791, 798-99, 23 S.E. 431, 431 (1895) (citation omitted).

Though Griffin's alleged conduct can be characterized as brash, rude, and unpleasant, these descriptions fall far short of being malicious. To show legal malice sufficient to overcome the presumption of public official immunity, plaintiffs are required to produce at least some evidence that Griffin *intended* to cause plaintiffs' alleged emotional distress. *Kaasa,* 312 N.C. at 313, 321 S.E.2d at 890; *see Hawkins v. State of North Carolina,* 117 N.C.App. 615, 630, 453 S.E.2d 233, 242 (1995) (" 'Malice' is defined as '[t]he *intentional* doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent.' ") (citation omitted and emphasis added). Plaintiffs' complaint in this case, taken as true, merely claims that through various acts of supremely poor emotional control and professional judgment, Griffin "caused" plaintiffs' emotional distress. However, none of plaintiffs' factual allegations demonstrate that Griffin was even aware of the degree of plaintiffs' emotional distress-much less that Griffin *intended* to cause it as is required to overcome the doctrine of public official immunity. Instead, as our Supreme Court stated was insufficient in *Meyer v. Walls,* plaintiffs' complaint only alleges that Griffin was malicious, and does not provide a sufficient forecast of facts showing that legal malice exists. 347 N.C. at 114, 489 S.E.2d at 890.

***8** Because the complaint fails to offer facts sufficient for a *prima facie* showing of legal malice on behalf of Griffin, plaintiffs cannot overcome Griffin's public official immunity for her allegedly negligent actions against plaintiffs. Thus, plaintiffs have no claim upon which relief can be granted, and the trial court did not err in dismissing the NIED claim against Griffin in her individual capacity. This assignment of error is overruled.

D. Negligent Supervision and Retention

Plaintiffs argue the trial court committed reversible error by dismissing their claims for negligent supervision and retention for failure to state a claim pursuant to N.C.R. Civ. P. 12(b)(6). We disagree.

We have already upheld the dismissal of plaintiffs' claims of IIED and NIED against Griffin, and thus plaintiffs cannot prove any liability on the part of Griffin for their alleged injuries. Since plaintiffs have no claim against Griffin, they also have no claim against DSS or Transylvania County for Griffin's alleged wrongful acts. *McLain v. Taco Bell Corp.,* 137 N.C.App. 179, 189-90, 527 S.E.2d 712, 719-20 (2000) (jury verdict in favor of employer on employee's negligent supervision and retention claim upheld on appeal where employee unable to prove manager's liability). Accordingly, this assignment of error is overruled.

IV. CONCLUSION

For the foregoing reasons, we affirm the trial court's order to dismiss plaintiffs' complaint in its entirety.

Affirmed.

Judges STROUD and ERVIN concur.
Report per Rule 30(e).

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All Citations

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Footnotes

1 We acknowledge that plaintiffs' rules violation is a non-jurisdictional defect in this appeal. *Dogwood Dev. & Mgmt. Co ., LLC v. White Oak Transp. Co.,* 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008). However, absent a valid argument to address, we find that dismissal of this assignment of error is an appropriate sanction given that it is not necessary for this Court to review plaintiffs' argument under Rule 2 of the North Carolina Rules of Appellate Procedure. *Id.* at 201, 657 S.E.2d 361, 657 S.E.2d at 367.

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