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# THE GENERAL STATUTES OF NORTH CAROLINA

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## 1983 CUMULATIVE SUPPLEMENT

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Annotated, under the Supervision of the Department of  
Justice, by the Editorial Staff of the Publishers

*Under the Direction of*  
D. P. HARRIMAN, S. C. WILLARD, W. L. JACKSON  
AND K. S. MAWYER

OCT 31 1983

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## Volume 2D

### 1979 Replacement

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Annotated through 303 S.E.2d 102. For complete scope of  
annotations, see scope of volume page.

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**Place in Pocket of Corresponding Volume of Main Set.  
This Supersedes Previous Supplement, Which  
May Be Retained for Reference Purposes.**

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## Scope of Volume

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### **Statutes:**

Permanent portions of the general laws enacted by the General Assembly through the 1983 Regular Session and the 1983 Extra Session affecting Chapters 97 through 105A of the General Statutes.

### **Annotations:**

Sources of the annotations to the General Statutes appearing in this volume are:

South Eastern Reporter 2nd Series through Volume 303, p. 102.  
Federal Reporter 2nd Series through Volume 707, p. 523.  
Bankruptcy Reports through Volume 29, p. 815.  
Federal Supplement through Volume 562, p. 911.  
Federal Rules Decisions through Volume 97, p. 544.  
Supreme Court Reporter through Volume 103, p. 2468.  
North Carolina Law Review through Volume 61, p. 744.  
Wake Forest Law Review through Volume 19, p. 150.  
Campbell Law Review through Volume 5, p. 262.  
Duke Law Journal through 1983, p. 195.  
North Carolina Central Law Journal through Volume 13, p. 282.  
Opinions of the Attorney General.



## Preface

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This Cumulative Supplement to Replacement Volume 2D contains the general laws of a permanent nature enacted by the General Assembly since publication of the replacement volume through the 1983 Regular Session and the 1983 Extra Session which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections except sections for which catchlines are carried for the purpose of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P. O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.



# The General Statutes of North Carolina

## 1983 Cumulative Supplement

### Volume 2D

#### Chapter 97.

#### Workers' Compensation Act.

##### Article 1.

##### Workers' Compensation Act.

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## ARTICLE 1.

*Workers' Compensation Act.*

## § 97-1. Short title.

**Cross References.** — As to application of this chapter to incapacitated State law-enforcement officers, see § 143-166.14.

**Legal Periodicals.** — For note discussing the nonexistence of a private right of action for retaliatory discharge resulting from pursuit of workers' compensation benefits, see 15 Wake Forest L. Rev. 139 (1979).

For note on workers' compensation and retaliatory discharge, see 58 N.C.L. Rev. 629 (1980).

For comment on injury by accident in workers' compensation, see 59 N.C.L. Rev. 175 (1980).

For a note on occupational disease under workers' compensation statute, see 16 Wake Forest L. Rev. 288 (1980).

For survey of 1980 administrative law, see 59 N.C.L. Rev. 1032 (1981).

## CASE NOTES

**Purpose of Act.** —

In accord with 3rd paragraph in original. See *Taylor v. J.P. Stevens & Co.*, 57 N.C. App. 643, 292 S.E.2d 277 (1982), modified, 307 N.C. 392, 298 S.E.2d 681 (1983).

The purpose of the Workers' Compensation Act is to furnish compensation for loss of earning capacity. *Wilhite v. Liberty Veneer Co.*, 47 N.C. App. 434, 267 S.E.2d 566, cert. granted, 301 N.C. 106, 273 S.E.2d 312 (1980), rev'd on other grounds, 303 N.C. 281, 278 S.E.2d 234 (1981).

The purpose of the Workers' Compensation Act is twofold. It was enacted to provide swift and sure compensation to injured workers without the necessity of protracted litigation. *Rorie v. Holly Farms Poultry Co.*, 306 N.C. 706, 295 S.E.2d 458 (1982).

**Constitutionality.** —

See *Sneed v. Carolina Power & Light Co.*, — N.C. App. —, 300 S.E.2d 563 (1983).

**The philosophy which supports, etc.** —

In accord with 1st paragraph in original. See *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 266 S.E.2d 760 (1980).

Workers' compensation laws were enacted to treat the cost of industrial accidents as a cost of production. *Daniels v. Swofford*, 55 N.C. App. 555, 286 S.E.2d 582 (1982).

**Doubtful Cases.** — In all cases of doubt, the intent of the Legislature regarding the operation or application of a particular provision is to be discerned from a consideration of the Workers' Compensation Act as a whole — its language, purposes and spirit. *Deese v. Southern Lawn & Tree Expert Co.*, 306 N.C. 275, 293 S.E.2d 140 (1982).

**Basis of Liability.** —

Workers' compensation laws were a statutory compromise, which assured workers' compensa-

tion for injuries arising out of and in the course of employment without their having to prove negligence on the part of the employer. In exchange for the employer's loss of common law defenses, however, the employee gave up his right to common-law verdicts. In effect, tort liability was replaced with no-fault liability. *Andrews v. Peters*, 55 N.C. App. 124, 284 S.E.2d 748 (1981), cert. denied, 305 N.C. 395, 290 S.E.2d 364 (1982).

**Construction.** —

In accord with 4th paragraph in original. *Deese v. Southern Lawn & Tree Expert Co.*, 306 N.C. 275, 293 S.E.2d 140 (1982); *Rorie v. Holly Farms Poultry Co.*, 306 N.C. 706, 295 S.E.2d 458 (1982).

In accord with 19th paragraph in original. See *Taylor v. J.P. Stevens & Co.*, 57 N.C. App. 643, 292 S.E.2d 277 (1982), modified, 307 N.C. 392, 298 S.E.2d 681 (1983).

Courts construe the Workers' Compensation Act liberally in favor of compensability. *Chandler v. Nello L. Teer Co.*, 53 N.C. App. 766, 281 S.E.2d 718 (1981), aff'd, 305 N.C. 292, 287 S.E.2d 890 (1982).

Liberality in construction of the Workers' Compensation Act should not extend beyond the clearly expressed language of its provisions, and the courts may not enlarge the ordinary meaning of the terms used by the Legislature or engage in any method of judicial legislation. *Deese v. Southern Lawn & Tree Expert Co.*, 306 N.C. 275, 293 S.E.2d 140 (1982).

The Workers' Compensation Act should be liberally construed to the end that benefits may not be denied on narrow or technical grounds, but at the same time, a court may not legislate under the guise of construing a statute liberally. *McCuiston v. Addressograph-Multigraph Corp.*, 59 N.C. App. 76, 295 S.E.2d

490 (1982), cert. granted, 307 N.C. 469, 299 S.E.2d 221 (1983).

The Workers' Compensation Act insures a limited and determinate liability for employers, and the court cannot legislate expanded liability under the guise of construing a statute liberally. *Rorie v. Holly Farms Poultry Co.*, 306 N.C. 706, 295 S.E.2d 458 (1982).

The workers' compensation statutes in North Carolina should be liberally construed to effect their purpose of compensating injured claimants and recovery should not be denied by a technical or narrow construction. *Donnell v. Cone Mills Corp.*, — N.C. App. —, 299 S.E.2d 436 (1983).

**Act Not Exclusive Remedy for Intentional Injury by Fellow Employee.** — North

Carolina's Workers' Compensation Act is not the exclusive remedy for an employee intentionally injured by a fellow employee. *Andrews v. Peters*, 55 N.C. App. 124, 284 S.E.2d 748 (1981), cert. denied, 305 N.C. 395, 290 S.E.2d 364 (1982).

**Cited in** *Wake County ex rel. Carrington v. Townes*, 53 N.C. App. 649, 281 S.E.2d 765 (1981); *Malloy v. Durham County Dep't of Social Servs.*, 58 N.C. App. 61, 293 S.E.2d 285 (1982); *Rutledge v. Tultex Corp./Kings Yarn*, — N.C. —, 301 S.E.2d 359 (1983); *Diaz v. United States Textile Corp.*, — N.C. App. —, 299 S.E.2d 843 (1983); *Weaver v. Swedish Imports Maintenance, Inc.*, — N.C. App. —, 301 S.E.2d 736 (1983).

## § 97-2. Definitions.

When used in this Article, unless the context otherwise requires —

- (2) **Employee.** — The term "employee" means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer, and as relating to those so employed by the State, the term "employee" shall include all officers and employees of the State, including such as are elected by the people, or by the General Assembly, or appointed by the Governor to serve on a per diem, part-time or fee basis, either with or without the confirmation of the Senate; as relating to municipal corporations and political subdivisions of the State, the term "employee" shall include all officers and employees thereof, including such as are elected by the people. The term "employee" shall include members of the North Carolina national guard, except when called into the service of the United States, and members of the North Carolina State guard, and members of these organizations shall be entitled to compensation for injuries arising out of and in the course of the performance of their duties at drill, in camp, or on special duty under orders of the Governor. The term "employee" shall include deputy sheriffs and all persons acting in the capacity of deputy sheriffs, whether appointed by the sheriff or by the governing body of the county and whether serving on a fee basis or on a salary basis, or whether deputy sheriffs serving upon a full-time basis or a part-time basis, and including deputy sheriffs appointed to serve in an emergency, but as to those so appointed, only during the continuation of the emergency. The sheriff shall furnish to the board of county commissioners a complete list of all deputy sheriffs named or appointed by him immediately after their appointment, and notify the board of commissioners of any changes made therein promptly after such changes are made. Any reference to an employee who has been injured shall, when the employee is dead, include also his legal representative, dependents, and other persons to whom compensation may be payable: Provided, further, that any employee as herein defined of a municipality, county, or of the State of North Carolina while engaged in the discharge of his official duty outside the jurisdictional or territorial limits of the municipality, county, or the State of North Carolina and while acting pursuant to

authorization or instruction from any superior officer, shall have the same rights under this Article as if such duty or activity were performed within the territorial boundary limits of his employer.

Every executive officer elected or appointed and empowered in accordance with the charter and bylaws of a corporation shall be considered as an employee of such corporation under this Article.

Any such executive officer of a corporation may, notwithstanding any other provision of this Article, be exempt from the coverage of the corporation's insurance contract by such corporation specifically excluding such executive officer in such contract of insurance and the exclusion to remove such executive officer from the coverage shall continue for the period such contract of insurance is in effect, and during such period such executive officers thus exempted from the coverage of the insurance contract shall not be employees of such corporation under this Article.

A county agricultural extension service employee holding an appointment as a member of the staff of the United States Department of Agriculture shall not be an employee of the county under this Article.

The term employee shall also include senior members of the Civil Air Patrol, 18 years of age or older, and currently certified pursuant to G.S. 143B-491(a) when performing duties in the course and scope of a State requested and approved mission pursuant to Article 11 of Chapter 143B.

Employee shall not include any person performing voluntary service as a ski patrolman who receives no compensation for such services other than meals or lodging or the use of ski tow or ski lift facilities or any combination thereof.

Any sole proprietor or partner of a business whose employees are eligible for benefits under this Article may elect to be included as an employee under the workers' compensation coverage of such business if he is actively engaged in the operation of the business and if the insurer is notified of his election to be so included. Any such sole proprietor or partner shall, upon such election, be entitled to employee benefits and be subject to employee responsibilities prescribed in this Article.

- (3) Employer. — The term "employer" means the State and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment and the legal representative of a deceased person or the receiver or trustee of any person. The board of commissioners of each county of the State, for the purposes of this law, shall be considered as "employer" of all deputy sheriffs serving within such county, or persons serving or performing the duties of a deputy sheriff, whether such persons are appointed by the sheriff or by the board of commissioners and whether serving on a fee basis or salary basis. Each county is authorized to insure its compensation liability for deputy sheriffs to the same extent it is authorized to insure other compensation liability for employees thereof.
- (6) Injury. — "Injury and personal injury" shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident. With respect to back injuries, however, where injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally

related to such incident. Injury shall include breakage or damage to eyeglasses, hearing aids, dentures, or other prosthetic devices which function as part of the body; provided, however, that eyeglasses and hearing aids will not be replaced, repaired, or otherwise compensated for unless injury to them is incidental to a compensable injury.

(1929, c. 120, s. 2; 1933, c. 448; 1939, c. 277, s. 1; 1943, c. 543; c. 672, s. 1; 1945, c. 766; 1947, c. 698; 1949, c. 399; 1953, c. 619; 1955, c. 644; c. 1026, s. 1; c. 1055; 1957, c. 95; 1959, c. 289; 1961, cc. 231, 235; 1967, c. 1229, s. 1; 1969, c. 206, s. 2; c. 707; 1971, c. 284, s. 1; c. 1231, s. 1; 1973, c. 521, ss. 1, 2; c. 763, ss. 1-3; c. 1291, s. 14; 1975, c. 266, s. 1; c. 284, ss. 2, 3; c. 288; c. 718, s. 3; c. 817, s. 1; 1977, c. 419; c. 893, s. 1; 1979, cc. 86, 374; c. 516, ss. 4, 5; c. 714, s. 3; 1981, c. 421, ss. 1, 2; 1983, c. 833.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amendment, effective July 1, 1981, and applicable to cases arising on and after that date, deleted a proviso near the middle of the fifth sentence of the first paragraph of subdivision (2), which read: "Provided, that the third and fourth sentences herein shall not apply to Alleghany, Avery, Bladen, Carteret, Cherokee, Gates, Hyde, Pender, Perquimans, Watauga and Wilkes Counties," and deleted a proviso from the end of the third sentence of subdivision (3), which read: "Provided, that the last two sentences herein shall not apply to Alleghany, Avery, Bladen, Carteret, Cherokee, Gates, Hyde, Pender, Perquimans, Union, Watauga and Wilkes Counties."

The 1983 amendment, effective July 20, 1983, added the present second sentence of subdivision (6) and deleted the former last sentence

of subdivision (6), which read "The Commissioner of Insurance shall hold a rate hearing, within 60 days of July 1, 1975, in order to make necessary rate adjustments."

**Legal Periodicals.** — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For comment on injury by accident in workers' compensation, see 59 N.C.L. Rev. 175 (1980).

For survey of 1980 law on evidence, see 59 N.C.L. Rev. 1173 (1981).

For survey of 1980 tort law, see 59 N.C.L. Rev. 1239 (1981).

For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

For note discussing the use of age, education, and work experience in determining disability in workmen's compensation cases, see 15 Wake Forest L. Rev. 570 (1979).

## CASE NOTES

### I. IN GENERAL.

#### Liberal Construction. —

In accord with 2nd paragraph in original. See *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 266 S.E.2d 760 (1980).

The legislature has provided that the Workers' Compensation Act shall be liberally construed but it does not permit either the commission or the courts to hurry evidence beyond the speed which its own force generates. *Weidle v. Cloverdale Ford*, 50 N.C. App. 555, 274 S.E.2d 263 (1981).

**Burden of Proving Claim Compensable.** See *Davis v. Raleigh Rental Center*, 58 N.C. App. 113, 292 S.E.2d 763 (1982).

The burden of proof of showing a disability is on the plaintiff. *Donnell v. Cone Mills Corp.*, — N.C. App. —, 299 S.E.2d 436 (1983).

**Applied** in *Development Assocs. v. Wake County Bd. of Adjustment*, 48 N.C. App. 541, 269 S.E.2d 700 (1980); *Hyatt v. Waverly Mills*, 56 N.C. App. 14, 286 S.E.2d 837 (1982); *Dowdy*

*v. Fieldcrest Mills, Inc.*, 59 N.C. App. 696, 298 S.E.2d 82 (1982).

**Quoted** in *Taylor v. J.P. Stevens & Co.*, 300 N.C. 94, 265 S.E.2d 144 (1980); *Hilliard v. Apex Cabinet Co.*, 54 N.C. App. 173, 282 S.E.2d 828 (1981); *McKee v. Crescent Spinning Co.*, 54 N.C. App. 558, 284 S.E.2d 175 (1981); *Cook v. Bladenboro Cotton Mills, Inc.*, — N.C. App. —, 300 S.E.2d 852 (1983).

**Stated** in *Thornton v. Thornton*, 45 N.C. App. 25, 262 S.E.2d 326 (1980); *Morrison v. Burlington Indus.*, 304 N.C. 1, 282 S.E.2d 458 (1981); *West v. Bladenboro Cotton Mills, Inc.*, — N.C. App. —, 302 S.E.2d 645 (1983).

**Cited** in *Morrison v. Burlington Indus.*, 47 N.C. App. 50, 266 S.E.2d 741 (1980); *Sparks v. Mountain Breeze Restaurant & Fish House, Inc.*, 55 N.C. App. 663, 286 S.E.2d 575 (1982); *Lankford v. Dacotah Cotton Mills*, 56 N.C. App. 250, 287 S.E.2d 471 (1982); *Harrell v. Yarns*, 56 N.C. App. 697, 289 S.E.2d 846 (1982); *Rutledge v. Tultex Corp./Kings Yarn*, — N.C. —, 301

S.E.2d 359 (1983); *Prevette v. Clark Equip. Co.*, — N.C. App. —, 302 S.E.2d 639 (1983).

## II. EMPLOYMENT; EMPLOYEE; EMPLOYER.

### A. Employment.

**Having five (now four) or more employees, etc. —**

In accord with 1st paragraph in original. See *Durham v. McLamb*, 59 N.C. App. 165, 296 S.E.2d 3 (1982).

Whether the employer had the number of employees required to subject him to the Workers' Compensation Act is a question of jurisdictional fact and the reviewing court is required to review and consider the evidence and make an independent determination. *Durham v. McLamb*, 59 N.C. App. 165, 296 S.E.2d 3 (1982).

**The term "regularly employed". —**

In accord with 1st paragraph in original. See *Durham v. McLamb*, 59 N.C. App. 165, 296 S.E.2d 3 (1982).

**Number of workers on the job site on the date of injury**, standing alone, is not determinative of the issue. If the defendant had four or more "regularly employed" employees, the fact that he fell below the minimum requirement on the actual date of injury would not preclude coverage. *Durham v. McLamb*, 59 N.C. App. 165, 296 S.E.2d 3 (1982).

**Full-Time Employment.** — Employees who are employed in distributive education programs may not be fairly and justly classified as full-time for purposes of the Workers' Compensation Act. *Mabry v. Bowers Implement Co.*, 48 N.C. App. 139, 269 S.E.2d 165 (1980).

### B. Employee.

#### 1. In General.

**Claimant Has Burden of Proving Employer-Employee Relationship.** — In order to bring himself within the coverage of the Workers' Compensation Act, the claimant has the burden of proving that the employer-employee relationship existed. *Lloyd v. Jenkins Context Co.*, 46 N.C. App. 817, 266 S.E.2d 35 (1980).

A claimant who seeks to avail himself of the Workers' Compensation Act has the burden of proving that the employer-employee relationship existed at the time of the injury. *Durham v. McLamb*, 59 N.C. App. 165, 296 S.E.2d 3 (1982).

**Intentional Injury Inflicted by Supervisor after Resignation.** — Where plaintiff sought damages for injuries intentionally inflicted by supervisor immediately after she had orally tendered her resignation, as a matter of law at the time of the alleged incident plaintiff was still an employee. *Daniels v. Swofford*, 55 N.C. App. 555, 286 S.E.2d 582 (1982).

## 2. Casual Employees; Employment in the Course of Trade, etc.

**Employment Covered Despite Its Casual Nature.** — An accident is compensable if it happens in employment incident to the proper operation of a business although the employment is casual. *Boyd v. Mitchell*, 48 N.C. App. 219, 268 S.E.2d 252 (1980).

## 3. Employees and Independent Contractors.

**The lessor-driver, under a trip-lease agreement with an interstate commerce carrier**, is deemed to be an employee of the carrier, for workers' compensation purposes, while operating the equipment under the carrier's Interstate Commerce Commission authority. *Smith v. Central Transp.*, 51 N.C. App. 316, 276 S.E.2d 751 (1981).

**Estoppel to Deny Employee Relationship.** — Where a contractor and subcontractor agreed that members of the subcontractor's work crew would be considered as "employees" of the contractor while working on a highway construction project, the contractor was reimbursed by the subcontractor for wages it paid to the crew and for workers' compensation insurance premiums it paid on those wages, a member of the subcontractor's work crew was killed while working on the highway project, and the Industrial Commission found that decedent was in fact an employee of the subcontractor, the contractor's workers' compensation insurance carrier was estopped to deny that it was liable for a portion of the workers' compensation benefits due because of the employee's death if it accepted premiums for workers' compensation insurance on the deceased employee. *Britt v. Colony Constr. Co.*, 35 N.C. App. 23, 240 S.E.2d 479 (1978).

While the evidence in a workers' compensation proceeding would have supported the Industrial Commission's conclusion that defendant insurer was estopped to deny that a pulpwood cutter was acting as an employee of the two defendant woodyards at the time of his death by accident while cutting pulpwood, the Commission's findings of fact were insufficient to support such conclusion, and the proceeding was therefore remanded for further findings of fact and conclusions of law based on the record. *Allred v. Piedmont Woodyards, Inc.*, 32 N.C. App. 516, 232 S.E.2d 879 (1977).

## 4. State and Municipal Employees.

**CETA Employee.** — Where a CETA employee would not otherwise be protected by workers' compensation insurance for a work-related injury, the state governmental unit which hired him and paid the required premiums would be estopped to deny liability therefor, as would its insurance carrier which

accepted payment of those premiums. *Godley v. County of Pitt*, 306 N.C. 357, 293 S.E.2d 167 (1982).

