



## North Carolina Department of Revenue

Roy Cooper  
Governor

Ronald G. Penny  
Secretary

July 16, 2020

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

Re: Private Letter Ruling Request  
FEIN: [REDACTED]

Dear [REDACTED]:

The Department has completed its review of your request for a private letter ruling on behalf of [REDACTED] ("Taxpayer"). In making this written determination, the Department has considered the facts presented in your initial request.

This private letter ruling is a written determination issued under N.C. Gen. Stat. § 105-264.2 and applies the tax law to a specific set of existing facts furnished by you on behalf of Taxpayer. This written determination is applicable only to the taxpayer addressed herein and as such has no precedential value except to the taxpayer to whom the determination is issued.

### **Overview and Relevant Facts**

You advise Taxpayer's "business generally involves performing [sic] [REDACTED] contracts and the design and construction of alternative energy projects" and "does not generally sell products or provide services at retail." Taxpayer holds a NC electrical contractor license. "On [REDACTED], [Taxpayer] and the [REDACTED] entered into . . ." an Energy Services Agreement (ESA) "with a total project cost of [REDACTED]." "The ESA provides for [Taxpayer] to design, engineer and install [REDACTED] ECMs [Energy Conservation Measures] in approximately [REDACTED] facilities. The ECMs are designed to result in measurable savings in the annual energy costs. [Taxpayer] (either itself or through its subcontractors) completed the [REDACTED] ECMs which involve substantial building improvements in the areas of heating, ventilation, cooling, lighting systems, water conservation and building automation system controls. The specific projects are described in Attachment B, Schedule E."

Pursuant to Attachment B, Schedule E, of the ESA the ECMs and equipment to be installed by Taxpayer include:

#### **ECM 1 - Lighting System Upgrades - Interior**

- The majority of the T12 fluorescent fixtures that are in good condition will be retrofit with 10W tLED linear lamps and low ballast factor electronic ballasts. Fluorescent fixtures already containing T8 lamps will also be re-lamped and re-ballasted with tLED linear lamps and universal voltage, low ballast factor electronic ballasts.

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- New LED high-bay fixtures will replace the existing HID, linear fluorescent and compact fluorescent high bay fixtures in [REDACTED].
- Incandescent and compact fluorescent fixtures that are not in low-use spaces will be retrofitted with screw-in and PL LED lamps.
- The 2-lamp, 2x2 foot fluorescent fixtures will be retrofit to accommodate 2' linear tLED lamps rather than the existing U-bend lamps.

#### ECM 2 - Lighting System Upgrades - Exterior

- The majority of the T12 fluorescent fixtures that are in good condition will be retrofit with 10W tLED linear lamps and low ballast factor electronic ballasts. Fluorescent fixtures already containing T8 lamps will also be re-lamped and re-ballasted with tLED linear lamps and universal voltage, low ballast factor electronic ballasts.
- Exterior HID building mounted exterior fixtures will be retrofit and/or replaced with lower wattage LED lamps or fixtures. Additionally, the parking lot HID pole fixtures and the walkway pole mounted HID fixtures will be retrofit with LED lamps.

#### ECM 3 - Water Conservation

- Replace urinals with high efficiency 0.125 gpf urinals, including china and piston flush valves.
- Retrofit faucets with 0.5 gpm vandal proof aerators.
- Replace shower heads with 1.5 gpm shower heads.
- Retrofit kitchen hand sinks with 1.5 gpm vandal proof aerators.
- Replace kitchen dish sprayers with 0.6 gpm sprayers.
- Install pedal valves at kitchen prep sinks and retrofit faucet with 1.5 gpm aerators.

#### ECM 4 - Upgrade, Expand, Commission and Retro-Commission BAS

- [REDACTED] will provide and install new panels and unitary controllers and replace space temperature sensors with new LCD sensors for certain [REDACTED]. The [REDACTED] will also replace all humidity, pressure, carbon dioxide transmitters, and other components at [REDACTED]. The upgraded control systems provided by [REDACTED] will implement a new HVAC occupancy schedule with new set points. Taxpayer shall only provide commissioning of [REDACTED] installation to ensure that the HVAC system and components operate as intended.