### III. AVERAGE WEEKLY WAGES.

**Basis for Compensation for Death of Minor.** — Under subdivision (5) of this section, compensation for the death of a minor employee must be based on the average weekly wage of adults employed in a similar class of work by the same employer to which decedent would probably have been promoted had he not been killed, if such method can be used, and it is only when such method cannot be used that compensation may be based upon a wage sufficient to yield the maximum weekly compensation benefit. *Hensley v. Caswell Action Comm., Inc.*, 296 N.C. 527, 251 S.E.2d 399 (1979).

**Averaging Full- and Part-Time Work Weeks.** — The Industrial Commission erred in determining a deceased minor employee's average weekly wage on the basis of 11 weeks during the summer when he worked full-time, and the commission should have averaged the 11 weeks of full-time with the 41 weeks of part-time employment contemplated in his distributive education job at the undisputed hourly wage rate of \$2.65 in order to reach a result fair and just to both the employee and employer. *Mabry v. Bowers Implement Co.*, 48 N.C. App. 139, 269 S.E.2d 165 (1980).

**Wages of Pulpwood Cutter Assisted Part-Time.** — The Industrial Commission erred in determining a pulpwood cutter's average weekly wage based on all of the proceeds of sales of pulpwood to two woodyards where the evidence showed that the cutter was assisted in his work part of the time by his two sons and that they received part of the proceeds from the sales of pulpwood for their labor. *Allred v. Piedmont Woodyards, Inc.*, 32 N.C. App. 516, 232 S.E.2d 879 (1977).

### IV. INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

#### A. In General.

**The threefold conditions antecedent, etc.** —

In accord with 1st paragraph in original. See *King v. Exxon Co.*, 46 N.C. App. 750, 266 S.E.2d 37 (1980).

In accord with 8th paragraph in original. See *Hollar v. Montclair Furn. Co.*, 48 N.C. App. 489, 269 S.E.2d 667 (1980).

**Reasonable Relationship to Employment Sufficient.** — An appellate court is justified in upholding a compensation award if the accident is fairly traceable to the employment as a contributing cause or if any reasonable relationship to employment exists. *Hoffman v.*

*Ryder Truck Lines*, 306 N.C. 502, 293 S.E.2d 807 (1982).

**Expert Testimony.** — Where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury. *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 265 S.E.2d 389 (1980).

**Standard of Review on Appeal.** — Whether an injury arose out of and in the course of employment is a mixed question of law and fact, and where there is evidence to support the commissioner's findings in this regard, the court is bound by those findings. *Barham v. Food World, Inc.*, 300 N.C. 329, 266 S.E.2d 676, rehearing denied, 300 N.C. 562, 270 S.E.2d 105 (1980).

#### B. Accident.

**An injury, in order to be compensable, etc.** —

In accord with 4th paragraph in original. See *Norris v. Kivettco, Inc.*, 58 N.C. App. 376, 293 S.E.2d 594 (1982).

In accord with 5th paragraph in original. See *Norris v. Kivettco, Inc.*, 58 N.C. App. 376, 293 S.E.2d 594 (1982).

To be compensable, the accident need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence. *Pittman v. Twin City Laundry & Cleaners*, — N.C. App. —, 300 S.E.2d 899 (1983).

The accident must be a separate event preceding and causing the injury. *Davis v. Raleigh Rental Center*, 58 N.C. App. 113, 292 S.E.2d 763 (1982).

Under the Workers' Compensation Act, an injury arising out of and in the course of employment is compensable only if it is caused by an accident. *Davis v. Raleigh Rental Center*, 58 N.C. App. 113, 292 S.E.2d 763 (1982).

**Accident Having Reasonable, etc.** —

Some risk inherent to the employment must be a contributing proximate cause of the injury and the risk must be enhanced by the employment and one to which the worker would not have been equally exposed apart from the employment. *Pittman v. Twin City Laundry & Cleaners*, — N.C. App. —, 300 S.E.2d 899 (1983).

**Accident and injury are considered separate, etc.** —

In accord with 2nd paragraph in original. See *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 264 S.E.2d 360 (1980).

In accord with 3rd paragraph in original. See *Reams v. Burlington Indus.*, 42 N.C. App. 54, 255 S.E.2d 586 (1979).

In accord with 4th paragraph in original. See *Reams v. Burlington Indus.*, 42 N.C. App. 54, 255 S.E.2d 586 (1979).

**"Accident" Defined. —**

In accord with 1st paragraph in original. See *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 264 S.E.2d 360 (1980); *Gladson v. Piedmont Stores/Scotties Dist. Drug Store*, 57 N.C. App. 579, 292 S.E.2d 18, cert. denied, 306 N.C. 556, 294 S.E.2d 370 (1982).

In accord with 2nd paragraph in original. See *Reams v. Burlington Indus.*, 42 N.C. App. 54, 255 S.E.2d 586 (1979); *Norris v. Kivettco, Inc.*, 58 N.C. App. 376, 293 S.E.2d 594 (1982).

The North Carolina Supreme Court has defined the term "accident" as used in the Workers' Compensation Act as an unlooked for and untoward event which is not expected or designed by the person who suffers the injury. *Adams v. Burlington Indus., Inc.*, — N.C. App. —, 300 S.E.2d 455 (1983).

The term "accident," under this Chapter, is an unlooked for and untoward event, and a result produced by a fortuitous cause. *Davis v. Raleigh Rental Center*, 58 N.C. App. 113, 292 S.E.2d 763 (1982).

"Accident" has been defined as an unlooked for and untoward event which is not expected or designed by the person who suffers the injury. Whether or not the statutory requirements of arising out of and in the course of the employment are met is a mixed question of law and fact. *Diaz v. United States Textile Corp.*, — N.C. App. —, 299 S.E.2d 843 (1983).

**Accident involves the interruption, etc. —**

In accord with 7th paragraph in original. See *King v. Exxon Co.*, 46 N.C. App. 750, 266 S.E.2d 37 (1980).

In accord with 1st paragraph in original. See *Gladson v. Piedmont Stores/Scotties Dist. Drug Store*, 57 N.C. App. 579, 292 S.E.2d 18, cert. denied, 306 N.C. 556, 294 S.E.2d 370 (1982); *Davis v. Raleigh Rental Center*, 58 N.C. App. 113, 292 S.E.2d 763 (1982); *Norris v. Kivettco, Inc.*, 58 N.C. App. 376, 293 S.E.2d 594 (1982).

The elements of an accident are the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences. *Adams v. Burlington Indus., Inc.*, — N.C. App. —, 300 S.E.2d 455 (1983).

To justify an award of compensation, injury must involve more than the carrying on of usual and customary duties in the usual way. *Davis v. Raleigh Rental Center*, 58 N.C. App. 113, 292 S.E.2d 763 (1982).

**Unusualness and unexpectedness are the essence of an accident.** *Davis v. Raleigh Rental Center*, 58 N.C. App. 113, 292 S.E.2d 763 (1982).

**Filling in for Absent Employee Not an Interruption. —** Evidence was sufficient to

support a finding by the Industrial Commission that there was no interruption of plaintiff's work routine or the introduction of some new circumstance not a part of the usual work routine, the fact that plaintiff was filling in for absent employees and therefore engaged in a greater volume of lifting than was her ordinarily assigned task not rendering her performance at the time of the injury other than a part of the usual work routine. *Dyer v. Mack Foster Poultry & Livestock, Inc.*, 50 N.C. App. 291, 273 S.E.2d 321 (1981).

**Lifting Heavier Object Than Usual. —** Where plaintiff's work routine, the lifting of lighter crates, was interrupted by introduction of a crate heavier than expected and heavier than usual, the commission was warranted in concluding as a matter of law that plaintiff suffered an injury "by accident." *Gladson v. Piedmont Stores/Scotties Dist. Drug Store*, 57 N.C. App. 579, 292 S.E.2d 18, cert. denied, 306 N.C. 556, 294 S.E.2d 370 (1982).

**There must be competent evidence to support the inference that the accident in question resulted in the injury complained of, i.e., some evidence that the accident at least might have or could have produced the particular disability in question.** *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 265 S.E.2d 389 (1980).

**Injury While Performing Work in Usual Way Is Not Accident. —** If the employee is performing his regular duties in the usual and customary manner, and is injured, there is no "accident" and the injury is not compensable. *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 264 S.E.2d 360 (1980).

An injury which occurs under normal work conditions is not considered an accident arising out of employment, and work conditions may be considered normal despite the presence of changed circumstances. *Trudell v. Seven Lakes Heating & Air Conditioning Co.*, 55 N.C. App. 89, 284 S.E.2d 538 (1981).

**An assault is an accident, etc. —**

An unexpected assault may be considered an accident despite its characterization as an intentional act. *Daniels v. Swofford*, 55 N.C. App. 555, 286 S.E.2d 582 (1982).

**Physical exertion may in and of itself be the precipitating cause of an injury by accident within the meaning of this section.** *Hollar v. Montclair Furn. Co.*, 48 N.C. App. 489, 269 S.E.2d 667 (1980).

**Evidence of the necessity of extreme exertion is sufficient to bring into an event causing an injury the necessary element of unusualness and unexpectedness from which accident may be inferred.** *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 264 S.E.2d 360 (1980).

Where it was clear from the evidence in a workmen's compensation case that acute

myocardial infarction suffered by plaintiff deputy sheriff occurred suddenly and immediately after the foot chase of a suspect, and that it was the overexertion experienced during the foot chase that caused the injury to his heart, it was not necessary for plaintiff to show that the overexertion which was the cause of his injury occurred while he was engaged in some unusual activity, since it was the extent and nature of the exertion that classified the resulting injury to the plaintiff's heart as an injury by accident within the meaning of this section. *King v. Forsyth County*, 45 N.C. App. 467, 263 S.E.2d 283 (1980).

**Injury Resulting from Accident — Examples.** — The Industrial Commission properly determined that plaintiff suffered an injury by "accident" where the evidence supported findings by the commission that plaintiff, in the course of her duties as a knitter, was pulling a rod out of a roll of cloth; this activity was a part of plaintiff's regular and customary job; on this occasion, the withdrawal of the rod was more difficult than usual because the roll of cloth was "extra tight"; and the extraordinary effort plaintiff exerted in her attempt to withdraw the rod injured her back, causing a ruptured intervertebral disc. *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 264 S.E.2d 360 (1980).

Damage to heart tissue clearly precipitated or caused by "overexertion" constitutes an injury by accident. *Weaver v. Swedish Imports Maintenance, Inc.*, — N.C. App. —, 301 S.E.2d 736 (1983).

#### **Injury Not Resulting from Accident. —**

Under the evidence, the Industrial Commission properly determined that the death of a traveling mechanic from the rupture of a congenital aneurysm in the left carotid artery did not result from an accident arising out of and in the course of his employment. *King v. Exxon Co.*, 46 N.C. App. 750, 266 S.E.2d 37 (1980).

### **C. Arising Out of and in the Course of Employment.**

#### **1. In General.**

##### **Injuries by accident arising out of, etc. —**

In accord with 4th paragraph in original. See *Barham v. Food World, Inc.*, 300 N.C. 329, 266 S.E.2d 676, rehearing denied, 300 N.C. 562, 270 S.E.2d 105 (1980).

##### **"Out of and in the Course of" Construed. —**

In accord with 1st paragraph in original. See *Long v. Asphalt Paving Co.*, 47 N.C. App. 564, 268 S.E.2d 1 (1980); *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 293 S.E.2d 196 (1982); *Powers v. Lady's Funeral Home*, 306 N.C. 728, 295 S.E.2d 473 (1982).

##### **"Out of" and "in the Course of" Distinguished. —**

In accord with 6th paragraph in original. See

*Powers v. Lady's Funeral Home*, 57 N.C. App. 25, 290 S.E.2d 720, rev'd on other grounds, 306 N.C. 728, 295 S.E.2d 473 (1982).

The phrases "arising out of" and "in the course of" in subdivision (6) of this section are not synonymous and both must be fulfilled in order for the plaintiff to recover. *Brown v. Jim Brown's Serv. Station*, 45 N.C. App. 255, 262 S.E.2d 700 (1980).

The term "arising out of" refers to the origin or causal connection of the injury to the employment; the phrase "in the course of" refers to the time, place and circumstances under which the injury by accident occurs. *Barham v. Food World, Inc.*, 300 N.C. 329, 266 S.E.2d 676, rehearing denied, 300 N.C. 562, 270 S.E.2d 105 (1980).

The two requirements for compensability of "arising out of" and "in the course of" employment are separate and distinct, and both must be satisfied in order to render an injury compensable. *Barham v. Food World, Inc.*, 300 N.C. 329, 266 S.E.2d 676, rehearing denied, 300 N.C. 562, 270 S.E.2d 105 (1980).

While often interrelated, the concepts of "arising out of" and "in the course of" employment are distinct elements, both of which must be established before compensation may be allowed. The term "arising out of" refers to the origin or cause of the accident, and the term "in the course of" refers to the time, place, and circumstances of the accident. *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 293 S.E.2d 196 (1982).

##### **"In the Course of" the Employment Construed. —**

In accord with 3rd paragraph in original. See *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 293 S.E.2d 196 (1982).

In accord with 4th paragraph in original. See *Brown v. Jim Brown's Serv. Station*, 45 N.C. App. 255, 262 S.E.2d 700 (1980); *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 293 S.E.2d 196 (1982).

In accord with 12th paragraph in original. See *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 293 S.E.2d 196 (1982).

The phrase "in the course of" employment deals with time, place, and circumstance. "Time and Place" do not necessarily mean the regular hours of employment and on the premises of the employer. If the employee is doing work at the direction and for the benefit of the employer, the time and place of work are for the benefit of the employer and a part of the employment of the employee. This satisfies the condition of time and place although the work is done off the premises of the employer and after regular working hours. In respect to "circumstance," compensable accidents are those sustained while the employee is doing what a man so employed may reasonably do within a time he is employed, and at a place where he may rea-

sonably be during the time to do that thing. *Brown v. Jim Brown's Serv. Station*, 45 N.C. App. 255, 262 S.E.2d 700 (1980).

Whether an injury occurs in the course of the employment depends upon the time, place and circumstances of the accident. *Powers v. Lady's Funeral Home*, 57 N.C. App. 25, 290 S.E.2d 720, rev'd on other grounds, 306 N.C. 728, 295 S.E.2d 473 (1982).

Where the evidence shows that the injury occurred during the hours of employment, at the place of employment, and while the claimant was actually in the performance of the duties of the employment, the injury is in the course of the employment. *Pittman v. Twin City Laundry & Cleaners*, — N.C. App. —, 300 S.E.2d 899 (1983).

With respect to time, the course of employment begins a reasonable time before work begins and continues for a reasonable time after work ends. *Pittman v. Twin City Laundry & Cleaners*, — N.C. App. —, 300 S.E.2d 899 (1983).

Where the employee is engaged in activities that he is authorized to undertake and that are calculated to further, directly or indirectly, the employer's business, the circumstances are such as to be within the course of the employment. *Pittman v. Twin City Laundry & Cleaners*, — N.C. App. —, 300 S.E.2d 899 (1983).

#### **"Arising Out of" Defined. —**

In accord with 10th paragraph in original. See *Powers v. Lady's Funeral Home*, 57 N.C. App. 25, 290 S.E.2d 720, rev'd on other grounds, 306 N.C. 728, 295 S.E.2d 473 (1982).

In accord with 17th paragraph in original. See *Brown v. Jim Brown's Serv. Station*, 45 N.C. App. 255, 262 S.E.2d 700 (1980).

In accord with 18th paragraph in original. See *Powers v. Lady's Funeral Home*, 57 N.C. App. 25, 290 S.E.2d 720, rev'd on other grounds, 306 N.C. 728, 295 S.E.2d 473 (1982).

An accident arises out of employment when it occurs while the employee is engaged in some activity or duty which he is authorized to undertake, and which is calculated to further, indirectly or directly, the employer's business. *Smith v. Central Transp.*, 51 N.C. App. 316, 276 S.E.2d 751 (1981).

The term "arising out of" requires an employee to demonstrate a causal connection between the injury complained of and an accident which occurred in the course of employment. *Buck v. Procter & Gamble Mfg. Co.*, 52 N.C. App. 88, 278 S.E.2d 268 (1981).

Where the conditions and obligations of the employment required the claimant to be at a place where the accident occurred, subjecting him to additional risks incident thereto, the injury arose out of the employment. *Powers v.*

*Lady's Funeral Home*, 306 N.C. 728, 295 S.E.2d 473 (1982).

For an accident to "arise out of" the employment, it is necessary that the conditions or obligations of the employment put the employee in the position or at the place where the accident occurs. *Pittman v. Twin City Laundry & Cleaners*, — N.C. App. —, 300 S.E.2d 899 (1983).

There must be some causal relationship between the injury and the employment before the resulting disability or disablement can be said to arise out of the employment. *Pittman v. Twin City Laundry & Cleaners*, — N.C. App. —, 300 S.E.2d 899 (1983).

The term "arising out of" refers to the origin or causal connection of the accident to the employment and the phrase "in the course of" refers to the time, place and circumstances under which the accident occurred. *Pittman v. Twin City Laundry & Cleaners*, — N.C. App. —, 300 S.E.2d 899 (1983).

#### **The test for determining, etc. —**

Where a claimant's right to recovery is based on an injury by accident, the employment need not be the sole causative force to render the injury compensable. *Walston v. Burlington Indus.*, 49 N.C. App. 301, 271 S.E.2d 516 (1980), cert. granted, 302 N.C. 221, 277 S.E.2d 71 (1981), rev'd on other grounds, 304 N.C. 670, 285 S.E.2d 822 (1982).

**Must Be Acting for Employer's Benefit at Time of Accident. —** Compensability of a claim basically turns upon whether or not the employee was acting for the benefit of his employer to any appreciable extent when the accident occurred. Such a determination depends largely upon the unique facts of each particular case, and, in close cases, the benefit of the doubt concerning this issue should be given to the employee in accordance with the established policy of liberal construction and application of the Workers' Compensation Act. *Hoffman v. Ryder Truck Lines*, 306 N.C. 502, 293 S.E.2d 807 (1982).

**Deficiencies in One Factor May Be Made Up by the Other. —** Since the terms of the Workers' Compensation Act should be liberally construed in favor of compensation, deficiencies in one factor are sometimes allowed to be made up by strength in the other. *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 293 S.E.2d 196 (1982).

#### **Mixed Question of Law and Fact. —**

In accord with 1st paragraph in original. See *Long v. Asphalt Paving Co.*, 47 N.C. App. 564, 268 S.E.2d 1 (1980).

Whether an accident grew out of the employment is a mixed question of law and fact which the court has the right to review on appeal. If

the detailed findings of fact force a conclusion opposite that reached by the commission, it is the duty of the court to reverse the commission. *Warren v. City of Wilmington*, 43 N.C. App. 748, 259 S.E.2d 786 (1979).

Whether injury arose out of and in the course of employment is a mixed question of fact and law, and where there is evidence to support the commission's findings, the Court of Appeals is bound by them. *Hemric v. Reed & Prince Mfg. Co.*, 54 N.C. App. 314, 283 S.E.2d 436 (1981), cert. denied, 304 N.C. 726, 288 S.E.2d 806 (1982).

Whether an injury arose out of and in the course of employment is a mixed question of law and fact, and where there is evidence to support the Commissioner's findings in this regard, the appellate court is bound by those findings. *Hoffman v. Ryder Truck Lines*, 306 N.C. 502, 293 S.E.2d 807 (1982).

The issue of whether a particular accident arises out of and in the course of employment is a mixed question of fact and law, and appellate review is limited on appeal to the question of whether the findings and conclusions are supported by competent evidence. *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 293 S.E.2d 196 (1982).

**Unexplained Injury Where Performance of Duties Is Only Active Force Involved.** — Where the cause of plaintiff's fall was unknown, but the only active force involved was plaintiff's exertion in the performance of his duties, the court gave effect to the liberal intent of the law by finding the accident to have arisen out of plaintiff's employment. *Slizewski v. International Seafood, Inc.*, 46 N.C. App. 228, 264 S.E.2d 810 (1980).

**Injuries to Trucker Preparing Truck for Job.** — Injuries to an owner-operator of a truck leased to an Interstate Commerce Commission franchise holder arose out of and in the course of employment where the plaintiff accepted the offer of a job driving from Greensboro to San Francisco, part of the duties of his employment was to present the tractor-trailer in condition to make the trip, and plaintiff was injured while preparing the truck. *Thompson v. Refrigerated Transp. Co.*, 32 N.C. App. 693, 236 S.E.2d 312 (1977).

## 2. Origin and Cause of Accident.

### a. Risks Incident to the Employment Generally.

**Nurse Turning Obese Patient.** — Plaintiff's injury suffered during the course of her employment was not the result of an accident within the meaning of subdivision (6) of this section where the injury occurred while plaintiff nurse was turning an unconscious, obese patient, where turning patients was part of plaintiff's job, and there was no evidence that the hospital room and its condition were any

different than plaintiff was used to working in and the patient, although obese, did not present an exceptional condition to plaintiff. *Artis v. N.C. Baptist Hosps.*, 44 N.C. App. 64, 259 S.E.2d 789 (1979).

### b. Falls.

#### When Fall Constitutes, etc. —

In accord with 2nd paragraph in original. See *Hollar v. Montclair Furn. Co.*, 48 N.C. App. 489, 269 S.E.2d 667 (1980).

**There is a clear line of distinction in fall cases:** (1) where the injury is clearly attributable to an idiopathic condition of the employee, with no other factors intervening or operating to cause or contribute to the injury, no award should be made; (2) where the injury is associated with any risk attributable to the employment, compensation should be allowed, even though the employee may have suffered from an idiopathic condition which precipitated or contributed to the injury. *Hollar v. Montclair Furn. Co.*, 48 N.C. App. 489, 269 S.E.2d 667 (1980).

### d. Street and Highway Accidents.

**Employer-Owned Road with Risks Not Different from Highway.** — Plaintiffs were not injured by accident arising out of and in the course of their employment when they were injured in a collision between two automobiles driven by fellow employees while they were leaving work on a two mile long private road maintained by the employer to provide ingress to and egress from the employer's plant where defendants, in driving plaintiffs home pursuant to a private arrangement, were not performing assigned duties for their employer; the accident occurred one and one-half miles from the employer's plant and parking lot on a road which was designed and constructed like a public highway; and the risks the employees were exposed to on the private road were not materially different from those encountered on a public highway. *Strickland v. King*, 293 N.C. 731, 239 S.E.2d 243 (1977).

**Teacher Killed in Accident at End of School Day.** — In an action to recover death benefits for the death of a school teacher which occurred when she backed her car, at the end of the school day, into the path of a truck, evidence and findings that the deceased was required as part of her duties to visit students in their homes after school hours, and that she was also required from time to time to purchase incidental supplies at retail stores for use in her class, along with related evidence and findings, presented nothing more than a scenario of what the deceased might do on a given day, and was not sufficient to support a finding that the deceased was performing one of the duties of her employment at the time of the accident. *Franklin v. Wilson County Bd. of Educ.*, 29 N.C. App. 491, 224 S.E.2d 657 (1976).

**Injury in Public Street During Fatigue Break.** — Claimant's injury by accident did not arise out of her employment where claimant left her employer's premises during a fatigue break and walked down a public street to where oil tanks for the use of defendant employer were being buried in the street, and claimant there stumbled over a cement block and fell in the street, injuring her hip and back. *Smith v. Dacotah Cotton Mills, Inc.*, 31 N.C. App. 687, 230 S.E.2d 772 (1976).

#### e. Assaults and Fights.

##### No Compensation Where Cause of Assault Is Personal. —

Injury is not compensable when it is inflicted in an assault upon an employee by an outsider as the result of a personal relationship between them, so that the attack was not created by and not reasonably related to the employment; to be compensable, the assault must have had such a connection with the employment that it can be found logically that the nature of the employment created the risk of the attack. *Hemric v. Reed & Prince Mfg. Co.*, 54 N.C. App. 314, 283 S.E.2d 436 (1981), cert. denied, 304 N.C. 726, 288 S.E.2d 806 (1982).

**Employer's Knowledge of Threats Irrelevant.** — Where employee is injured in the course of employment by an outsider because of hate, jealousy, or revenge based on a personal relationship, fact that the employer has knowledge of prior threats of death or bodily harm does not result in the injury's arising out of the employment; to allow compensation under such circumstances would have the practical effect of placing on the employer the duty of yielding to such threats of violence and terminating the employment of any worker so threatened, which would saddle the employer with a grossly unfair burden and the employee, in many cases, with an unjust job termination. *Hemric v. Reed & Prince Mfg. Co.*, 54 N.C. App. 314, 283 S.E.2d 436 (1981), cert. denied, 304 N.C. 726, 288 S.E.2d 806 (1982).

**Shooting by Boyfriend of Coworker.** — Injuries received by plaintiff at place of employment when the boyfriend of a coworker shot both plaintiff and coworker did not arise out of his employment where the assault resulted from the personal relationship between coworker and her boyfriend and was not created by or reasonably related to the employment, notwithstanding plaintiff was present in the office in which the shooting occurred because he had been instructed to keep a record of coworker's hours. *Hemric v. Reed & Prince Mfg. Co.*, 54 N.C. App. 314, 283 S.E.2d 436 (1981), cert. denied, 304 N.C. 726, 288 S.E.2d 806 (1982).

#### f. Horseplay.

##### Death by Drowning Held Compensable.

— The death of a 14-year-old employee of a sanitary district by drowning while he was attempting to wade across a reservoir to complete his work of cutting weeds on the side arose out of and in the course of his employment, although he had received general instructions at an earlier time not to go into the water, where the place at which he stepped into the water was shallow and the danger was not so obvious, and decedent's actions were thus not so extreme as to break the causal connection between his employment and his death. *Hensley v. Caswell Action Comm., Inc.*, 296 N.C. 527, 251 S.E.2d 399 (1979).

##### Death by Drowning Held Not Compensable.

— The death of a 15-year-old laborer by drowning while swimming in a lake on his employer's premises during his lunch hour when the lifeguard was not on duty did not arise out of and in the course of his employment where all the evidence showed that deceased was acting in contravention of specific instructions from his employer and that he was engaged in an independent recreational activity totally unrelated to his work of cutting grass. *Martin v. Bonclarken Ass'y*, 296 N.C. 540, 251 S.E.2d 403 (1979).

**Thrill seeking** which bears no conceivable relation to accomplishing the job for which the employee was hired moves the employee from the scope of his employment. *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 293 S.E.2d 196 (1982).

#### 3. Time, Place and Circumstances of Accident.

##### b. Injuries While Going to and from Work.

###### (1) General Rule.

##### Injury Suffered Going to or Returning from Work. —

In accord with 1st paragraph in original. See *Robertson v. Shepherd Constr. Co.*, 44 N.C. App. 335, 261 S.E.2d 16 (1979), cert. denied, 299 N.C. 545, 265 S.E.2d 405 (1980); *Barham v. Food World, Inc.*, 300 N.C. 329, 266 S.E.2d 676, rehearing denied, 300 N.C. 562, 270 S.E.2d 105 (1980); *Powers v. Lady's Funeral Home*, 306 N.C. 728, 295 S.E.2d 473 (1982).

##### Where Going to and from Meetings Part of Duties.

— Plaintiff's accident on a city street as she was returning home to write a report about a work-related meeting she had just attended was an accident in the course of her employment, where going to and from the meetings was a part of plaintiff's job duties for which she was paid the same as when actually in the office or at community meetings. *Warren v. City of Wilmington*, 43 N.C. App. 748, 259 S.E.2d 786 (1979).

**As to statement and application of "dual purpose rule,"** see *Felton v. Hospital Guild*, 57 N.C. App. 33, 291 S.E.2d 158, aff'd by divided S. Ct. as law of case but without precedential value, 307 N.C. 121, 296 S.E.2d 297 (1982).

### (2) Special Errand.

**Exception to General Rule.** — The special errand exception to the "coming and going" rule is no more than that — an exception to the general rule that accidents occurring while the employee is in transit to and from work are not compensable. Therefore the special errand doctrine does not transform all employees covered by the Workers' Compensation Act into absolute insurers of the safety of employees called away on some special mission. *Powers v. Lady's Funeral Home*, 57 N.C. App. 25, 290 S.E.2d 720, rev'd on other grounds, 306 N.C. 728, 295 S.E.2d 473 (1982).

**Employee on Special Errand Covered Portal to Portal.** — Equally as well recognized as the general rule as to injuries suffered going to or from work is the "special errand" exception, which permits coverage of the employee from "portal to portal." *Powers v. Lady's Funeral Home*, 306 N.C. 728, 295 S.E.2d 473 (1982).

**As to statement and application of "special errand rule,"** see *Felton v. Hospital Guild*, 57 N.C. App. 33, 291 S.E.2d 158, aff'd by divided S. Ct. as law of case but without precedential value, 307 N.C. 121, 296 S.E.2d 297 (1982).

### (3) On Employer's Premises.

**Injury on Employer's Premises May Be Compensable.** —

In accord with 3rd paragraph in original. See *Barham v. Food World, Inc.*, 45 N.C. App. 409, 263 S.E.2d 285 (1980).

Employee injured while traveling to and from his employment on the employer's premises is covered by this Chapter. *Chandler v. Nello L. Teer Co.*, 53 N.C. App. 766, 281 S.E.2d 718 (1981), aff'd, 305 N.C. 292, 287 S.E.2d 890 (1982).

**In order for an accident to be "on-premises,"** it is not necessary that the employer own or lease the area in question. It is enough that the employer controls the area and uses it in his business. *Barham v. Food World, Inc.*, 45 N.C. App. 409, 263 S.E.2d 285 (1980).

**Loading Zone.** — An injury to plaintiff grocery store employee when she slipped and fell on ice in a loading zone in front of defendant employer's store in a shopping center while she was walking to her work site after parking her car in the shopping center parking lot did not occur on her employer's premises and thus did not arise out of and in the course of her employment where defendant neither owned nor leased the parking lot or the loading zone;

although defendant had instructed employees not to park in the loading zone and had occasionally asked customers to move their cars from the zone, it had no responsibility for the upkeep of the loading zone area and had no authority or obligation under its lease with the shopping center to instruct drivers not to park in any area; the parking lot and loading zone were common areas and all of the stores had access to them for the convenience of their customers; and plaintiff failed to show that she was performing any duties for defendant employer at the time of her injury or that she was exposed to any danger greater than that of the public generally. *Barham v. Food World, Inc.*, 300 N.C. 329, 266 S.E.2d 676, rehearing denied, 300 N.C. 562, 270 S.E.2d 105 (1980).

### (4) Where Employer Furnishes Transportation.

**Where Employer Furnishes Transportation as Incident, etc.** —

In accord with 1st paragraph in original. See *Robertson v. Shepherd Constr. Co.*, 44 N.C. App. 335, 261 S.E.2d 16 (1979), cert. denied, 299 N.C. 545, 265 S.E.2d 405 (1980).

**The test in such cases, etc.** —

In accord with original. See *Robertson v. Shepherd Constr. Co.*, 44 N.C. App. 335, 261 S.E.2d 16 (1979), cert. denied, 299 N.C. 545, 265 S.E.2d 405 (1980).

**Isolated Instance of Permission to Drive Company Truck Home.** — In an action for workmen's compensation, where the deceased employee had permission to drive the company truck home the day of the accident, the permission given the deceased on this single, isolated occasion would not make the operation of the pickup truck an incident of his contract of employment. *Robertson v. Shepherd Constr. Co.*, 44 N.C. App. 335, 261 S.E.2d 16 (1979), cert. denied, 299 N.C. 545, 265 S.E.2d 405 (1980).

### e. Injuries While Traveling.

**Employees whose work entails travel away from the employer's premises, etc.** —

In accord with original. See *Smith v. Central Transp.*, 51 N.C. App. 316, 276 S.E.2d 751 (1981); *Chandler v. Nello L. Teer Co.*, 53 N.C. App. 766, 281 S.E.2d 718 (1981), aff'd, 305 N.C. 292, 287 S.E.2d 890 (1982).

**Injuries arising out of the necessity of sleeping in hotels, etc.** —

In accord with original. See *Smith v. Central Transp.*, 51 N.C. App. 316, 276 S.E.2d 751 (1981).

**Necessary Business Trip Combining Simultaneous Private Purpose.** — If the work of the employee creates the necessity for travel, such is in the course of his employment, though he is serving at same time some purpose of his own. *Bee v. Yates Aluminum Window Co.*, 46 N.C. App. 96, 264 S.E.2d 368 (1980).

### **Employee Sent to Africa by Employer. —**

Where employer sent employee on a business trip to an isolated part of Africa and provided his employees with sleeping, eating and recreational facilities within various company project areas, while within the project areas employees were continuously in an employment situation and were protected by this Chapter. *Chandler v. Nello L. Teer Co.*, 53 N.C. App. 766, 281 S.E.2d 718 (1981), *aff'd*, 305 N.C. 292, 287 S.E.2d 890 (1982).

Employee sent to Africa by employer to work on road project, who went on a personal detour to visit a nearby sugar plantation but was back within the confines of the road project when accident occurred, returning to his place of employment and the sleeping accommodations provided, was entitled to compensation under this Chapter. *Chandler v. Nello L. Teer Co.*, 53 N.C. App. 766, 281 S.E.2d 718 (1981), *aff'd*, 305 N.C. 292, 287 S.E.2d 890 (1982).

### **f. Deviation, Departure, and Abandonment.**

#### **Violation of Orders. —**

Disobedience of a direct and specific order by a then present superior breaks the casual relation between the employment and the resulting injury. This is patently so; the employee's subjective belief concerning the advisability of his course of action becomes irrelevant since there would be no room for doubt as how best to serve his employer's interest in the face of the employer's direct and immediate order. Conversely, when there is a rule or a prior order and the employee is faced with the choice of remaining idle in compliance with the rule or order or continuing to further his employer's business in contravention of it, no superior being present, the employer who would reap the benefits of the employee's acts if successfully completed should bear the burden of injury resulting from such acts. Under such circumstances, engaging in an activity which is outside the narrow confines of the employee's job description, but which is reasonably related to the accomplishment of the task for which the employee was hired, does not ordinarily constitute a departure from the scope of employment. *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 293 S.E.2d 196 (1982).

### **4. Evidence and Burden of Proof.**

In the compensation cases holding medical testimony unnecessary to make a *prima facie* case of causation, the distinguishing features are an uncomplicated situation, the immediate appearance of symptoms, the prompt reporting of the occurrence by the workman to his supervisor and consultation with a physician, and the fact that the plaintiff was theretofore in good health and free from any disability of the kind involved. A further

relevant factor is the absence of expert testimony that the alleged precipitating event could not have been the cause of the injury. *Slizewski v. International Seafood, Inc.*, 46 N.C. App. 228, 264 S.E.2d 810 (1980).

### **5. Miscellaneous Illustrative Cases.**

**Employer-Sponsored Recreational and Social Activities. —** In determining whether employee injuries incurred at employer-sponsored recreational and social activities arise out of and in the course of the employment, several questions should be considered: (1) Did the employer in fact sponsor the event? (2) To what extent was attendance really voluntary? (3) Was there some degree of encouragement to attend evidenced by such factors as: (a) taking a record of attendance; (b) paying for the time spent; (c) requiring the employee to work if he did not attend; or (d) maintaining a known custom of attending? (4) Did the employer finance the occasion to a substantial extent? (5) Did the employees regard it as an employment benefit to which they were entitled as of right? (6) Did the employer benefit from the event, not merely in a vague way through better morale and good will, but through such tangible advantages as having an opportunity to make speeches and awards? *Martin v. Mars Mfg. Co.*, 58 N.C. App. 577, 293 S.E.2d 816, *cert. denied*, 306 N.C. 742, 295 S.E.2d 759 (1982).

**Christmas Party. —** Evidence established a sufficient nexus between injury and employment where employee injured her ankle while dancing at an annual Christmas party sponsored and paid for by employer, where wages were paid for the time employees spent at the party and the plant manager considered the party an employee fringe benefit, one definite purpose of which was to improve employer-employee relations and made a 20 to 30 minute speech praising the employees for their work and presenting service awards. *Martin v. Mars Mfg. Co.*, 58 N.C. App. 577, 293 S.E.2d 816, *cert. denied*, 306 N.C. 742, 295 S.E.2d 759 (1982).

**Injury at Annual Department Picnic. —** Plaintiff was not entitled to workmen's compensation for a broken ankle suffered while playing volleyball at an annual picnic for faculty members in the radiology department in defendant school, where it was not clear that the radiology department in fact sponsored the picnic; attendance at the picnic was voluntary; no record of attendance was taken; participants were not paid for the time spent at the picnic, nor was any employee required to work at the medical school if he did not attend; the picnic, while certainly an annual custom, was not an event that employee regarded as being a benefit to which he was entitled as a matter of right, and the radiology department did not utilize the

picnic as an opportunity to give a "pep" talk or grant awards. *Chilton v. Bowman Gray School of Medicine*, 45 N.C. App. 13, 262 S.E.2d 347 (1980).

**Award Held Improper.** — The Industrial Commission erred in awarding plaintiff workmen's compensation for a herniated intervertebral disc in the absence of expert medical testimony tending to establish a causal relationship between plaintiff's work related accident and the injury for which compensation was sought. *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 265 S.E.2d 389 (1980).

#### D. Injury from Disease.

**Apportionment Between Incapacitating Disease and Other Factors Not Proper.** — Where an industrial disease renders an employee actually incapacitated to earn any wages, the employer may not ask that a portion of the disability be charged to the employee's advanced age and poor learning on the grounds that if it were not for these factors he might still retain some earning capacity. *Anderson v. A.M. Smyre Mfg. Co.*, 54 N.C. App. 337, 283 S.E.2d 433 (1981).

#### E. Aggravation of Existing Infirmary; Contributing to Injury.

**Policy Considerations.** — If the employee by reason of constitutional infirmities is predisposed to sustain injuries while engaged in labor, nevertheless the leniency and humanity of the law permit him to recover compensation if the physical aspects of the employment contribute in some reasonable degree to bring about or intensify the condition which renders him susceptible to such accident and consequent injury. *Moore v. J.P. Stevens & Co.*, 47 N.C. App. 744, 269 S.E.2d 159, cert. denied, 301 N.C. 401, 274 S.E.2d 226 (1980); *Walston v. Burlington Indus.*, 49 N.C. App. 301, 271 S.E.2d 516 (1980), rev'd on other grounds, 304 N.C. 670, 285 S.E.2d 822 (1982); *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E.2d 101 (1981).

**Employment Need Not Be Sole Causative Force.** — In workers' compensation actions the rule of causation is that where the right to recover is based on injury by accident, employment need not be the sole causative force to render an injury compensable. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E.2d 101 (1981).

**Relative Contribution of Accident and Preexisting Condition Not Weighed.** — An employer accepts an employee as he is, and if a compensable injury precipitates a latent physical condition, such as heart disease, cancer, back weakness, and the like, the entire disability is compensable and no attempt is made to weigh the relative contribution of the accident and the preexisting condition. *Anderson v. A.M. Smyre Mfg. Co.*, 54 N.C. App. 337, 283

S.E.2d 433 (1981).

**Idiopathic Condition.** — Where the accident and resultant injury arise out of both the idiopathic condition of the workman and hazards incident to the employment, the employer is liable. But not so where the idiopathic condition is the sole cause of the injury. *Norris v. Kivettco, Inc.*, 58 N.C. App. 376, 293 S.E.2d 594 (1982).

#### V. DISABILITY.

##### "Disability" Construed. —

In accord with original. See *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 264 S.E.2d 360 (1980).

Entitlement to compensation under this Chapter is rooted in and must be measured by plaintiff's capacity or incapacity to earn wages. *Mills v. J.P. Stevens & Co.*, 53 N.C. App. 341, 280 S.E.2d 802, cert. denied, 304 N.C. 196, 285 S.E.2d 100 (1981).

**Total and Partial Disability Compared.** — If plaintiff is unable to work and earn any wages, he is totally disabled. If he is able to work and earn some wages, but less than he was receiving at the time of his injury, he is partially disabled. *Robinson v. J.P. Stevens & Co.*, 57 N.C. App. 619, 292 S.E.2d 144 (1982).

##### How Disability Measured. —

The test for disability is whether and to what extent earning capacity is impaired, not the fact or extent of physical impairment. *Robinson v. J.P. Stevens & Co.*, 57 N.C. App. 619, 292 S.E.2d 144 (1982).

##### "Disability" Signifies Impairment of Wage-Earning Capacity. —

In accord with 2nd paragraph in original. See *Wood v. J.P. Stevens & Co.*, 297 N.C. 636, 256 S.E.2d 692 (1979); *Priddy v. Cone Mills Corp.*, 58 N.C. App. 720, 294 S.E.2d 743 (1982).

"Disability" does not mean physical impairment. Rather, the term signifies an impairment in the employee's wage-earning capacity because of injury. *Lucas v. Burlington Indus.*, 57 N.C. App. 366, 291 S.E.2d 360, cert. granted, 306 N.C. 385, 294 S.E.2d 209 (1982).

##### Capacity to Earn Is Test of "Disability". —

In determining disability, the commission is not allowed to consider whether the average employee with plaintiff's injury is capable of working and earning wages. The question is whether this particular employee has such a capacity. *Lucas v. Burlington Indus.*, 57 N.C. App. 366, 291 S.E.2d 360, cert. granted, 306 N.C. 385, 294 S.E.2d 209 (1982).

**It is insufficient for claimant to show that he has obtained no other employment** since his retirement. He must prove that he is unable to earn wages in other employment. *Hundley v. Fieldcrest Mills*, 58 N.C. App. 184, 292 S.E.2d 766 (1982).

**The Workers' Compensation Act does not ensure an employee any particular employment;** subdivision (9) of this section speaks of incapacity to earn wages "in the same or any other employment." *Lucas v. Burlington Indus.*, 57 N.C. App. 366, 291 S.E.2d 360, cert. granted, 306 N.C. 385, 294 S.E.2d 209 (1982).

**Ability to Carry Out "Normal Life Functions" Not Determinative.** — Physicians' estimates of plaintiff's disability which referred only to the degree of loss of use of her nervous system and to the impairment of her ability to carry out "total life functions" were insufficient to support the commission's finding that plaintiff was entitled to compensation for permanent partial disability or loss of use of her back and not to benefits for total incapacity to work, since a person may be wholly incapable of working and earning wages even though her ability to carry out normal life functions has not been wholly destroyed and even though she has not lost 100 percent use of her nervous system. *Little v. Anson County Schools Food Serv.*, 295 N.C. 527, 246 S.E.2d 743 (1978).