#### ECM 5 - SZ CV to SZ VAV AHU Conversion

- Taxpayer will convert the single zone constant volume air handling units to single zone variable air volume air handling units by installing new premium efficiency, inverter duty motors and variable frequency drives on the supply and return fans.

#### ECM 6 - Boiler Replacement

- Taxpayer will replace an existing [REDACTED] oil fired cast iron hot water boiler with a new propane fired high efficiency condensing hot water boiler at one of the [REDACTED]. The new boiler will be a 3,000 MBH propane-fired [REDACTED] hot water condensing boiler.

#### ECM 7 - Variable CHW Pumping Upgrades

- Taxpayer will install new chilled water pumps, premium efficiency inverter duty motors, and variable frequency drives and convert the existing chilled water systems to variable flow design.

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#### ECM 8 - Upgrade Cooling Tower

- Taxpayer will install a new premium efficiency inverter duty motor and variable frequency drive on a cooling tower fan at one of the ██████████.

#### ECM 9 - Demand Control Ventilation

- Taxpayer will implement carbon dioxide based demand controlled ventilation for certain air handling units serving many of the ██████████. A new demand control ventilation sequence utilizing the outside air dampers and carbon dioxide sensors will be installed.

#### ECM 10 - AHU Replacement

- Taxpayer will replace the existing air handling units serving the ██████████ at one ██████████ with new split system single zone constant volume units with direct expansion cooling and hot water heating.

Section 4.1. of the ESA, Implementation of the Work, states “[t]he [Taxpayer] shall perform or cause its subcontractors to perform the Work pursuant to this Agreement. Construction and installation shall proceed in accordance with the provisions contained in this Agreement and the Project Installation schedule.” “Schedule I: Construction and Installation Schedule” reflects the start date, finish date, and duration projected for each of the ECMs provided for each ██████████.

Section 4.5. of the ESA, Permits and Approvals, states “[t]he [Taxpayer] shall obtain and pay for all necessary permits and approvals for the design, installation and operation of the ECMs. . . . The Work shall conform to all applicable laws, regulations, and codes in effect at the time performed. The Taxpayer shall furnish ██████████] . . . copies of each permit or license required for performance of the Work under this Agreement before the Taxpayer commences that portion of Work.”

Section 4.12. of the ESA, Performance and Labor and Material Payment Bonds, “[t]he [Taxpayer] shall, prior to commencing the Project, deliver to the ██████████] a Performance Bond and a Labor and Material Payment Bond that conforms to the requirements of N.C. General Statute Chapter 44A, Article 3.”

Pursuant to Schedule M of the ESA, construction hard costs and the cost of project services such as the investment grade audit, engineering fees, construction management fees, system commissioning fees, Taxpayer’s markup, attorney fees, and performance and payment bond fees represent over 80% of the proposed final project cost paid to Taxpayer.

Schedule O, which lists the compensation to Taxpayer, reflects a monthly progress payment schedule. Taxpayer’s Attachment F, Invoice Number 37084A, provides an amount for and description of the work completed, payments applied to work completed, retainage (if applicable), and the balance due and payable.

### **Issue**

Is Taxpayer’s ESA a real property contract or a retail sale of repair, maintenance, and installation services to real property?

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### Applicable Statutes and References

Under Chapter 105 of the North Carolina General Statutes, Article 5 (“Article”) of the North Carolina Revenue Act (“Act”)<sup>1</sup> and N.C. Gen. Stat. § 105-164.1 *et. seq.*, Subchapter VIII: Local Government Sales and Use Tax, State, local, and applicable transit sales and use taxes are imposed on a retailer engaged in business in the State on the retailer’s net taxable sales or gross receipts of tangible personal property and certain services at the applicable State, applicable local, and applicable transit rates of sales and use tax.

N.C. Gen. Stat. § 105-164.3(171) defines the term “real property,” in part, as “[a]ny one or more of the following:

- a. Land.
- b. Building or structure on land.
- c. Permanent fixture on land. . . .”