**How Disability Measured for Second Compensable Injury.** — While, in the ordinary case, "disability" can be measured in terms of percentage, in those cases where the claimant has a preexisting "disability" to the same part of the body which is affected by a subsequent compensable injury, "disability" must be measured in terms of capacity to earn wages. *Ridenhour v. Fisher Transp. Corp.*, 50 N.C. App. 126, 272 S.E.2d 889 (1980).

**Effect of Preexisting Conditions.** — If preexisting conditions such as an employee's age, education and work experience are such that an injury causes him a greater degree of incapacity for work than the same injury would cause some other person, the employee must be compensated for the incapacity which he or she suffers, and not for the degree of disability which would be suffered by someone with superior education or work experience or who is younger or in better health. *Little v. Anson County Schools Food Serv.*, 295 N.C. 527, 246 S.E.2d 743 (1978).

Plaintiff may prove his wage-earning impairment by evidence of preexisting conditions such as his age, education and work experience which are such that an injury causes him a greater degree of incapacity for work than the same injury would cause some other person. *Hundley v. Fieldcrest Mills*, 58 N.C. App. 184, 292 S.E.2d 766 (1982).

**Burden of Proving Disability.** — In workers' compensation cases, a claimant ordinarily has the burden of proving both the existence of his disability and its degree. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982); *Hundley v. Fieldcrest Mills*, 58 N.C. App. 184, 292 S.E.2d 766 (1982).

In order to receive disability compensation, the burden is on the claimant to prove that his illness has impaired his capacity to work and the extent of this impairment. *Priddy v. Cone Mills Corp.*, 58 N.C. App. 720, 294 S.E.2d 743 (1982).

**The determination of whether a disability exists is a conclusion of law,** which must be based upon findings of fact supported by competent evidence. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982); *Hundley v. Fieldcrest Mills*, 58 N.C. App. 184, 292 S.E.2d 766 (1982).

**Findings Required to Support Conclusion of Disability.** — In order to support a conclusion of disability, the Industrial Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this incapacity to earn was caused by plaintiff's injury. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982); *Hundley v. Fieldcrest Mills*, 58 N.C. App. 184, 292 S.E.2d 766 (1982); *Priddy v. Cone Mills Corp.*, 58 N.C. App. 720, 294 S.E.2d 743 (1982).

**Award for Loss of Use of Back Insufficient.** — Where physicians indicated that an injury to the plaintiff's spinal cord resulted in weakness in all of her extremities, and numbness or loss of sensation throughout her body, and the doctors further testified that she suffered diminished mobility and has difficulty with position sense and with recognition of things in her hands when objects are placed in her hands, the commission could not limit the plaintiff to an award under § 97-31(32) for loss of use of the back. *Little v. Anson County Schools Food Serv.*, 295 N.C. 527, 246 S.E.2d 743 (1978).

## VI. COMPENSATION.

**Deductions from Gross Income in Calculating Income.** — Farm income of injured volunteer fireman could not be properly calculated without deducting from gross income interest on money which was borrowed to finance crop production, depreciation on equipment used to produce the crops, license fees for things used in crop production, and taxes on land used to produce crops. *York v. Unionville Volunteer Fire Dept.*, 58 N.C. App. 591, 293 S.E.2d 812 (1982).

**Persons Compensated by Other Than Salary or Wages.** — As to calculation of compensation for the death of pulpwood cutter who was not paid a salary or wages, but received a certain amount for each cord of pulpwood delivered to employer, where decedent owned a truck and other equipment which he used in cutting and preparing the pulpwood, see

**Baldwin v. Piedmont Woodyards, Inc.**, 58 N.C. App. 602, 293 S.E.2d 814 (1982).

**Plaintiff who was injured as a volunteer fireman** should be compensated based on what he would have earned from his labor as a farmer had he not been injured. **York v. Unionville Volunteer Fire Dep't**, 58 N.C. App. 591, 293 S.E.2d 812 (1982).

## VII. CHILD, GRANDCHILD, ETC.

**How Child Acknowledged.** — Word "acknowledged," referring to illegitimate children under this section, is not a term of art requiring a formal declaration before an authorized official; in regard to paternity actions, the term "acknowledgment" generally has been held to mean the recognition of a parental relation, either by written agreement, verbal declarations or statements, by the life, acts, and

conduct of the parties, or any other satisfactory evidence that the relation was recognized and admitted. **Carpenter v. Hawley**, 53 N.C. App. 715, 281 S.E.2d 783, cert. denied and appeal dismissed, 304 N.C. 587, 289 S.E.2d 564 (1981).

## VIII. WIDOW; WIDOWER.

**A second or subsequent, etc.** —

In accord with original. See **Ivory v. Greer Bros.**, 45 N.C. App. 455, 263 S.E.2d 290 (1980).

**Whether Presumption of Subsequent Marriage's Validity Is Overcome Is Question of Fact.** — The question of whether a first wife of a deceased employee had overcome the presumption of the validity of a subsequent marriage was a question of fact for the commission. **Ivory v. Greer Bros.**, 45 N.C. App. 455, 263 S.E.2d 290 (1980).

## § 97-3. Presumption that all employers and employees have come under provisions of Article.

**Legal Periodicals.** — For comment on injury by accident in workers' compensation, see 59 N.C.L. Rev. 175 (1980).

## CASE NOTES

Cited in **Wood v. J.P. Stevens & Co.**, 297 N.C. 636, 256 S.E.2d 692 (1979).

## § 97-6. No special contract can relieve an employer of obligations.

**Legal Periodicals.** — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For note discussing the nonexistence of a private right of action for retaliatory discharge resulting from pursuit of workers' compensa-

tion benefits, see 15 Wake Forest L. Rev. 139 (1979).

For note on workers' compensation and retaliatory discharge, see 58 N.C.L. Rev. 629 (1980).

## CASE NOTES

**Employer Liable If Elements Otherwise Exist.** — An employer is not permitted to escape his liability or obligations under this Article through the use of a special contract or agreement if the elements required for

coverage of the injured individual would otherwise exist. **Hoffman v. Ryder Truck Lines**, 306 N.C. 502, 293 S.E.2d 807 (1982).

Cited in **Wood v. J.P. Stevens & Co.**, 297 N.C. 636, 256 S.E.2d 692 (1979).

## § 97-6.1. Protection of claimants from discharge or demotion by employers.

**Legal Periodicals.** — For note on workers' compensation and retaliatory discharge, see 58 N.C.L. Rev. 629 (1980).

## CASE NOTES

**Legislative Intent.** — Clearly, this section was intended to prevent employers from firing or demoting employees in retaliation for pursuing their remedies under the Workers' Compensation Act. *Wright v. Fiber Indus., Inc.*, — N.C. App. —, 299 S.E.2d 284 (1983).

If this section were limited only to retaliatory acts which occurred after the employee filed his claim, an employer could easily avoid the statute by firing the injured employee before he filed. The court does not think the legislature intended the statute to be so easily circumvented. *Wright v. Fiber Indus., Inc.* — N.C. App. —, 299 S.E.2d 284 (1983).

Liberally construed, this section encompasses acts by employers intending to prevent

employees from exercising their rights under the Workers' Compensation Act. Whether the employee is fired before or after he files his claim should make no difference. *Wright v. Fiber Indus., Inc.*, — N.C. App. —, 299 S.E.2d 284 (1983).

**Punitive Damages.** — As this section clearly limits recovery to damages "suffered by the employee" as a result of the employer's violation of the Workers' Compensation Act, punitive damages may not be awarded as they are not damages "suffered" by anyone. *Buie v. Daniel Int'l Corp.*, 56 N.C. App. 445, 289 S.E.2d 118, cert. denied, 305 N.C. 759, 292 S.E.2d 574 (1982).

## § 97-9. Employer to secure payment of compensation.

**Legal Periodicals.** — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

## CASE NOTES

**And the result is that immunity, etc.** —

By reading this section in conjunction with § 97-10.1, fellow employees are excluded from common-law liability. *Andrews v. Peters*, 55 N.C. App. 124, 284 S.E.2d 748 (1981), cert. denied, 305 N.C. 395, 290 S.E.2d 364 (1982).

**Meaning of "Those Conducting His Business", —**

The phrase "those conducting his business" includes fellow employees. *Andrews v. Peters*, 55 N.C. App. 124, 284 S.E.2d 748 (1981), cert. denied, 305 N.C. 395, 290 S.E.2d 364 (1982).

**Intentional assault by an employer removes the employer from his common-law immunity** and the employee must choose between suing his employer at common law or accepting compensation. *Andrews v. Peters*, 55 N.C. App. 124, 284 S.E.2d 748 (1981), cert. denied, 305 N.C. 395, 290 S.E.2d 364 (1982).

Where the employer is guilty of a felonious or willful assault on an employee he cannot relegate him to the compensation act for recovery. *Daniels v. Swofford*, 55 N.C. App. 555, 286 S.E.2d 582 (1982).

**And assaultive behavior removes a coemployee from his immunity** to common-law actions. *Andrews v. Peters*, 55 N.C. App. 124, 284 S.E.2d 748 (1981), cert. denied, 305 N.C. 395, 290 S.E.2d 364 (1982).

While the Workers' Compensation Act precludes plaintiff from asserting a cause of action against corporate employer for alleged assault of a supervisory employee, the act does not preclude her from pursuing recovery from the assaultive employee. *Daniels v. Swofford*, 55 N.C. App. 555, 286 S.E.2d 582 (1982).

## § 97-10.1. Other rights and remedies against employer excluded.

**Legal Periodicals.** — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

## CASE NOTES

**This section implements the purpose of the act**, which is to provide certain limited benefits to an injured employee regardless of negligence on the part of the employer, and simultaneously to deprive the employee of certain rights he had at the common law. *Brown v. Motor Inns of Carolina, Inc.*, 47 N.C. App. 115, 266 S.E.2d 848 (1980).

**Act is Inapplicable Where, etc. —**

In accord with original. See *Brown v. Motor Inns of Carolina, Inc.*, 47 N.C. App. 115, 266 S.E.2d 848 (1980).

**Section Construed with § 97-9.** — By reading § 97-9 in conjunction with this section, fellow employees are excluded from common-law liability. *Andrews v. Peters*, 55 N.C. App. 124, 284 S.E.2d 748 (1981), cert. denied, 305 N.C. 395, 290 S.E.2d 364 (1982).

**This section is not arbitrary legislation** unrelated to the valid objective of compensating injured employees or their dependents. *Carpenter v. Hawley*, 53 N.C. App. 715, 281 S.E.2d 783, cert. denied and appeal dismissed, 304 N.C. 587, 289 S.E.2d 564 (1981).

**Employee's Rights and Remedies under, etc. —**

In accord with 3rd paragraph in original. See *Brown v. Motor Inns of Carolina, Inc.*, 47 N.C. App. 115, 266 S.E.2d 848 (1980).

**This section is clear and unambiguous and requires the result that plaintiff cannot maintain an action for loss of consortium** resulting from injuries to plaintiff's spouse when those injuries are compensable under the Workers' Compensation Act. *Sneed v. Carolina*

*Power & Light Co.*, — N.C. App. —, 300 S.E.2d 563 (1983).

**Intentional assault by an employer removes the employer from his common-law immunity** and the employee must choose between suing his employer at common law or accepting compensation. *Andrews v. Peters*, 55 N.C. App. 124, 284 S.E.2d 748 (1981), cert. denied, 305 N.C. 395, 290 S.E.2d 364 (1982).

Where the employer is guilty of a felonious or willful assault on an employee he cannot relegate him to the compensation act for recovery. *Daniels v. Swofford*, 55 N.C. App. 555, 286 S.E.2d 582 (1982).

**Assaultive behavior removes a coemployee from his immunity** to common-law actions. *Andrews v. Peters*, 55 N.C. App. 124, 284 S.E.2d 748 (1981), cert. denied, 305 N.C. 395, 290 S.E.2d 364 (1982).

North Carolina's Workers' Compensation Act is not the exclusive remedy for an employee intentionally injured by a fellow employee. *Andrews v. Peters*, 55 N.C. App. 124, 284 S.E.2d 748 (1981), cert. denied, 305 N.C. 395, 290 S.E.2d 364 (1982).

Assaultive behavior by a coemployee limits the employee's immunity under this Chapter. Such misconduct is outside the realm of industrial accidents which workers' compensation laws were designed to exclusively cover. *Daniels v. Swofford*, 55 N.C. App. 555, 286 S.E.2d 582 (1982).

**Cited in** *Sneed v. Carolina Power & Light Co.*, — N.C. App. —, 300 S.E.2d 563 (1983).

## § 97-10.2. Rights under Article not affected by liability of third party; rights and remedies against third parties.

(e) The amount of compensation and other benefits paid or payable on account of such injury or death shall be admissible in evidence in any proceeding against the third party. In the event that said amount of compensation and other benefits is introduced in such a proceeding the court shall instruct the jury that said amount will be deducted by the court from any amount of damages awarded to the plaintiff. If the third party defending such proceeding, by answer duly served on the employer, sufficiently alleges that actionable negligence of the employer joined and concurred with the negligence of the third party in producing the injury or death, then an issue shall be submitted to the jury in such case as to whether actionable negligence of employer joined and concurred with the negligence of the third party in producing the injury or death. The employer shall have the right to appear, to be represented, to introduce evidence, to cross-examine adverse witnesses, and to argue to the jury as to this issue as fully as though he were a party although not named or joined as a party to the proceeding. Such issue shall be the last of the issues

submitted to the jury. If the verdict shall be that actionable negligence of the employer did join and concur with that of the third party in producing the injury or death, then the court shall reduce the damages awarded by the jury against the third party by the amount which the employer would otherwise be entitled to receive therefrom by way of subrogation hereunder and the entire amount recovered, after such reduction, shall belong to the employee or his personal representative free of any claim by the employer and the third party shall have no further right by way of contribution or otherwise against the employer, except any right which may exist by reason of an express contract of indemnity between the employer and the third party, which was entered into prior to the injury to the employee. In the event that the court becomes aware that there is an express contract of indemnity between the employer and the third party the court may in the interest of justice exclude the employer from the trial of the claim against the third party and may meet the issue of the actionable negligence of the employer to the jury in a separate hearing.

(j) In the event that a judgment is obtained which is insufficient to compensate the subrogation claim of the Workers' Compensation Insurance Carrier, or in the event that a settlement has been agreed upon by the employee and the third party when said action is pending on a trial calendar and the pretrial conference with the judge has been held, either party may apply to the resident superior court judge of the county in which the cause of action arose or the presiding judge before whom the cause of action is pending, for determination as to the amount to be paid to each by such third party tort-feasor. If the matter is pending in the federal district court such determination may be made by a federal district court judge of that division. (1929, c. 120, s. 11; 1933, c. 449, s. 1; 1943, c. 622; 1959, c. 1324; 1963, c. 450, s. 1; 1971, c. 171, s. 1; 1979, c. 865, s. 1; 1983, c. 645, ss. 1, 2.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** —

Session Laws 1983, c. 645, s. 3, makes the act effective Oct. 1, 1983, and applicable to actions initiated on or after that date.

**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, in subsection (e), substituted "on account of such injury" for "on account to such injury" and "shall be admissi-

ble" for "shall not be admissible" in the first sentence, inserted the present second sentence, deleted "the" preceding the second use of the phrase "employer joined and concurred with" in the third sentence, and added the last sentence, and added subsection (j).

**Legal Periodicals.** — For article, "Third-Party Action Over Against Workers' Compensation Employer," see 1982 Duke L.J. 483.

## CASE NOTES

**Applicability.** — This section applies only to persons who are strangers to the employment and negligently cause an injury. *Andrews v. Peters*, 55 N.C. App. 124, 284 S.E.2d 748 (1981), cert. denied, 305 N.C. 395, 290 S.E.2d 364 (1982).

This section, which provides for actions against "some person other than the employer," has been held inapplicable to the negligent employee. *Andrews v. Peters*, 55 N.C. App. 124, 284 S.E.2d 748 (1981), cert. denied, 305 N.C. 395, 290 S.E.2d 364 (1982).

**Distribution of Wrongful Death Settlement Following Disapproval of Compensation Agreement.** — Where the Indus-

trial Commission disapproved an agreement for compensation for death only because the employee's widow was a minor and the death benefits had been miscalculated, but the employer's admission of liability was not disapproved, the Commission had jurisdiction to issue an order for the distribution of a wrongful death settlement made before the Commission finally approved the compensation agreement. *Williams v. Insurance Repair Specialists of N.C., Inc.*, 32 N.C. App. 235, 232 S.E.2d 5 (1977).

**Distribution of Wrongful Death Settlement Despite Liability Carrier's Possible Loss.** — Where an employee's death arose

out of and in the course of his employment, the employer filed with the Industrial Commission a written admission of liability, the compensation insurance carrier notified the third-party tortfeasor's liability insurance carrier that a compensation settlement was in process and that it would expect its lien upon any settlement of a wrongful death claim by the liability carrier, the liability carrier settled the wrongful death claim for \$55,000 and paid that amount to the deceased employee's administrator, and the Industrial Commission later approved a workmen's compensation settlement awarding \$28,500 to the widow, the Industrial Commission thereafter had authority under this section to issue an order of distribution of the \$55,000 wrongful death settlement, including a requirement that the liability carrier pay \$28,500 to the compensation carrier in settlement of its subrogation interest, notwithstanding that the widow may

have spent her entire distributive share of the wrongful death settlement and all of the workmen's compensation benefits paid to her and the liability carrier may be unable to recoup any of the amount previously paid from the widow or the decedent's administrator. *Williams v. Insurance Repair Specialists of N.C., Inc.*, 32 N.C. App. 235, 232 S.E.2d 5 (1977).

**Action against Negligent Third Party Where Injury Occurred Out of State.** — Where the situs of decedent's injury was Virginia, Virginia substantive law will be applied as to whether a negligent third-party tortfeasor may defeat an employer's right to recoup from it damages paid under a worker's compensation award, since this is an issue of substantive, not procedural, law. *Leonard v. Johns-Manville Sales Corp.*, 59 N.C. App. 454, 297 S.E.2d 147 (1982).

## § 97-12. Use of intoxicant or controlled substance; willful neglect; willful disobedience of statutory duty, safety regulation or rule.

### CASE NOTES

#### **Suicide Induced by Injury.** —

In accord with 3rd paragraph in original. See *Thompson v. Lenoir Transf. Co.*, 48 N.C. App. 47, 268 S.E.2d 534, cert. denied, 301 N.C. 405, 273 S.E.2d 450 (1980).

**Subdivision (3) presents an affirmative defense** to a claim under the Workers' Compensation Act. It requires a finding that the claimant had the willful intention to injure or kill himself or another and that this intention was the proximate cause of the claimant's injuries. *Rorie v. Holly Farms Poultry Co.*, 306 N.C. 706, 295 S.E.2d 458 (1982).

**Cause in Fact Standard Applicable to Subdivision (3).** — Using a cause in fact standard, the claimant's injuries must be the result of a natural and continuous sequence of events, unbroken by a new independent cause, stemming from the claimant's willful intention to injure himself or another. It is also necessary that some injury be foreseeable from the claimant's actions, although the extent or nature of the injury suffered need not have been foreseen. *Rorie v. Holly Farms Poultry Co.*, 306 N.C. 706, 295 S.E.2d 458 (1982).

Under subdivision (3) of this section for the claimant's injuries to be proximately caused by her actions, the willful intention of the claimant must be more than a cause of her injuries. However, it need not be the sole cause. Rather,

a cause in fact standard is required. *Rorie v. Holly Farms Poultry Co.*, 306 N.C. 706, 295 S.E.2d 458 (1982).

**Injuries Must Be Proximately Caused by Claimant's Willful Intent.** — Once willful intention has been established, in order to deny recovery it is necessary to find that the claimant's injuries were "proximately caused by" an act resulting from such intent. *Rorie v. Holly Farms Poultry Co.*, 306 N.C. 706, 295 S.E.2d 458 (1982).

**But This Need Not Be "Sole" Proximate Cause.** — This section was designed to be an exception to the general rule that the employee would receive compensation for an injury arising out of and in the course of employment. To utilize a "sole" proximate cause standard would virtually vitiate the statute and defeat the express will of the General Assembly. Whenever an employee intends to injure another, that employee will usually not be injured unless the intended victim retaliates. The actions of the intended victim could always be considered a cause of the claimant's injuries, and therefore the willful intention of the claimant would rarely if ever be the sole cause. *Rorie v. Holly Farms Poultry Co.*, 306 N.C. 706, 295 S.E.2d 458 (1982).

The sole proximate cause standard is inapplicable to this section. *Rorie v. Holly*

Farms Poultry Co., 306 N.C. 706, 295 S.E.2d 458 (1982).

**Need Not Show Intent to Inflict "Serious" Injury.** — Neither acts by the claimant, nor mere words spoken by the claimant and unaccompanied by any overt act, will be sufficient to bar compensation unless the willful intent to injure is apparent from the context and nature of the physical or verbal assault. However, no intent to inflict "serious" injury must be shown before the statutory bar to recovery will apply. The bar to recovery, set forth in subdivision (3) of this section, applies when a general willful intent to inflict some injury is established by the evidence. *Rorie v. Holly Farms Poultry Co.*, 306 N.C. 706, 295 S.E.2d 458 (1982).

**Crucial Question Is Willful Intent.** — The crucial question is whether the claimant had a willful intention to injure the other employee. The fact that the other employee may have produced the knife and therefore escalated the fight is immaterial. The claimant may not have intended to kill or even seriously injure the other employee but subdivision (3) of this section does not require that any such intent be shown before recovery will be denied. *Rorie v. Holly Farms Poultry Co.*, 306 N.C. 706, 295 S.E.2d 458 (1982).

**Proximate Cause Is Question for Finder of Fact.** — The determination of the proximate

cause of the claimant's injuries is a question for the finder of fact. *Rorie v. Holly Farms Poultry Co.*, 306 N.C. 706, 295 S.E.2d 458 (1982).

**Burden under Subdivision (3).** — Since subdivision (3) of this section is an affirmative defense, the burden of proof is on the employer to show that compensation should be denied notwithstanding the fact that the injury arose out of and in the course of the employment. *Rorie v. Holly Farms Poultry Co.*, 306 N.C. 706, 295 S.E.2d 458 (1982).

**Burden of Defense of Intoxication.** — This section places the burden of defense based upon intoxication upon the defendants to prove intoxication and to prove that death was proximately caused thereby. *Smith v. Central Transp.*, 51 N.C. App. 316, 276 S.E.2d 751 (1981).

**Applied in** *McCuiston v. Addressograph-Multigraph Corp.*, 59 N.C. App. 76, 295 S.E.2d 490 (1982); *Pittman v. Twin City Laundry & Cleaners*, — N.C. App. —, 300 S.E.2d 899 (1983).

**Cited in** *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 293 S.E.2d 196 (1982); *Coleman v. City of Winston-Salem*, 57 N.C. App. 137, 291 S.E.2d 155 (1982); *Diaz v. United States Textile Corp.*, — N.C. App. —, 299 S.E.2d 843 (1983); *Prevette v. Clark Equip. Co.*, — N.C. App. —, 302 S.E.2d 639 (1983).

## § 97-13. Exceptions from provisions of Article.

(c) Prisoners. — This Article shall not apply to prisoners being worked by the State or any subdivision thereof, except to the following extent: Whenever any prisoner assigned to the State Department of Correction shall suffer accidental injury or accidental death arising out of and in the course of the employment to which he had been assigned, if there be death or if the results of such injury continue until after the date of the lawful discharge of such prisoner to such an extent as to amount to a disability as defined in this Article, then such discharged prisoner or the dependents or next of kin of such discharged prisoner may have the benefit of this Article by applying to the Industrial Commission as any other employee; provided, such application is made within 12 months from the date of the discharge; and provided further that the maximum compensation to any prisoner or to the dependents or next of kin of any deceased prisoner shall not exceed thirty dollars (\$30.00) per week and the period of compensation shall relate to the date of his discharge rather than the date of the accident. If any person who has been awarded compensation under the provisions of this subsection shall be recommitted to prison upon conviction of an offense committed subsequent to the award, such compensation shall immediately cease. Any awards made under the terms of this subsection shall be paid by the State Department of Correction from the funds available for the operation of the Department of Corrections. The provisions of G.S. 97-10.1 and 97-10.2 shall apply to prisoners and discharged prisoners entitled to compensation under this subsection and to the State in the same manner as said section applies to employees and employers.

(1929, c. 120, s. 14; 1933, c. 401; 1935, c. 150; 1941, c. 295; 1943, c. 543; 1945, c. 766; 1957, c. 349, s. 10; c. 809; 1967, c. 996, s. 13; 1971, c. 284, s. 2; c. 1176; 1975, c. 718, s. 3; 1979, c. 247, s. 1; c. 714, s. 2; 1981, c. 378, s. 1.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amend-

ment, effective July 1, 1981, substituted "thirty dollars (\$30.00)" for "twenty dollars (\$20.00)" near the end of the first sentence of subsection (c).

## CASE NOTES

### V. NUMBER OF EMPLOYEES.

#### **Employment of the Minimum, etc.** —

Evidence showing a defendant had in his employ five (now four) or more employees must affirmatively appear in the record to sustain the jurisdiction of the Industrial Commission over the claim. *Durham v. McLamb*, 59 N.C. App. 165, 296 S.E.2d 3 (1982).

**Number of workers on job site on date of injury**, standing alone, is not determinative of the issue. If the defendant had four or more "regularly employed" employees, the fact that he fell below the minimum requirement on the

actual date of injury would not preclude coverage. *Durham v. McLamb*, 59 N.C. App. 165, 296 S.E.2d 3 (1982).

**Reviewing Court Must Make Independent Determination.** — Whether the employer had the number of employees required to subject him to the Workers' Compensation Act is a question of jurisdictional fact and the reviewing court is required to review and consider the evidence and make an independent determination. *Durham v. McLamb*, 59 N.C. App. 165, 296 S.E.2d 3 (1982).

## § 97-17. Settlements allowed in accordance with Article.

## CASE NOTES

#### **Not Binding If Not Approved.** —

Agreement for compensation which is signed by the parties but is not approved by the Commission pursuant to this section is not binding. *Baldwin v. Piedmont Woodyards, Inc.*, 58 N.C. App. 602, 293 S.E.2d 814 (1982).

#### **Setting Aside Settlement.** —

This statutory provision clearly grants the

Industrial Commission the authority to rehear and set aside prior orders approving settlements on any one of the stated grounds, i.e., fraud, misrepresentation, undue influence or mutual mistake. *Graham v. City of Hendersonville*, 42 N.C. App. 456, 255 S.E.2d 795, cert. denied, 298 N.C. 568, 261 S.E.2d 121 (1979).

## § 97-18. Prompt payment of compensation required; installments; notice to Commission; penalties.

## CASE NOTES

#### **Applied in Hyatt v. Waverly Mills**, 56 N.C.

App. 14, 286 S.E.2d 837 (1982).

## § 97-21. Claims unassignable and exempt from taxes and debts; agreement of employee to contribute to premium or waive right to compensation void; unlawful deduction by employer.

**Legal Periodicals.** — For article analyzing North Carolina's exemptions law, see 18 Wake Forest L. Rev. 1025 (1982).

## § 97-22. Notice of accident to employer.

### CASE NOTES

**Application of Section in Occupational Disease Cases under § 97-58 (b).** See *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979).

**With reference to occupational diseases, time within which an employee must give notice or file claim begins to run when the employee is first informed by competent medical authority of the nature and work-related cause of the disease.** *McKee v. Crescent Spinning Co.*, 54 N.C. App. 558, 284 S.E.2d 175 (1981), cert. denied, 305 N.C. 301, 291 S.E.2d 150 (1982).

**Effect of Personal Knowledge of Employer.** — The failure of plaintiff faculty member to file a written claim within the time set forth in this section did not bar his claim to workmen's compensation where several members of the faculty had personal knowledge of plaintiff's injury the second it happened, and there is evidence that the dean of the school knew of plaintiff's injury. *Chilton v. Bowman Gray School of Medicine*, 45 N.C. App. 13, 262 S.E.2d 347 (1980).

**Appeal of Notice Issue.** — An employer who fails to raise the issue of notice at the hearing before the compensation board may not raise it on appeal. *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979).

**The purpose of the notice-of-injury requirement is two-fold.** It allows the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury, and it facilitates the earliest possible investigation of the circumstances surrounding the injury. *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979).

To allow an employer to raise the issue of notice for the first time on appeal would deprive the claimants of the benefits of that determination and could easily lead to a denial of compensation in a case where the facts would justify a finding of no prejudice. *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979).

**Quoted in** *Taylor v. J.P. Stevens & Co.*, 300 N.C. 94, 265 S.E.2d 144 (1980).

## § 97-24. Right to compensation barred after two years; destruction of records.

### Cross References. —

As to filing of claim for compensation by incapacitated State law-enforcement officer whose salary has been paid for two years following

inception of incapacity, see § 143-166.16.

**Legal Periodicals.** — For a note on occupation disease under workers' compensation statute, see 16 *Wake Forest L. Rev.* 288 (1980).

### CASE NOTES

**Section 97-58 Compared.** — An accident claim must be filed within two years of the accident, not within two years after the claimant becomes aware of his disorder, as is the case under § 97-58. *Perdue v. Daniel Int'l, Inc.*, 59 N.C. App. 517, 296 S.E.2d 845 (1982), cert. denied, — N.C. —, 299 S.E.2d 647 (1983).

**The requirement that claim be filed, etc.** —

In accord with 2nd paragraph in original. See *Perdue v. Daniel Int'l, Inc.*, 59 N.C. App. 517, 296 S.E.2d 845 (1982), cert. denied, — N.C. —,

299 S.E.2d 647 (1983).

**When Informal Letter Insufficient.** — An informal letter may not serve as the filing of a claim for compensation for statute of limitations purposes where it contains no request for a hearing, it fails to assert in any way that the plaintiff is demanding compensation or that action by the Industrial Commission is necessary to settle the question. *Gantt v. Edmos Corp.*, 56 N.C. App. 408, 289 S.E.2d 75 (1982).

**Quoted in** *Taylor v. J.P. Stevens & Co.*, 300 N.C. 94, 265 S.E.2d 144 (1980).

## § 97-25. Medical treatment and supplies.

**Legal Periodicals.** — For survey of 1980 administrative law, see 59 N.C.L. Rev. 1032 (1981).

### CASE NOTES

**Controlling Effect of § 97-59 in Cases Involving Occupational Disease.** — Section 97-59, which is a more recent and specific statute dealing with awards of medical benefits in cases involving occupational disease, controls over this section in such cases. *Smith v. American & Efrid Mills*, 305 N.C. 507, 290 S.E.2d 634 (1982).

**Application of 1973 Amendment.** — The 1973 amendment to this section which eliminated the 10-week limitation for the recovery of medical expenses for an employee's treatments which are necessary "to effect a cure or give relief" will not be applied retroactively to a case in which the claim arose out of an accident occurring prior to the effective date of the amendment. *Peeler v. State Hwy. Comm'n*, 302 N.C. 183, 273 S.E.2d 705 (1981).

**The provisions of this section are in pari materia** and must be construed together as a whole. *Schofield v. Great Atl. & Pac. Tea Co.*, 299 N.C. 582, 264 S.E.2d 56 (1980).

**The phrase "lessen the period of disability"** as used in this section means "lessen the period of time of diminution in earnings." *Peeler v. State Hwy. Comm'n*, 48 N.C. App. 1, 269 S.E.2d 153 (1980), *aff'd*, 302 N.C. 183, 273 S.E.2d 705 (1981).

**Employer's Inability to Provide Services Amounts to Failure to Provide.** — An employee is justified under this section in seeking another physician in an emergency where the employer's "failure to provide" medical services amounts merely to an inability to provide those services. *Schofield v. Great Atl. & Pac. Tea Co.*, 299 N.C. 582, 264 S.E.2d 56 (1980).

**Proviso to Entire Section.** — The proviso at the end of this section, relating to choice of personal physician, constitutes a proviso to the entire section, and not solely to the emergency provision. *Schofield v. Great Atl. & Pac. Tea Co.*, 299 N.C. 582, 264 S.E.2d 56 (1980).

**Employee May Choose Physician Even in Absence of Emergency.** — The proviso to this section, relating to choice of personal physician, constitutes a proviso to the entire section, and not solely to the emergency provision. Construed in this light, the proviso clearly states that an injured employee has the right to procure, even in the absence of an emergency, a physician of his own choosing, subject to the approval of the commission. *Schofield v. Great*

*Atl. & Pac. Tea Co.*, 299 N.C. 582, 264 S.E.2d 56 (1980).

**Same Terms Apply to Treatment Whether Chosen by Employee or Employer.** — Fairness requires that medical treatment provided by the employee's own doctor be subject to the same limitations, terms and conditions as apply to medical treatment provided by the employer. *Schofield v. Great Atl. & Pac. Tea Co.*, 299 N.C. 582, 264 S.E.2d 56 (1980).

**Emergency Treatment.** — Treatment received by a plaintiff employee in a workmen's compensation case can be of an emergency nature even though it extended over a 17-month period of time. *Schofield v. Great Atl. & Pac. Tea Co.*, 43 N.C. 567, 259 S.E.2d 338 (1979), vacated on other grounds, 299 N.C. 582, 264 S.E.2d 56 (1980).

**"Emergency" Function of Circumstances.** — This section does not define an emergency. What may be an emergency under one set of circumstances may not qualify as such under another. *Schofield v. Great Atl. & Pac. Tea Co.*, 43 N.C. 567, 259 S.E.2d 338 (1979), vacated on other grounds, 299 N.C. 582, 264 S.E.2d 56 (1980).

**Substitute Physician Must Be Approved.** — In order for the defendant to be responsible for the costs of a substitute physician, the Industrial Commission must approve of the change, but there is no requirement that such approval must be in advance of the change — only that the change must be approved. *Schofield v. Great Atl. & Pac. Tea Co.*, 43 N.C. 567, 259 S.E.2d 338 (1979), vacated on other grounds, 299 N.C. 582, 264 S.E.2d 56 (1980).

An employee is required to obtain approval of the commission within a reasonable time after he has selected a physician of his own choosing to assume treatment. *Schofield v. Great Atl. & Pac. Tea Co.*, 299 N.C. 582, 264 S.E.2d 56 (1980).

**Findings Required to Support Approval of Claim for Treatment.** — Upon submission of a claim for approval for medical treatment rendered by the employee's own physician, there must be findings based upon competent evidence that the treatment was "required to effect a cure or give relief," or where additional time is involved, that it has "tend[ed] to lessen the period of disability." There should also be findings that the condition treated is, or was,

caused by, or was otherwise traceable to or related to the injury giving rise to the compensable claim. *Schofield v. Great Atl. & Pac. Tea Co.*, 299 N.C. 582, 264 S.E.2d 56 (1980).

Since an employee who procures his own doctor must obtain approval by the commission within a reasonable time after such procurement, the commission must make findings relative to whether such approval was sought within a reasonable time. *Schofield v. Great Atl. & Pac. Tea Co.*, 299 N.C. 582, 264 S.E.2d 56 (1980).

Implicit in determining whether the cost of emergency treatment is reasonable is a determination of how long the emergency lasted. Before approving the cost of emergency treatment rendered by "a physician other than provided by the employer," the Industrial Commission must make findings, based upon competent evidence, relative to the duration of the emergency. *Schofield v. Great Atl. & Pac. Tea Co.*, 299 N.C. 582, 264 S.E.2d 56 (1980).

**Permanently Disabled Employee Entitled to Medical Expenses for Life.** — In a workers' compensation case there was no merit to defendant's argument that medical expenses should be compensated only to the extent they

would tend to lessen the period of disability, since, if a plaintiff is found to be totally and permanently disabled, he will be entitled to medical expenses for life, dating from the time he became totally disabled, subject only to the requirements of § 97-29 that the expenses be "reasonable and necessary." *Smith v. American & Efrid Mills*, 51 N.C. App. 480, 277 S.E.2d 83 (1981), *aff'd*, 305 N.C. 507, 290 S.E.2d 634 (1982).

**Appeal of Award Does Not Suspend Jurisdiction of Commission.** — An appeal of an award of the Industrial Commission does not suspend that agency's authority to accept notification of an employee's decision to select his own doctor; neither does an appeal deprive the commission of its jurisdiction to accept the submission of a claim. It may well be that the determination of the particular claim will be delayed until the outcome of the appeal. Nevertheless, the commission has jurisdiction to receive the claim and is, in fact, the only agency vested with that jurisdiction. *Schofield v. Great Atl. & Pac. Tea Co.*, 299 N.C. 582, 264 S.E.2d 56 (1980).

**Cited in** *Robinson v. J.P. Stevens & Co.*, 57 N.C. App. 619, 292 S.E.2d 144 (1982).

## § 97-27. Medical examination; facts not privileged; refusal to be examined suspends compensation; autopsy.

**Cross References.** — As to application of this section to incapacitated State law-enforcement officers, see § 143-166.15.

### CASE NOTES

**The language of this section is mandatory as to the employee.** The employee "shall" submit himself to an examination if it is requested by an employer or ordered by the Industrial Commission. The language of this section, however, imposes no mandatory obligation on the Industrial Commission to order an examination. *Taylor v. M.L. Hatcher Pick-Up & Delivery Serv.*, 45 N.C. App. 682, 263 S.E.2d 788 (1980).

**Commission Approval of Request for**

**Examination Is Discretionary.** — When an employer requests the commission to order an employee to submit to an examination, whether the commission grants or denies the employer's request is within the discretion of the commission. *Taylor v. M.L. Hatcher Pick-Up & Delivery Serv.*, 45 N.C. App. 682, 263 S.E.2d 788 (1980).

**Applied in** *Clark v. Burlington Indus.*, 49 N.C. App. 269, 271 S.E.2d 101 (1980).

## § 97-28. Seven-day waiting period; exceptions.

No compensation, as defined in G.S. 97-2(11), shall be allowed for the first seven calendar days of disability resulting from an injury, except the benefits provided for in G.S. 97-25. Provided however, that in the case the injury results in disability of more than 28 days, the compensation shall be allowed from the date of the disability. Nothing in this section shall prevent an employer from allowing an employee to use paid sick leave, vacation or annual leave, or

disability benefits provided directly by the employer during the first seven calendar days of disability. (1929, c. 120, s. 28; 1983, c. 599.)

**Effect of Amendments.** — The 1983 amendment, effective July 1, 1983, inserted "as defined in G.S. 97-2(11)" in the first sentence and added the third sentence.

## § 97-29. Compensation rates for total incapacity.

Except as hereinafter otherwise provided, where the incapacity for work resulting from the injury is total, the employer shall pay or cause to be paid, as hereinafter provided, to the injured employee during such total disability a weekly compensation equal to sixty-six and two-thirds percent ( $66\frac{2}{3}\%$ ) of his average weekly wages, but not more than the amount established annually to be effective October 1 as provided herein, nor less than thirty dollars (\$30.00) per week.

In cases of total and permanent disability, compensation, including reasonable and necessary nursing services, medicines, sick travel, medical, hospital, and other treatment or care of rehabilitative services shall be paid for by the employer during the lifetime of the injured employee. If death results from the injury then the employer shall pay compensation in accordance with the provisions of G.S. 97-38.

The weekly compensation payment for members of the North Carolina national guard and the North Carolina State guard shall be the maximum amount established annually in accordance with the last paragraph of this section per week as fixed herein. The weekly compensation payment for deputy sheriffs, or those acting in the capacity of deputy sheriffs, who serve upon a fee basis, shall be thirty dollars (\$30.00) a week as fixed herein.

An officer or member of the State Highway Patrol shall not be awarded any weekly compensation under the provisions of this section for the first two years of any incapacity resulting from an injury by accident arising out of and in the course of the performance by him of his official duties if, during such incapacity, he continues to be an officer or member of the State Highway Patrol, but he shall be awarded any other benefits to which he may be entitled under the provisions of this Article.

Notwithstanding any other provision of this Article, beginning August 1, 1975, and on July 1 of each year thereafter, a maximum weekly benefit amount shall be computed. The amount of this maximum weekly benefit shall be derived by obtaining the average weekly insured wage in accordance with G.S. 96-8(22) and by rounding such figure to its nearest multiple of two dollars (\$2.00), and this said maximum weekly benefit shall be applicable to all injuries and claims arising on and after January 1 following such computation. Such maximum weekly benefit shall apply to all provisions of this Chapter effective August 1, 1975, and shall be adjusted July 1 and effective January 1 of each year thereafter as herein provided. (1929, c. 120, s. 29; 1939, c. 277, s. 1; 1943, c. 502, s. 3; c. 543; c. 672, s. 2; 1945, c. 766; 1947, c. 823; 1949, c. 1017; 1951, c. 70, s. 1; 1953, c. 1135, s. 1; c. 1195, s. 2; 1955, c. 1026, s. 5; 1957, c. 1217; 1963, c. 604, s. 1; 1967, c. 84, s. 1; 1969, c. 143, s. 1; 1971, c. 281, s. 1; c. 321, s. 1; 1973, c. 515, s. 1; c. 759, s. 1; c. 1103, s. 1; c. 1308, ss. 1, 2; 1975, c. 284, s. 4; 1979, c. 244; 1981, c. 276, s. 2; c. 378, s. 1; c. 421, s. 3; c. 521, s. 2; c. 920, s. 1.)

**Cross References.** — As to payment of full salary in lieu of compensation to incapacitated State law-enforcement officers, see § 143-166.16.

**Effect of Amendments.** — Session Laws 1981, c. 276, s. 2, substituted "the amount established annually to be effective October 1 as provided herein" for "eighty dollars (\$80.00)"

near the end of the first paragraph.

Session Laws 1981, c. 378, s. 1, effective July 1, 1981, substituted "thirty dollars (\$30.00)" for "twenty dollars (\$20.00)" in the first and third paragraphs.

Session Laws 1981, c. 421, s. 3, effective July 1, 1981, and applicable to cases arising on and after that date, deleted a proviso from the end of the second sentence of the third paragraph, which read: "Provided that the last sentence herein shall not apply to Ashe, Avery, Bladen, Carteret, Caswell, Cherokee, Gates, Hyde, Macon, Pender, Perquimans, Union, Watauga and Wilkes Counties."

Session Laws 1981, c. 521, s. 2, substituted "July" for "August" in the first and last sentences of the last paragraph, substituted "January" for "November" near the end of the second sentence of the last paragraph and for "October" in the last sentence of the last paragraph.