N.C. Gen. Stat. § 105-164.3(173) defines the term “real property contract” as “[a] contract between a real property contractor and another person to perform a capital improvement to real property.”

N.C. Gen. Stat. § 105-164.3(175) defines the term “real property contractor,” in part, as “[a] person that contracts to perform a real property contract in accordance with [N.C. Gen. Stat. §] 105-164.4H. The term includes a general contractor, a subcontractor, or a builder.”

N.C. Gen. Stat. § 105-164.3(21) defines the term “capital improvement,” in part, as “[o]ne or more of the following:

- a. New construction, reconstruction, or remodeling.
- b. Performance of work that requires the issuance of a permit under the State Building Code, other than repair or replacement of electrical components, gas logs, water heater, and similar individual items that are not part of new construction, reconstruction, or remodeling.
- . . .
- d. Installation of equipment or a fixture that is attached to real property and that meets one or more of the following conditions:
  1. Is capitalized and depreciated under Generally Accepted Accounting Principles or International Financial Reporting Standards.
  2. Is depreciated under the Code.
  3. Is expensed under Section 179 of the Code.
- . . .
- f. Replacement or installation of a septic tank system, siding, roof, plumbing, electrical, commercial refrigeration, irrigation, sprinkler, or other similar system. The term does not include the repair, replacement, or installation of electrical or plumbing components, water heaters, gutters, and similar individual items that are not part of new construction, reconstruction, or remodeling.
- g. Replacement or installation of a heating or air conditioning unit or a heating, ventilation, or air conditioning system. The term does not include the repair, replacement, or installation of gas logs, water heaters, pool heaters, and similar individual items that are not part of new construction, reconstruction, or remodeling.
- . . .
- i. Services performed to resolve an issue that was part of a real property contract if the services are performed within six months of completion of the real property contract or, for new construction, within 12 months of the new structure being occupied for the first time.

<sup>1</sup> References to the Act and North Carolina General Statutes are based on the laws in effect as of the date of issuance of this private letter ruling except as otherwise noted herein.

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- ...
- k. An addition or alteration to real property that is permanently affixed or installed to real property and is not an activity listed in . . . [N.C. Gen. Stat. § 105.164.3](191) . . . as repair, maintenance, and installation services.”

N.C. Gen. Stat. § 105-164.3(185) defines the term “remodeling” as “[a] transaction comprised of multiple services performed by one or more persons to restore, improve, alter, or update real property that may otherwise be subject to tax as repair, maintenance, and installation services if separately performed. The term includes a transaction where the internal structure or design of one or more rooms or areas within a room or building are substantially changed. The term does not include a single service that is included in repair, maintenance, and installation services. The term does not include a transaction where the true purpose is repair, maintenance, and installation services no matter that another service included in repair, maintenance, and installation services is performed that is incidental to the true purpose of the transaction; examples include repair of sheetrock that includes applying paint, replacement of cabinets that includes installation of caulk or molding, and the installation of hardwood floors that includes installation of shoe molding.”

### **Ruling**

The term “capital improvement,” as defined in N.C. Gen. Stat. § 105-164.3(21), includes remodeling. N.C. Gen. Stat. § 105-164.3(184) provides, in part, that remodeling is “[a] transaction comprised of multiple services performed by one or more persons to restore, improve, alter, or update real property that may otherwise be subject to tax as repair, maintenance, and installation services if separately performed.” Based on the information and documentation furnished, Taxpayer’s ESA meets the definition of a capital improvement and Taxpayer meets the definition of a real property contractor as set forth in N.C. Gen. Stat. § 105-164.3(175). Therefore, Taxpayer’s ESA is a real property contract in accordance with N.C. Gen. Stat. § 105.164.3(173).

This ruling is based solely on the facts submitted to the Department of Revenue for consideration of the transactions described. If the facts and circumstances given are not accurate, or if they change, then the taxpayer requesting this ruling may not rely on it. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material aspect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that this document is not to be cited as precedent and that a change in statute, a regulation, or case law could void this ruling.

Issued on behalf of the Secretary of Revenue  
By the Sales and Use Tax Division