Session Laws 1981, c. 920, s. 1, substituted

"established annually in accordance with the last paragraph of this section" for "of eighty dollars (\$80.00)" near the end of the first sentence of the third paragraph.

Session Laws 1981, c. 920, s. 3, makes the act effective upon ratification and applicable to cases arising on and after that date. The act was ratified July 10, 1981.

**Legal Periodicals.** — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For survey of 1980 tort law, see 59 N.C.L. Rev. 1239 (1981).

For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

For comment on *Morrison v. Burlington Indus.*, 304 N.C. 1, 282 S.E.2d 458 (1981), see 4 Campbell L. Rev. 107 (1981).

For note discussing the use of age, education, and work experience in determining disability in workers' compensation cases, see 15 Wake Forest L. Rev. 570 (1979).

### CASE NOTES

**Legislative Intent.** — The legislature intended the maximums to be separate and independent provisions of this section. *Taylor v. J.P. Stevens Co.*, 307 N.C. 392, 298 S.E.2d 681 (1982).

**Section contains a mandatory provision** that applies when the Commission finds a permanent and total disability. *Robinson v. J.P. Stevens & Co.*, 57 N.C. App. 619, 292 S.E.2d 144 (1982).

**The 1973 amendment to this section governing the maximum weekly workers' compensation benefit applies to § 97-38**, so that § 97-38 no longer limits recovery for death claims to \$80.00 per week. *Andrews v. Nu-Woods, Inc.*, 43 N.C. App. 591, 259 S.E.2d 306 (1979), *aff'd*, 299 N.C. 723, 264 S.E.2d 99 (1980).

The 1973 amendment clearly establishes maximum weekly benefits for all sections of the Workers' Compensation Act, including benefits for total incapacity and death and benefits under § 97-38 no longer limited to \$80.00 per week. *Andrews v. Nu-Woods, Inc.*, 299 N.C. 723, 264 S.E.2d 99 (1980).

**Application of Section as Amended Upheld.** — Where all of the evidence disclosed that plaintiff did not become totally disabled until 1978, no right to recover for permanent total disability vested until after the enactment of the 1978 version of this section (S. L. 1973, c. 1308, §§ 1, 2) and no possible liability accrued to defendants as a result of plaintiff's permanent total disability until after the enactment and effective date of the 1973 revision of this section; hence, the application of the 1978 version of this section did not constitute an

unconstitutional application of substantive law. *Smith v. American & Efrid Mills*, 305 N.C. 507, 290 S.E.2d 634 (1982).

**Section 97-29.1 Provides Parity with Certain Benefits under This Section.** — The import of § 97-29.1 was to effectuate some economic parity in benefits afforded persons who prior to § 97-29.1 received lifetime weekly benefits with those who received lifetime weekly benefits by virtue of the 1975 amendment to this section. *Taylor v. J.P. Stevens & Co.*, 57 N.C. App. 643, 292 S.E.2d 277 (1982), modified, 307 N.C. 392, 298 S.E.2d 681 (1983).

**Stacking of Benefits under § 97-30 and this Section Not Permitted.** — If the Industrial Commission in workers' compensation actions should find that a plaintiff became totally and permanently disabled, the plaintiff's compensation should be to the fullest extent allowed under this section and should be awarded without regard to compensation previously awarded the plaintiff under § 97-30 for partial disability; however, a plaintiff should receive full compensation under this section only where an award under § 97-30 was fully paid before the plaintiff became totally disabled, since, if the period for partial disability award overlapped the period for the total award, the stacking of total benefits on top of partial benefits, for the same time period, would allow the plaintiff a greater recovery than the legislature intended. *Smith v. American & Efrid Mills*, 51 N.C. App. 480, 277 S.E.2d 83 (1981), *aff'd*, 305 N.C. 507, 290 S.E.2d 634 (1982).

At a given point in time, the provisions of this section and § 97-30 must be mutually exclu-

sive; that is, a claimant cannot simultaneously be both totally and partially incapacitated. *Smith v. American & Efirid Mills*, 51 N.C. App. 480, 277 S.E.2d 83 (1981), *aff'd*, 305 N.C. 507, 290 S.E.2d 634 (1982).

In a workers' compensation case plaintiff was compensated for his permanent and total disability under this section as it read in 1978 when his disability became permanent and total, rather than as it read in 1970 when he first became disabled and was entitled to compensation, for partial disability under § 97-30, since plaintiff had no right to claim compensation, nor was the employer exposed to liability, under this section until 1978 when plaintiff appeared to have become totally disabled. *Smith v. American & Efirid Mills*, 51 N.C. App. 480, 277 S.E.2d 83 (1981), *aff'd*, 305 N.C. 507, 290 S.E.2d 634 (1982).

**Construed with § 97-31.** — In many instances, an award under this section better fulfills the policy of the Workers' Compensation Act than an award under § 97-31 because it is a more favorable remedy and is more directly related to compensating inability to work. *West v. Bladenboro Cotton Mills, Inc.*, — N.C. App. —, 302 S.E.2d 645 (1983).

An award for damage to the lungs may be made under subdivision (24) of § 97-31. But such an award, by the express terms of the statute, would be in lieu of all other compensation. Such award may also be based on this section, as has been done in many other reported cases involving byssinosis disability. *West v. Bladenboro Cotton Mills, Inc.*, — N.C. App. —, 302 S.E.2d 645 (1983).

**Compensation for Byssinosis.** — It was not until 1975, when the General Assembly enacted the amendments to this section, that employees suffering from byssinosis were able to receive unlimited weekly benefits for their total and permanent disability. Prior to that time, this section only provided lifetime weekly benefits for persons disabled due to paralysis resulting from injury to the brain or spinal cord or from loss of mental capacity due to injury to the brain. In all other cases of total disability, compensation was restricted in the amount of money paid per week, in the amount of weeks paid and in the maximum amount which the claimant could receive. *Taylor v. J.P. Stevens & Co.*, 57 N.C. App. 643, 292 S.E.2d 277 (1982), modified, 307 N.C. 392, 298 S.E.2d 681 (1983).

**Under the traditional four-way classification of disabilities**, a total disability under this section must be either permanent or temporary. *Gamble v. Borden, Inc.*, 45 N.C. App. 506, 263 S.E.2d 280 (1980).

**Medical Expenses Compensated Only Where Disability Is Total and Permanent.**

— This section entitles a claimant to recover compensation for medical care only where disability is found to be total and permanent. *Peeler v. State Hwy. Comm'n*, 48 N.C. App. 1, 269 S.E.2d 153 (1980), *aff'd*, 302 N.C. 183, 273 S.E.2d 705 (1981).

**Total Incapacity from Emotional Disturbance Caused by Injury.** — Where employee receives a compensable injury which causes her to become so emotionally disturbed that she is unable to work, she is entitled to compensation for total incapacity under this section. *Fayne v. Fieldcrest Mills, Inc.*, 54 N.C. App. 144, 282 S.E.2d 539 (1981), *cert. denied*, 304 N.C. 725, 288 S.E.2d 380 (1982).

**The commission can only apportion when the claimant retains some capacity to work.** *Morrison v. Burlington Indus.*, 47 N.C. App. 50, 266 S.E.2d 741 (1980).

**Apportionment Held Necessary.** — Industrial Commission did not have authority to award claimant compensation for total disability when 40 to 50 percent of disability was not occupational in origin and was not aggravated or accelerated by any occupational disease. *Morrison v. Burlington Indus.*, 304 N.C. 1, 282 S.E.2d 458 (1981).

**Apportionment Held Improper.** — If an employee's incapacity to work is total and that incapacity is occasioned by a compensable injury or disease, the employee's incapacity to work cannot be apportioned to other preexisting or latent illnesses or infirmities, nor may the entitlement to compensation be dismissed for such conditions. Therefore, where the Industrial Commission found that plaintiff was totally disabled to work, that 55 percent of her disability was due to her occupational disease, and that 45 percent of her disability was due to physical infirmities not related to her work, the commission erred in holding that plaintiff was entitled only to compensation for partial rather than total disability. *Morrison v. Burlington Indus.*, 47 N.C. App. 50, 266 S.E.2d 741 (1980).

**Applied in** *Morrison v. Burlington Indus.*, 304 N.C. 1, 282 S.E.2d 458 (1981); *McKee v. Crescent Spinning Co.*, 54 N.C. App. 558, 284 S.E.2d 175 (1981).

**Stated in** *Gasperson v. Buncombe County Pub. Schools*, 52 N.C. App. 154, 277 S.E.2d 872 (1981).

**Cited in** *In re Annexation Ordinance*, 300 N.C. 337, 266 S.E.2d 661 (1980); *Morrison v. Burlington Indus.*, 301 N.C. 226, 271 S.E.2d 364 (1980); *Peeler v. State Hwy. Comm'n*, 302 N.C. 183, 273 S.E.2d 705 (1981); *Rutledge v. Tultex Corp./Kings Yarn.* — N.C. —, 301 S.E.2d 359 (1983); *Cook v. Bladenboro Cotton Mills, Inc.*, — N.C. App. —, 300 S.E.2d 852 (1983).

## § 97-29.1. Increase in payments in cases for total and permanent disability occurring prior to July 1, 1973.

### CASE NOTES

**Purpose.** — In enacting this section, the Legislature did not intend to do anything other than increase the weekly benefits of claimants who were totally and permanently disabled. *Taylor v. J.P. Stevens & Co.*, 57 N.C. App. 643, 292 S.E.2d 277 (1982), modified, 307 N.C. 392, 298 S.E.2d 681 (1983).

The legislative history of this section reveals an intent to provide additional benefits for persons who were disabled prior to 1973. *Taylor v. J.P. Stevens & Co.*, 57 N.C. App. 643, 292 S.E.2d 277 (1982), modified, 307 N.C. 392, 298 S.E.2d 681 (1983).

By enacting this section, the Legislature intended only to affect those cases in which the claimant received lifetime weekly benefits under § 97-29 prior to the 1975 amendment to that statute which provided lifetime weekly benefits for total and permanent disability regardless of the cause of disability. *Taylor v. J.P. Stevens & Co.*, 57 N.C. App. 643, 292 S.E.2d 277 (1982), modified, 307 N.C. 392, 298 S.E.2d 681 (1983).

This section increases only the weekly compensation benefits in all cases of total and permanent disability occurring prior to July 1, 1973; no provision has been made for an increase in total benefits. It is a well-settled principle of statutory construction that where a statute is intelligible without any additional words, no additional words may be supplied. *Taylor v. J.P. Stevens & Co.*, 307 N.C. 392, 298 S.E.2d 681 (1983).

**Section Provides Parity with Certain Benefits under § 97-29.** — The import of this section was to effectuate some economic parity in benefits afforded persons who prior to this section received lifetime weekly benefits with those who received lifetime weekly benefits by virtue of the 1975 amendment to § 97-29. *Taylor v. J.P. Stevens & Co.*, 57 N.C. App. 643, 292 S.E.2d 277 (1982), modified, 307 N.C. 392, 298 S.E.2d 681 (1983).

## § 97-30. Partial incapacity.

Except as otherwise provided in G.S. 97-31, where the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to sixty-six and two-thirds percent ( $66\frac{2}{3}\%$ ) of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than the amount established annually to be effective October 1 as provided in G.S. 97-29 a week, and in no case shall the period covered by such compensation be greater than 300 weeks from the date of injury. In case the partial disability begins after a period of total disability, the latter period shall be deducted from the maximum period herein allowed for partial disability. An officer or member of the State Highway Patrol shall not be awarded any weekly compensation under the provisions of this section for the first two years of any incapacity resulting from an injury by accident arising out of and in the course of the performance by him of his official duties if, during such incapacity, he continues to be an officer or member of the State Highway Patrol, but he shall be awarded any other benefits to which he may be entitled under the provisions of this Article. (1929, c. 120, s. 30; 1943, c. 502, s. 4; 1947, c. 823; 1951, c. 70, s. 2; 1953, c. 1195, s. 3; 1955, c. 1026, s. 6; 1957, c. 1217; 1963, c. 604, s. 2; 1967, c. 84, s. 2; 1969, c. 143, s. 2; 1971, c. 281, s. 2; 1973, c. 515, s. 2; c. 759, s. 2; 1981, c. 276, s. 1.)

### Cross References. —

As to payment of full salary in lieu of com-

pensation to incapacitated State law-enforcement officers, see § 143-166.16.

**Effect of Amendments.** — The 1981 amendment substituted "the amount established annually to be effective October 1 as provided in G.S. 97-29" for "eighty dollars (\$80.00)" near the end of the first sentence.

**Legal Periodicals.** — For survey of 1978

administrative law, see 57 N.C.L. Rev. 831 (1979).

For comment on *Morrison v. Burlington Indus.*, 304 N.C. 1, 282 S.E.2d 458 (1981), see 4 Campbell L. Rev. 107 (1981).

## CASE NOTES

**Stacking of Benefits under § 97-29 and this Section Not Permitted.** — If the Industrial Commission in workers' compensation actions should find that a plaintiff became totally and permanently disabled, the plaintiff's compensation should be to the fullest extent allowed under § 97-29 and should be awarded without regard to compensation previously awarded the plaintiff under this section for partial disability; however, a plaintiff should receive full compensation under § 97-29 only where an award under this section was fully paid before the plaintiff became totally disabled, since, if the period for partial disability award overlapped the period for the total award, the stacking of total benefits on top of partial benefits, for the same time period, would allow the plaintiff a greater recovery than the legislature intended. *Smith v. American & Efird Mills*, 51 N.C. App. 480, 277 S.E.2d 83, aff'd, 305 N.C. 507, 290 S.E.2d 634 (1982).

At a given point in time, the provisions of § 97-29 and this section must be mutually exclusive; that is, a claimant cannot simultaneously be both totally and partially incapacitated. *Smith v. American & Efird Mills*, 51 N.C. App. 480, 277 S.E.2d 83, aff'd, 305 N.C. 507, 290 S.E.2d 634 (1982).

In a workers' compensation case plaintiff was compensated for his permanent and total disability under § 97-29 as it read in 1978 when his disability became permanent and total, rather than as it read in 1970 when he first became disabled and was entitled to compensation, for partial disability under this section, since plaintiff had no right to claim compensation, nor was the employer exposed to liability, under § 97-29 until 1978 when plaintiff appeared to have become totally disabled. *Smith v. American & Efird Mills*, 51 N.C. App. 480, 277 S.E.2d 83, aff'd, 305 N.C. 507, 290 S.E.2d 634 (1982).

**Test of Earning Capacity.** —

In accord with 1st paragraph in original. See *Wilhite v. Liberty Veneer Co.*, 47 N.C. App.

434, 267 S.E.2d 566, cert. granted, 301 N.C. 106, 273 S.E.2d 312 (1980), rev'd on other grounds, 303 N.C. 281, 278 S.E.2d 234 (1981).

**The commission can only apportion when the claimant retains some capacity to work.** *Morrison v. Burlington Indus.*, 47 N.C. App. 50, 266 S.E.2d 741 (1980).

**Apportionment Held Proper.** — Where evidence supported the Industrial Commission's conclusion that claimant was totally disabled and that 55 percent of her disability was due to an occupational disease while 45 percent was due to other physical infirmities, it was not error for the Industrial Commission to award claimant compensation for a 55 percent partial disability rather than for total disability. *Morrison v. Burlington Indus.*, 304 N.C. 1, 282 S.E.2d 458 (1981).

**Apportionment Held Improper.** — If an employee's incapacity to work is total and that incapacity is occasioned by a compensable injury or disease, the employee's incapacity to work cannot be apportioned to other preexisting or latent illnesses or infirmities, nor may the entitlement to compensation be dismissed for such conditions. Therefore, where the Industrial Commission found that plaintiff was totally disabled to work, that 55 percent of her disability was due to her occupational disease, and that 45 percent of her disability was due to physical infirmities not related to her work, the commission erred in holding that plaintiff was entitled only to compensation for partial rather than total disability. *Morrison v. Burlington Indus.*, 47 N.C. App. 50, 266 S.E.2d 741 (1980).

**Stated in West v. Bladenboro Cotton Mills, Inc.**, — N.C. App. —, 302 S.E.2d 645 (1983).

**Cited in Morrison v. Burlington Indus.**, 301 N.C. 226, 271 S.E.2d 364 (1980); *Gamble v. Borden, Inc.*, 45 N.C. App. 506, 263 S.E.2d 280 (1980); *Smith v. American & Efird Mills*, 305 N.C. 507, 290 S.E.2d 634 (1982); *Cloutier v. State*, 57 N.C. App. 239, 291 S.E.2d 362 (1982).

## § 97-31. Schedule of injuries; rate and period of compensation.

**Legal Periodicals.** — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For survey of 1980 tort law, see 59 N.C.L. Rev. 1239 (1981).

For survey of 1981 administrative law, see 60

N.C.L. Rev. 1165 (1982).

For note discussing the use of age, education, and work experience in determining disability

in workers' compensation cases, see 15 Wake Forest L. Rev. 570 (1979).

## CASE NOTES

**Construed with § 97-29.** — In many instances, an award under § 97-29 better fulfills the policy of the Workers' Compensation Act than an award under this section because it is a more favorable remedy and is more directly related to compensating inability to work. *West v. Bladenboro Cotton Mills, Inc.*, — N.C. App. —, 302 S.E.2d 645 (1983).

An award for damage to the lungs may be made under subdivision (24) of this section. But such an award, by the express terms of the statute, would be in lieu of all other compensation. Such award may also be based on § 97-29, as has been done in many other reported cases involving byssinosis disability. *West v. Bladenboro Cotton Mills, Inc.*, — N.C. App. —, 302 S.E.2d 645 (1983).

**Injury to "Hip."** — For purposes of this section, an injury to the "hip" will be considered an injury to the "leg." See *Gasperson v. Buncombe County Pub. Schools*, 52 N.C. App. 154, 277 S.E.2d 872 (1981).

**Consideration of Earning Capacity.** — Although the courts have not explicitly stated that earning capacity can be considered in a subdivision (24) award, two cases, *Shuler v. Talon Div. of Textron*, 30 N.C. App. 570, 227 S.E.2d 627 (1976), and *Arrington v. Engineering Corp.*, 264 N.C. 38, 140 S.E.2d 759 (1965), support such a holding. *Key v. McLean Trucking*, — N.C. App. —, 300 S.E.2d 280 (1983).

Although disability compensation under this section is awarded for physical impairment irrespective of ability to work or loss of wage earning power, there is nothing in this section or the case law that forbids consideration of loss of earning capacity. *Key v. McLean Trucking*, — N.C. App. —, 300 S.E.2d 280 (1983).

To support a conclusion of disability the North Carolina Supreme Court has said the Commission must find the following three facts: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury. *Cook v. Bladenboro Cotton Mills, Inc.*, — N.C. App. —, 300 S.E.2d 852 (1983).

**Deductions from Gross Income in Calculating Income.** — Farm income of injured volunteer fireman could not be properly calculated without deducting from gross income interest on money which was borrowed to finance crop production, depreciation on equipment used to produce the crops, license fees for things used in crop production, and taxes on land used to produce crops. *York v. Unionville Volunteer Fire Dep't*, 58 N.C. App. 591, 293 S.E.2d 812 (1982).

**Disfigurement alone is not made compensable by the act.** Before it is compensable it must be not only (1) marked disfigurement, but also one which (2) impairs the future usefulness or occupational opportunities of the injured employee. *Wilhite v. Liberty Veneer Co.*, 47 N.C. App. 434, 267 S.E.2d 566, cert. granted, 301 N.C. 106, 273 S.E.2d 312 (1980), rev'd on other grounds, 303 N.C. 281, 278 S.E.2d 234 (1981).

**Discretion of Commission in Awarding Compensation for Disfigurement.** —

Where serious bodily disfigurement is involved, an award of compensation therefor is not required by this section, but may be allowed in the discretion of the Industrial Commission. *Wilhite v. Liberty Veneer Co.*, 303 N.C. 281, 278 S.E.2d 234 (1981).

**There is a serious disfigurement in law, etc.** —

In accord with original. See *Wilhite v. Liberty Veneer Co.*, 303 N.C. 281, 278 S.E.2d 234 (1981).

**Determining Award for Serious, etc.** —

In accord with original. See *Wilhite v. Liberty Veneer Co.*, 303 N.C. 281, 278 S.E.2d 234 (1981).

**Disfigurement of Forearm and Permanent Partial Disability of Hand.** — An employee who had received compensation for the permanent partial disability of his left hand was entitled under subdivision (22) of this section to additional compensation for serious disfigurement because of surgical scars on his left forearm above the wrist. While a double recovery for a single injury compensated pursuant to this section is not authorized, since the settlement related only to partial loss of use of plaintiff's hand, and there was no evidence indicating that the scars extended to the wrist, plaintiff was entitled to the additional com-

pensation. *Thompson v. Frank Ix & Sons*, 33 N.C. App. 350, 235 S.E.2d 250 (1977), *aff'd*, 294 N.C. 358, 240 S.E.2d 783 (1978).

**Injury to Finger Not Serious Bodily Disfigurement.** — In an action to recover an award for "serious bodily disfigurement" resulting from a cut finger sustained by an accident arising out of and in the course of plaintiff's employment with the defendant-employer where plaintiff's finger was scarred and the nail had a roughish appearance and was deformed and where plaintiff suffered no pain or embarrassment as a result of the injury, there was no evidence in the record to support a finding by the Industrial Commission that the injury to plaintiff's finger resulted in "serious bodily disfigurement." *Weidle v. Cloverdale Ford*, 50 N.C. App. 555, 274 S.E.2d 263 (1981).

**Compensation under this Section or Commission Rule.** — When plaintiff can prove a case under either partial loss of a member subject to Industrial Commission Rule XV or partial loss of the use of that member, he is entitled to compensation under either heading. This interpretation is consistent with the plain and explicit language of subdivision (19) of this section. *Caesar v. Piedmont Publishing Co.*, 46 N.C. App. 619, 265 S.E.2d 474 (1980).

Where the distal portion of an employee's left thumb was amputated, the rate of compensation for permanent partial disability was not limited to 25 percent under Industrial Commission Rule XV(1) for partial loss of the thumb itself, and the employee could be compensated at a higher rate under subdivisions (1) and (19) of this section for loss of use of the thumb. *Caesar v. Piedmont Publishing Co.*, 46 N.C. App. 619, 265 S.E.2d 474 (1980).

**Compensation of Disfigurement under Subdivision (22).** — The Workers' Compensation Act deals with compensation for reduced capacity for work. A bodily disfigurement, other than facial or head disfigurements which are governed by subdivision (21) of this section, is serious and compensable under subdivision (22) of this section only when it is of such a nature that it may be fairly presumed that it causes to the injured employee a diminution of his future earning capacity. *Liles v. Charles Lee Byrd Logging Co.*, 59 N.C. App. 330, 296 S.E.2d 485 (1982), *cert. granted*, — N.C. —, 299 S.E.2d 646 (1983).

**No Award for Disfigurement for Period Covered by Temporary Total Disability Award.** — There can be no recovery for disfigurement during the period in which an award was made for temporary total disability payments, otherwise there would, in effect, be a double recovery for the same injury. *Wilhite v. Liberty Veneer Co.*, 47 N.C. App. 434, 267 S.E.2d 566, *cert. granted*, 301 N.C. 106, 273 S.E.2d 312 (1980), *rev'd on other grounds*, 303 N.C. 281, 278 S.E.2d 234 (1981).

**Sinuses are important internal organs under subdivision (24)** of this section. *Cloutier v. State*, 57 N.C. App. 239, 291 S.E.2d 362, *cert. denied*, 306 N.C. 555, 294 S.E.2d 222 (1982).

**Loss of Senses of Taste and Smell, etc.** —

The loss of sense of taste and smell is compensable as the loss of an important internal organ. *Cloutier v. State*, 57 N.C. App. 239, 291 S.E.2d 362, *cert. denied*, 306 N.C. 555, 294 S.E.2d 222 (1982).

**Proof Required for Claim under Subsection (24).** — In order for plaintiff to be entitled to workers' compensation pursuant to subsection (24) of this section, he must show from medical evidence that he has loss of or permanent injury to an important external or internal organ or part of his body for which no compensation is payable under any other subdivision of this section. *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 266 S.E.2d 760 (1980).

**Applicability of Subdivision (24) to Occupational Disease.** — Injury caused by an occupational disease does not fall within the scope of subdivision (24) of this section. *Harrell v. Yarns*, 56 N.C. App. 697, 289 S.E.2d 846 (1982). But see *Cook v. Bladenboro Cotton Mills, Inc.*, — N.C. App. —, 300 S.E.2d 852 (1983) holding that subdivision (24) is applicable to occupational diseases.

**Rights Where Employee Dies Prior to Determination of Award.** — Generally speaking, a lump sum award made prior to decedent's death is deemed to be an accrued benefit, but logic compels the conclusion that if, pursuant to subsection (22) of this section, no determination of the lump sum award for disfigurement had been made prior to death, then such entitlements are unaccrued until such time as they are determined, and, for that reason, the payment of the lump sum award for disfigurement would pass to the worker's dependents pursuant to this section rather than to the deceased worker's estate. *Wilhite v. Liberty Veneer Co.*, 47 N.C. App. 434, 267 S.E.2d 566, *cert. granted*, 301 N.C. 106, 273 S.E.2d 312 (1980), *rev'd on other grounds*, 303 N.C. 281, 278 S.E.2d 234 (1981).

Dependents of an employee who suffers a serious bodily disfigurement due to an accident covered by the Workers' Compensation Act, but who dies due to an unrelated cause, are entitled to a post mortem award for serious bodily disfigurement. *Bridges v. McCrary Stone Servs., Inc.*, 48 N.C. App. 185, 268 S.E.2d 559 (1980).

When an employee suffers serious bodily disfigurement due to an accident covered by the Workers' Compensation Act and dies from unrelated causes while drawing compensation for temporary total disability, his dependents are entitled to a postmortem award for serious bodily disfigurement. *Wilhite v. Liberty Veneer Co.*, 303 N.C. 281, 278 S.E.2d 234 (1981).

**Proceedings Pend until All Injuries Adjudicated.** — Until all of an injured employee's compensable injuries and disabilities have been considered and adjudicated by the commission, the proceeding pends for the purpose of evaluation, absent laches or some statutory time limit.

*Wilhite v. Liberty Veneer Co.*, 303 N.C. 281, 278 S.E.2d 234 (1981).

**Applied** in *Morrison v. Burlington Indus.*, 304 N.C. 1, 282 S.E.2d 458 (1981).

**Cited** in *Hundley v. Fieldcrest Mills*, 58 N.C. App. 184, 292 S.E.2d 766 (1982).

### § 97-31.1. Effective date of legislative changes in benefits.

Every act of the General Assembly that changes the benefits enumerated in this Chapter shall have a ratification date of no later than June 1 and shall have an effective date of no earlier than January 1 of the year after which it is ratified. (1981, c. 521, s. 3.)

### § 97-33. Prorating in event of earlier disability or injury.

**Legal Periodicals.** — For comment on *Morrison v. Burlington Indus.*, 304 N.C. 1, 282

S.E.2d 458 (1981), see 4 Campbell L. Rev. 107 (1981).

### § 97-35. How compensation paid for two injuries; employer liable only for subsequent injury.

**Legal Periodicals.** — For comment on *Morrison v. Burlington Indus.*, 304 N.C. 1, 282

S.E.2d 458 (1981), see 4 Campbell L. Rev. 107 (1981).

### § 97-36. Accidents taking place outside State; employees receiving compensation from another state.

#### CASE NOTES

**Applied** in *Leonard v. Johns-Manville Sales Corp.*, 59 N.C. App. 454, 297 S.E.2d 147 (1982).

### § 97-37. Where injured employee dies before total compensation is paid.

**Legal Periodicals.** — For survey of 1980 tort law, see 59 N.C.L. Rev. 1239 (1981).

#### CASE NOTES

**Recovery Where Employee Died After Filing Claim.** — In the situation where a claimant dies after a claim has been filed, the claimant's estate may recover all accrued but unpaid benefits, and all unaccrued benefits to which the employee would have been entitled had he lived are payable to decedent's dependents pursuant to this section. *Wilhite v. Liberty Veneer Co.*, 47 N.C. App. 434, 267 S.E.2d 566, cert. granted, 301 N.C. 106, 273 S.E.2d 312 (1980), rev'd on other grounds, 303 N.C. 281,

278 S.E.2d 234 (1981).

**Recovery Where Employee Died Without Filing Claim.** — Allowing a dependent widow of a deceased worker to recover that to which her husband would have been entitled is consistent with the statutory purpose of this section, and a widow's claim will not be denied because her husband had not filed a worker's compensation claim for disfigurement before he died. *Wilhite v. Liberty Veneer Co.*, 47 N.C. App. 434, 267 S.E.2d 566, cert. granted, 301 N.C.

106, 273 S.E.2d 312 (1980), rev'd on other grounds, 303 N.C. 281, 278 S.E.2d 234 (1981).

**Basis for Award.** — The dependents of a deceased employee who suffered a serious bodily disfigurement due to an accident covered by the Workers' Compensation Act but who died due to an unrelated cause are entitled to a post mortem award for serious bodily disfigurement based on the best possible medical estimate as to the probable residual disability that would have remained had the employee lived to complete his healing period,

notwithstanding the employee had not filed a worker's compensation claim for disfigurement before he died. *Wilhite v. Liberty Veneer Co.*, 47 N.C. App. 434, 267 S.E.2d 566, cert. granted, 301 N.C. 106, 273 S.E.2d 312 (1980), rev'd on other grounds, 303 N.C. 281, 278 S.E.2d 234 (1981).

**Applied in** *Bridges v. McCrary Stone Servs., Inc.*, 48 N.C. App. 185, 268 S.E.2d 559 (1980).

**Stated in** *Wilhite v. Liberty Veneer Co.*, 303 N.C. 281, 278 S.E.2d 234 (1981).

### **§ 97-38. Where death results proximately from the accident; dependents; burial expenses; compensation to aliens; election by partial dependents.**

If death results proximately from the accident and within two years thereafter, or while total disability still continues and within six years after the accident, or while total disability still continues and within two years of the final determination of total disability, whichever is later, the employer shall pay or cause to be paid, subject to the provisions of other sections of this Article, weekly payments of compensation equal to sixty-six and two-thirds percent ( $66\frac{2}{3}\%$ ) of the average weekly wages of the deceased employee at the time of the accident, but not more than the amount established annually to be effective October 1 as provided in G.S. 97-29, nor less than thirty dollars (\$30.00), per week, and burial expenses not exceeding one thousand dollars (\$1,000), to the person or persons entitled thereto as follows:

- (1) Persons wholly dependent for support upon the earnings of the deceased employee at the time of the accident shall be entitled to receive the entire compensation payable share and share alike to the exclusion of all other persons. If there be only one person wholly dependent, then that person shall receive the entire compensation payable.
- (2) If there is no person wholly dependent, then any person partially dependent for support upon the earnings of the deceased employee at the time of the accident shall be entitled to receive a weekly payment of compensation computed as hereinabove provided, but such weekly payment shall be the same proportion of the weekly compensation provided for a whole dependent as the amount annually contributed by the deceased employee to the support of such partial dependent bears to the annual earnings of the deceased at the time of the accident.
- (3) If there is no person wholly dependent, and the person or all persons partially dependent is or are within the classes of persons defined as "next of kin" in G.S. 97-40, whether or not such persons or such classes of persons are of kin to the deceased employee in equal degree, and all so elect, he or they may take, share and share alike, the commuted value of the amount provided for whole dependents in (1) above instead of the proportional payment provided for partial dependents in (2) above; provided, that the election herein provided may be exercised on behalf of any infant partial dependent by a duly qualified guardian; provided, further, that the Industrial Commission may, in its discretion, permit a parent or person standing in loco parentis to such infant to exercise such option in its behalf, the award to be payable only to a duly qualified guardian except as in this Article otherwise provided; and provided, further, that if such election is exercised by or on behalf

of more than one person, then they shall take the commuted amount in equal shares.

When weekly payments have been made to an injured employee before his death, the compensation to dependents shall begin from the date of the last of such payments. Compensation payments due on account of death shall be paid for a period of 400 weeks from the date of the death of the employee; provided, however, after said 400-week period in case of a widow or widower who is unable to support herself or himself because of physical or mental disability as of the date of death of the employee, compensation payments shall continue during her or his lifetime or until remarriage and compensation payments due a dependent child shall be continued until such child reaches the age of 18.

Compensation payable under this Article to aliens not residents (or about to become nonresidents) of the United States or Canada, shall be the same in amount as provided for residents, except that dependents in any foreign country except Canada shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to the surviving father or mother whom the employee has supported, either in whole or in part, for a period of one year prior to the date of the injury; provided, that the Commission may, in its discretion, or, upon application of the employer or insurance carrier shall commute all future installments of compensation to be paid to such aliens to their present value and payment of one half of such commuted amount to such aliens shall fully acquit the employer and the insurance carrier. (1929, c. 120, s. 38; 1943, c. 163; c. 502, s. 5; 1947, c. 823; 1951, c. 70, s. 3; 1953, c. 53, s. 1; 1955, c. 1026, s. 8; 1957, c. 1217; 1963, c. 604, s. 3; 1967, c. 84, s. 4; 1969, c. 143, s. 4; 1971, c. 281, s. 3; 1973, c. 515, s. 4; c. 759, s. 4; c. 1308, ss. 3, 4; c. 1357, ss. 1, 2; 1977, c. 409; 1981, c. 276, s. 1; c. 378, s. 1; c. 379; 1983, c. 772, s. 1.)

#### Editor's Note. —

Session Laws 1983, c. 772, s. 2, provides that the act is effective upon ratification and applies to all claims where death occurs on and after that date. The act was ratified July 15, 1983.

**Effect of Amendments.** — The first 1981 amendment substituted "the amount established annually to be effective October 1 as provided in G.S. 97-29" for "eighty dollars (\$80.00)" near the end of the introductory paragraph.

The second 1981 amendment, effective July 1, 1981, substituted "thirty dollars (\$30.00)" for "twenty dollars (\$20.00)" near the end of the introductory paragraph.

The third 1981 amendment, effective July 1, 1981, and applicable to cases arising on and after that date, substituted "one thousand dollars (\$1,000)" for "five hundred dollars

(\$500.00)" near the end of the introductory paragraph.

The 1983 amendment, effective July 15, 1983, inserted "or while total disability still continues and within two years of the final determination of total disability, whichever is later" in the introductory language of this section.

**Legal Periodicals.** — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

For a note on occupation disease under workers' compensation statute, see 16 Wake Forest L. Rev. 288 (1980).

## CASE NOTES

**Section Criticized.** See *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979).

The 1973 amendment to § 97-29 governing the maximum weekly workers' compensation benefit applies to this section so that this section no longer limits recovery for death claims to \$80.00 per week.

*Andrews v. Nu-Woods, Inc.*, 43 N.C. App. 591, 259 S.E.2d 306 (1979), *aff'd*, 299 N.C. 723, 264 S.E.2d 99 (1980).

**Statute in Effect at Time of Death Controls Award.** — Where an employee died of serum hepatitis, which was found to be a disease characteristic of and peculiar to his occupation of lab technician, the commission

did not err in awarding compensation according to the statute in effect when the employee died rather than the statute in effect at the time he contracted the disease. *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979).

**Recipients' Shares Fixed at Date of Death.** — General Assembly intended to fix each recipient's share of death benefits at the date of decedent's death. *Chinault v. Floyd S. Pike Electrical Contractors*, 53 N.C. App. 604, 281 S.E.2d 460 (1981), *aff'd*, 306 N.C. 286, 293 S.E.2d 147 (1982).

**Percentage of Survivors' Benefits Fixed by Subdivision (1).** — Paragraph fixing the period of time for which benefits are to be paid as 400 weeks for the widow and for each minor child until he reaches age 18 is not intended to fix the percentage of survivors' benefits; that is done by subdivision (1) of this section. *Chinault v. Floyd S. Pike Electrical Contractors*, 53 N.C. App. 604, 281 S.E.2d 460 (1981), *aff'd*, 306 N.C. 286, 293 S.E.2d 147 (1982).

**Shares of Partial Dependents Fixed by Subdivisions (2) and (3).** — Subdivisions (2) and (3) of this section fix the share each survivor is to receive if there are no persons wholly dependent on decedent at the date of his death. *Chinault v. Floyd S. Pike Electrical Contractors*, 53 N.C. App. 604, 281 S.E.2d 460 (1981), *aff'd*, 306 N.C. 286, 293 S.E.2d 147 (1982).

**If there is a decrease in the dependent beneficiary pool** during the 400 weeks following the employee's death, there must be a corresponding reapportionment of the full award payable for that set period among the remaining eligible members of the pool. That is the only situation in which there will be an increase in the amount of the individual shares paid to the dependents still partaking of the compensation fund. *Deese v. Southern Lawn & Tree Expert Co.*, 306 N.C. 275, 293 S.E.2d 140 (1982).

**Section does not permit a reapportionment of the entire compensation award** among eligible dependents after 400 weeks have elapsed. *Deese v. Southern Lawn & Tree Expert Co.*, 306 N.C. 275, 293 S.E.2d 140 (1982).

**No Finding of Permanent Disability Required for Disabled Widow.** — The provision in this section for compensation for life or until remarriage for the disabled widow of an employee who dies under compensable circum-

stances does not on its face require a finding of permanent disability. *Hedrick v. Southland Corp.*, 41 N.C. App. 431, 255 S.E.2d 198, cert. denied, 298 N.C. 296, 259 S.E.2d 912 (1979).

**Date of "Accident" in Occupational Disease Case.** — Where employee died 15 months after he became totally disabled by serum hepatitis, the claim of deceased employee's dependents for death benefits was not barred by this section providing compensation if death results from an accident within two years or, while total disability continues, within six years after the accident, since the date of the "accident" in cases involving occupational disease is treated as the date on which disablement occurs and not as the date employee contracted the disease. *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979).

**Suicide Due to Derangement Caused by Pain and Suffering from Compensable Injury.** — If an employee receives an injury which is compensable under this Chapter and as a result of pain and suffering from this injury he becomes so deranged that he commits suicide, the death is compensable. *Fayne v. Fieldcrest Mills, Inc.*, 54 N.C. App. 144, 282 S.E.2d 539 (1981), cert. denied, 304 N.C. 725, 288 S.E.2d 380 (1982).

**Allocation of Compensation to Widow and Children Upheld.** — Industrial Commission properly held that the entire compensation to which survivors, a widow and three minor children, were entitled should be divided into four equal parts, with the widow to receive weekly payments for 400 weeks, and each of the three minor children to receive only its share of weekly compensation beyond the 400 week period and until such child reached 18 years of age. *Chinault v. Floyd S. Pike Electrical Contractors*, 53 N.C. App. 604, 281 S.E.2d 460 (1981), *aff'd*, 306 N.C. 286, 293 S.E.2d 147 (1982).

**Applied in** *Chinault v. Floyd S. Pike Elec. Contractors*, 306 N.C. 286, 293 S.E.2d 147 (1982); *Baldwin v. Piedmont Woodyards, Inc.*, 58 N.C. App. 602, 293 S.E.2d 814 (1982).

**Stated in** *Carpenter v. Hawley*, 53 N.C. App. 715, 281 S.E.2d 783 (1981).

**Cited in** *In re Annexation Ordinance*, 300 N.C. 337, 266 S.E.2d 661 (1980); *Thompson v. Lenoir Transf. Co.*, 48 N.C. App. 47, 268 S.E.2d 534 (1980); *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 293 S.E.2d 196 (1982).

**§ 97-39. Widow, widower, or child to be conclusively presumed to be dependent; other cases determined upon facts; division of death benefits among those wholly dependent; when division among partially dependent.**

**CASE NOTES**

**Quoted** in *Carpenter v. Hawley*, 53 N.C. App. 715, 281 S.E.2d 783 (1981). **57 N.C. App. 137, 291 S.E.2d 155 (1982).**  
**Cited** in *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 293 S.E.2d 196 (1982).  
**Stated** in *Coleman v. City of Winston-Salem*,

**§ 97-40. Commutation and payment of compensation in absence of dependents; "next of kin" defined; commutation and distribution of compensation to partially dependent next of kin; payment in absence of both dependents and next of kin.**

Subject to the provisions of G.S. 97-38, if the deceased employee leaves neither whole nor partial dependents, then the compensation which would be payable under G.S. 97-38 to whole dependents shall be commuted to its present value and paid in a lump sum to the next of kin as herein defined. For purposes of this section and G.S. 97-38, "next of kin" shall include only child, father, mother, brother or sister of the deceased employee, including adult children or adult brothers or adult sisters of the deceased, but excluding a parent who has willfully abandoned the care and maintenance of his or her child and who has not resumed its care and maintenance at least one year prior to the first occurring of the majority or death of the child and continued its care and maintenance until its death or majority. For all such next of kin who are neither wholly nor partially dependent upon the deceased employee and who take under this section, the order of priority among them shall be governed by the general law applicable to the distribution of the personal estate of persons dying intestate. In the event of exclusion of a parent based on abandonment, the claim for compensation benefits shall be treated as though the abandoning parent had predeceased the employee. For all such next of kin who were also partially dependent on the deceased employee but who exercise the election provided for partial dependents by G.S. 97-38, the general law applicable to the distribution of the personal estate of persons dying intestate shall not apply and such person or persons upon the exercise of such election, shall be entitled, share and share alike, to the compensation provided in G.S. 97-38 for whole dependents commuted to its present value and paid in a lump sum.

If the deceased employee leaves neither whole dependents, partial dependents, nor next of kin as hereinabove defined, then no compensation shall be due or payable on account of the death of the deceased employee, except that the employer shall pay or cause to be paid the burial expenses of the deceased employee not exceeding one thousand dollars (\$1,000) to the person or persons entitled thereto. (1929, c. 120, s. 40; 1931, c. 274, s. 5; c. 319; 1945, c. 766; 1953, c. 53, s. 2; c. 1135, s. 2; 1963, c. 604, s. 4; 1965, c. 419; 1967, c. 84, s. 5; 1971, c. 1179; 1981, c. 379.)

**Effect of Amendments.** — The 1981 amendment, effective July 1, 1981, and applicable to cases arising on and after that date, substituted

"one thousand dollars (\$1,000)" for "five hundred dollars (\$500.00)" near the end of the second paragraph.

## CASE NOTES

**Applied** in *Deese v. Southern Lawn & Tree Expert Co.*, 306 N.C. 275, 293 S.E.2d 140 (1982).

## § 97-40.1. Second Injury Fund.

**Legal Periodicals.** — For comment on *Morrison v. Burlington Indus.*, 304 N.C. 1, 282 S.E.2d 458 (1981), see 4 *Campbell L. Rev.* 107 (1981).

**Quoted** in *Harris v. Lee Paving Co.*, 47 N.C. App. 348, 267 S.E.2d 381 (1980).

## § 97-44. Lump sums.

## CASE NOTES

**Lump Sum Payable Only in Unusual Cases.** — The general statutory scheme for periodic payment of income benefits can be changed to a lump sum payment only in unusual cases and when the commissioner deems it to be in the best interest of the employee or his dependents. *Harris v. Lee Paving Co.*, 47 N.C. App. 348, 267 S.E.2d 381,

cert. denied, 301 N.C. 88, 273 S.E.2d 297 (1980).

**The maximum amount of the lump sum** under this section is not its commuted value or its commutable value but rather its uncommuted value. *Harris v. Lee Paving Co.*, 47 N.C. App. 348, 267 S.E.2d 381, cert. denied, 301 N.C. 88, 273 S.E.2d 297 (1980).

## § 97-47. Change of condition; modification of award.

## CASE NOTES

**"Change of condition" refers to a substantial condition.** —

In accord with original. See *Edwards v. Smith & Sons*, 49 N.C. App. 191, 270 S.E.2d 569 (1980), cert. denied, 301 N.C. 720, 274 S.E.2d 228 (1981).

**A change of condition means, etc.** —

Change of condition under this section occurs where conditions are different from those existent when the award was made; and a continued incapacity of the same kind and character and for the same injury is not a change of condition, the change must be actual, and not a mere change of opinion with respect to a preexisting condition. *Edwards v. Smith & Sons*, 49 N.C. App. 191, 270 S.E.2d 569 (1980), cert. denied, 301 N.C. 720, 274 S.E.2d 228 (1981).

**Physician's change of opinion with respect to degree of permanent partial disability** is not evidence of a change in condition within the meaning of this section if it is based solely on his reconsidering the contents of the patient's medical record as of the date of his first opinion. If, however, the physician examines his patient subsequent to the date of his

first opinion and in the interim the patient's physical condition has deteriorated, then a change of opinion with respect to the degree of permanent partial disability is evidence of a change in condition for purposes of this section. *McLean v. Roadway Express, Inc.*, 307 N.C. 99, 296 S.E.2d 456 (1982).

**A change in the degree, etc.** —

In accord with original. See *McLean v. Roadway Express, Inc.*, 307 N.C. 99, 296 S.E.2d 456 (1982).

**The time limitation is not jurisdictional, etc.** —

Two year limitation of this section is not jurisdictional; it merely provides a defense which the employer may assert. *Pennington v. Flame Refractories, Inc.*, 53 N.C. App. 584, 281 S.E.2d 463 (1981).

The time limitation in this section is a nonjurisdictional limit, and is a technical, legal defense, and sound public policy and the fair, effective disposition of contested worker's compensation claims requires that if the time limitation of this section is to be available as a defense to claims based upon a change of condition, such defense must be asserted prior to

hearing on the merits, and if not so asserted, it must be deemed to have been waived. *Gragg v. W.M. Harris & Son*, 54 N.C. App. 607, 284 S.E.2d 183 (1981).

**But Is Technical Legal Defense. —**

Under general principles of civil procedure, the statute of limitations is a technical defense, and must be timely pleaded or it is deemed waived. There is no reason why this same rule should not apply to cases arising under this section. *Gragg v. W.M. Harris & Son*, 54 N.C. App. 607, 284 S.E.2d 183 (1981).

**Purpose of the two year limitation is to protect the employer** against claims too old to be successfully investigated and defended. *Pennington v. Flame Refractories, Inc.*, 53 N.C. App. 584, 281 S.E.2d 463 (1981).

**Letter based on change in condition, mailed to the Industrial Commission, held**

**timely.** *Pennington v. Flame Refractories, Inc.*, 53 N.C. App. 584, 281 S.E.2d 463 (1981).

**Avenue of Review Where Appeal Not Taken. —** Where the plaintiff did not perfect an appeal from the Industrial Commission's order denying her claim for workers' compensation based upon an accident which arose out of and in the course of her employment, she was not entitled to a hearing de novo, and the only avenue of review open to her was an application for review based on a change of condition pursuant to the provisions of this section. *Smith v. Carolina Footwear, Inc.*, 50 N.C. App. 460, 274 S.E.2d 386 (1981).

**Applied in** *McLean v. Roadway Express, Inc.*, 56 N.C. App. 451, 289 S.E.2d 58 (1982).

**Cited in** *Lucas v. Burlington Indus.*, 57 N.C. App. 366, 291 S.E.2d 360 (1982).

## § 97-52. Occupational disease made compensable; "accident" defined.

**Legal Periodicals. —** For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For comment on injury by accident in worker's compensation, see 59 N.C.L. Rev. 175 (1980).

For a note on occupation disease under workers' compensation statute, see 16 Wake Forest L. Rev. 288 (1980).

### CASE NOTES

**Applicability of § 97-53(13). —** The current version of § 97-53(13) applies to all claims for disablement in which the disability occurs after the effective date of subdivision (13) of § 97-53 as amended, i.e., July 1, 1971, since under this section of the Workers' Compensation Act injury resulting from occupational disease is compensable only when it leads to disablement, and until that time the employee has no cause of action and the employer has no liability. *Wood v. J.P. Stevens & Co.*, 297 N.C. 636, 256 S.E.2d 692 (1979).

**Disability Defined. —** Disability is defined as incapacity because of injury to earn wages which employee was receiving at the time of injury in the same or any other employment; this definition applies to occupational diseases. *Hilliard v. Apex Cabinet Co.*, 54 N.C. App. 173, 282 S.E.2d 828 (1981), rev'd on other grounds, 305 N.C. 593, 290 S.E.2d 682 (1982).

**This Chapter does not guarantee that benefits will be paid** whenever an employee is injured or suffers from an occupational disease; it is not designed to be health or accident insurance. *Hilliard v. Apex Cabinet Co.*, 54 N.C. App. 173, 282 S.E.2d 828 (1981), rev'd on other grounds, 305 N.C. 593, 290 S.E.2d 682 (1982).

**When Benefits Payable. —** Benefits are paid only when, due to occupational disease or injury, employee is incapable of earning the same wages he earned at the time of contracting the disease or receiving the injury, at his same job or any other employment. *Hilliard v. Apex Cabinet Co.*, 54 N.C. App. 173, 282 S.E.2d 828 (1981), rev'd on other grounds, 305 N.C. 593, 290 S.E.2d 682 (1982).

**Disease Must Be Incident to, etc. —**

Employees who suffer occupational diseases due to personal sensitivities are not entitled to workers' compensation benefits absent a finding that the disability is due to an occupational disease. *Hilliard v. Apex Cabinet Co.*, 54 N.C. App. 173, 282 S.E.2d 828 (1981), rev'd on other grounds, 305 N.C. 593, 290 S.E.2d 682 (1982).

Disability resulting from a disease is compensable when the disease is aggravated or accelerated by causes and conditions characteristic of and peculiar to claimant's employment. *Robinson v. J.P. Stevens & Co.*, 57 N.C. App. 619, 292 S.E.2d 144 (1982).

**Claimant Must Prove Causation. —** A claimant's right to compensation for an occupational disease under § 97-53(13) and this section depends upon proper proof of causation,

and the burden of proving each and every element of compensability is upon the plaintiff. *Moore v. J.P. Stevens & Co.*, 47 N.C. App. 744, 269 S.E.2d 159, cert. denied, 301 N.C. 401, 274 S.E.2d 226 (1980).

Claimant must show that diminution in earning capacity is due to occupational disease or injury; it is not enough merely to show a diminution in wages earned subsequent to the affliction or injury. *Hilliard v. Apex Cabinet Co.*, 54 N.C. App. 173, 282 S.E.2d 828 (1981), rev'd on other grounds, 305 N.C. 593, 290 S.E.2d 682 (1982).

In order to be entitled to compensation for disablement from an occupational disease, plaintiff must establish: (1) that the disablement results from an occupational disease encompassed by subdivision (13) of § 97-53 and (2) the extent of the disablement resulting from said occupational disease. That means, in occupational disease cases, that disablement of an employee resulting from an occupational disease which arises out of and in the course of the employment is compensable and claimant has the burden of proof to show not only disability, but also its degree. *Swink v. Cone Mills, Inc.*, — N.C. App. —, 300 S.E.2d 848 (1983).

One of the circumstances under which compensation for disability caused by and resulting from a disease may be awarded is when the disease is aggravated or accelerated by causes and conditions characteristic or peculiar to claimant's employment. However, in order to be entitled to compensation for disablement from an occupational disease, the claimant must carry his burden of proof in establishing the causal connection among the disability, the disease, and the employment. *Swink v. Cone Mills, Inc.*, — N.C. App. —, 300 S.E.2d 848 (1983).

**Date of "Accident" in Occupational Disease Cases.** — Where employee died 15 months after he became totally disabled by serum hepatitis, the claim of deceased employee's dependents for death benefits was not barred by § 97-38 providing compensation if death results from an accident within two years or, while total disability continues, within six years after the accident, since the date of the "accident" in cases involving occupational disease is treated as the date on which disablement occurs and not as the date employee contracted the disease. *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979).

The date when plaintiff became disabled due to byssinosis is deemed to be the date upon which she sustained an injury by accident. *Taylor v. J.P. Stevens & Co.*, 300 N.C. 94, 265 S.E.2d 144 (1980).

**Date Disease "Originates" Irrelevant.** — As it is the event of disability which triggers entitlement to compensation and not the date of the last injurious exposure, the date on which a plaintiff's occupational disease "originated" has no relevance to his claim. *Taylor v. Cone Mills Corp.*, 56 N.C. App. 291, 289 S.E.2d 60, rev'd on other grounds, 306 N.C. 314, 293 S.E.2d 189 (1982).

**If a disease is not disabling apart from aggravation by occupational conditions,** the employer must compensate the employee for the entire resulting disability. *Robinson v. J.P. Stevens & Co.*, 57 N.C. App. 619, 292 S.E.2d 144 (1982).

**Byssinosis is an occupational disease under § 97-53(13) and is compensable under this section.** *Donnell v. Cone Mills Corp.*, — N.C. App. —, 299 S.E.2d 436 (1983).

**Industrial Commission did not err in concluding that plaintiff had not contracted an occupational disease** while employed in defendant's textile mill where the evidence tended to show that plaintiff suffered from chronic bronchitis and had evidence of mild obstructive lung disease, aggravated by exposure to cotton dust, but such infirmities would not interfere with any work except the most strenuous kind, and plaintiff therefore did not suffer any disablement which would entitle him to compensation. *Mills v. J.P. Stevens & Co.*, 53 N.C. App. 341, 280 S.E.2d 802, cert. denied, 304 N.C. 196, 285 S.E.2d 100 (1981).

**Applied in** *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E.2d 101 (1981); *Clark v. Burlington Indus.*, 49 N.C. App. 269, 271 S.E.2d 101 (1980); *Harrell v. Yarns*, 56 N.C. App. 697, 289 S.E.2d 846 (1982).

**Quoted in** *Taylor v. J.P. Stevens & Co.*, 300 N.C. 94, 265 S.E.2d 144 (1980).

**Stated in** *West v. Bladenboro Cotton Mills, Inc.*, — N.C. App. —, 302 S.E.2d 645 (1983).

**Cited in** *Morrison v. Burlington Indus.*, 47 N.C. App. 50, 266 S.E.2d 741 (1980); *Rutledge v. Tultex Corp./Kings Yarn*, — N.C. —, 301 S.E.2d 359 (1983); *Hundley v. Fieldcrest Mills*, 58 N.C. App. 184, 292 S.E.2d 766 (1982).

## § 97-53. Occupational diseases enumerated; when due to exposure of chemicals.

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For survey of 1980 administrative law, see 59 N.C.L. Rev. 1032 (1981).

For comment on *Morrison v. Burlington*

Indus., 304 N.C. 1, 282 S.E.2d 458 (1981), see 4 Campbell L. Rev. 107 (1981).

For a note on occupational disease under workers' compensation statute, see 16 Wake Forest L. Rev. 288 (1980).

For note on *Morrison v. Burlington Indus.*, 304 N.C. 1, 282 S.E.2d 458 (1981), see 18 Wake Forest L. Rev. 801 (1982).

## CASE NOTES

**Legislative Intent.** — The clear intent of the General Assembly in enacting the current version of this section was to bring North Carolina in line with the vast majority of states by providing comprehensive coverage for occupational diseases. *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979).

### "Occupational Disease" Defined. —

Clear language of this section provides that for any disease other than those specifically named to be deemed an "occupational disease," it must be proven to be due to causes and conditions as specified in the section. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E.2d 101 (1981).

**When Illness Compensable.** — An illness is compensable under this section, whether mentioned specifically in the statute or falling within the general definition in subdivision (13) of this section, only if it also comes within "well understood definitions of the term 'occupational diseases.'" *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979).

Disability resulting from a disease is compensable when the disease is aggravated or accelerated by causes and conditions characteristic of and peculiar to claimant's employment. *Robinson v. J.P. Stevens & Co.*, 57 N.C. App. 619, 292 S.E.2d 144 (1982).

If a disease is not disabling apart from the aggravation by occupational conditions, the employer must compensate the employee for the entire resulting disability. *Robinson v. J.P. Stevens & Co.*, 57 N.C. App. 619, 292 S.E.2d 144 (1982).

### To prove the existence of a compensable "occupational disease" under this section:

(1) the disease must be characteristic of a trade or occupation; (2) the disease must not be an ordinary disease of life to which the public is equally exposed outside of the employment; and (3) there must be proof of causation, i.e., proof of a causal connection between the disease and the employment. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E.2d 101 (1981).

For an occupational disease to be compensable under subdivision (13) of this section, two conditions must be met: It must be due to causes and conditions characteristic and peculiar to the employment; and the particular employment conditions must place the worker at

greater risk than the general public of contracting the disease. *Fann v. Burlington Indus.*, 59 N.C. App. 512, 296 S.E.2d 819 (1982).

**Findings of Fact.** — In determining whether a given illness falls within a definition set out in this section, it is the duty of the commission to consider all of the competent evidence, make definitive findings, draw its conclusions of law from these findings, and enter the appropriate award. In making its findings, the commission's function is to weigh and evaluate the entire evidence and determine as best it can where the truth lies. *Harrell v. J.P. Stevens & Co.*, 45 N.C. App. 197, 262 S.E.2d 830, cert. denied, 300 N.C. 196, 269 S.E.2d 623 (1980).

Where the commission awards compensation for disablement due to an occupational disease encompassed by subsection (13), the opinion and award must contain explicit findings as to the characteristics, symptoms and manifestations of the disease from which the plaintiff suffers, as well as a conclusion of law as to whether the disease falls within the statutory provision. *Moore v. J.P. Stevens & Co.*, 47 N.C. App. 744, 269 S.E.2d 159, cert. denied, 301 N.C. 401, 274 S.E.2d 226 (1980); *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E.2d 101 (1981).

**Proof of Causation Essential.** — Proof of a causal connection between the disease and the employee's occupation is an essential element in proving the existence of a compensable occupational disease within the meaning of this section. *Hansel v. Sherman Textiles*, 49 N.C. App. 1, 270 S.E.2d 585 (1980), rev'd on other grounds, 304 N.C. 44, 283 S.E.2d 101 (1981).

In order for an occupational disease which develops over a long period of time to be compensable under subsection (13) of this section, it must be proved that it was caused by the plaintiff's employment. *Brown v. J.P. Stevens & Co.*, 49 N.C. App. 118, 270 S.E.2d 602 (1980), cert. denied, 304 N.C. 192, 285 S.E.2d 96 (1981).

One of the circumstances under which compensation for disability caused by and resulting from a disease may be awarded is when the disease is aggravated or accelerated by causes and conditions characteristic or peculiar to claimant's employment. However, in order to be entitled to compensation for disablement from an occupational disease, the claimant must

carry his burden of proof in establishing the causal connection among the disability, the disease, and the employment. *Swink v. Cone Mills, Inc.*, — N.C. App. —, 300 S.E.2d 848 (1983).

**Claimant Must Prove Causation.** — A claimant's right to compensation for an occupational disease under subsection (13) of this section and § 97-52 depends upon proper proof of causation, and the burden of proving each and every element of compensability is upon the plaintiff. *Moore v. J.P. Stevens & Co.*, 47 N.C. App. 744, 269 S.E.2d 159, cert. denied, 301 N.C. 401, 274 S.E.2d 226 (1980).

In order to be entitled to compensation for disablement from an occupational disease, plaintiff must establish: (1) that the disablement results from an occupational disease encompassed by subdivision (13) of this section and (2) the extent of the disablement resulting from said occupational disease. That means, in occupational disease cases, that disablement of an employee resulting from an occupational disease which arises out of and in the course of the employment is compensable and claimant has the burden of proof to show not only disability, but also its degree. *Swink v. Cone Mills, Inc.*, — N.C. App. —, 300 S.E.2d 848 (1983).

**If a disease is produced by some extrinsic or independent agency,** it may not be imputed to the occupation or the employment. *Moore v. J.P. Stevens & Co.*, 47 N.C. App. 744, 269 S.E.2d 159, cert. denied, 301 N.C. 401, 274 S.E.2d 226 (1980).

**Applicability of Amended Subdivision (13).** — The current version of subdivision (13) applies to all claims for disablement in which the disability occurs after the effective date of subdivision (13), as amended, i.e., July 1, 1971, since under § 97-52 of the Workmen's Compensation Act injury resulting from occupational disease is compensable only when it leads to disablement, and until that time the employee has no cause of action and the employer has no liability. *Wood v. J.P. Stevens & Co.*, 297 N.C. 636, 256 S.E.2d 692 (1979).

**Subdivision (13) Intended to Define "Occupational Disease".** — Except for those diseases specifically named in the statute, the legislature intended the present version of subdivision (13) to define the term "occupational disease." To the extent that this statute conflicts with prior judicial definitions of the term "occupational disease," the older definitions must give way. *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979).

**Employment Need Not Be Exclusive Cause.** — Subdivision (13) in no way requires that the conditions of employment be the exclusive cause of the disease in order to be compensable. *Humphries v. Cone Mills Corp.*, 52 N.C. App. 612, 279 S.E.2d 56, cert. denied, 304 N.C. 390, 285 S.E.2d 832 (1981).

The disease need not be one which originates exclusively from the particular kind of employment in which the employee is engaged, but rather employment must result in a hazard which distinguishes it in character from the general run of occupations. *Humphries v. Cone Mills Corp.*, 52 N.C. App. 612, 279 S.E.2d 56, cert. denied, 304 N.C. 390, 285 S.E.2d 832 (1981).

Despite evidence that plaintiff had smoked three-fourths a pack of cigarettes daily for 30 years, medical evidence and plaintiff's own testimony was sufficient to find him permanently disabled under this section from byssinosis caused by the conditions of his employment in the weave room of a textile plant. *Humphries v. Cone Mills Corp.*, 52 N.C. App. 612, 279 S.E.2d 56, cert. denied, 304 N.C. 390, 285 S.E.2d 832 (1981).

The hazards of employment do not have to be the sole cause of a worker's injury in order for the worker to receive compensation for the full extent of his incapacity for work caused by the injury. *Rutledge v. Tultex Corp./Kings Yarn*, — N.C. —, 301 S.E.2d 359 (1983).

To hold that the inhalation of cotton dust must be the sole cause of chronic obstructive lung disease before this disease can be considered occupational establishes too harsh a principle from the standpoint of the worker and the purposes and policies of the Workers' Compensation Act. This act should be liberally construed so that the benefits under the act will not be denied by narrow, technical or strict interpretation. *Rutledge v. Tultex Corp./Kings Yarn*, — N.C. —, 301 S.E.2d 359 (1983).

Where the accident and resultant injury arise out of both the idiopathic condition of the workman and hazards incident to the employment, the employer is liable. But not so where the idiopathic condition is the sole cause of the injury. *Rutledge v. Tultex Corp./Kings Yarn*, — N.C. —, 301 S.E.2d 359 (1983).

**What Plaintiff Must Show Under Subdivision (13).** — Plaintiff must show, in order to be entitled to compensation for disablement resulting from an occupational disease covered by subdivision (13) of this section: (1) that her disablement results from an occupational disease encompassed by this section, i.e., an occupational disease due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, as distinguished from an ordinary disease of life to which the general public is equally exposed outside of the employment; and (2) the extent of the disablement resulting from said occupational disease, i.e., whether she is totally or partially disabled as a result of the disease. *Morrison v. Burlington Indus.*, 304 N.C. 1, 282 S.E.2d 458 (1981).

To satisfy the first and second elements of subdivision (13) of this section it is not neces-

sary that the disease originate exclusively from or be unique to the particular trade of occupation in question. All ordinary diseases of life are not excluded from the statute's coverage. Only such ordinary diseases of life to which the general public is exposed equally with workers in the particular trade or occupation are excluded. Thus, the first two elements are satisfied if, as a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally. *Rutledge v. Tultex Corp./Kings Yarn*, — N.C. —, 301 S.E.2d 359 (1983).

**Ordinary Disease of Life.** — If the medical evidence tends to show that plaintiff suffers from an ordinary disease of life to which the general public is equally exposed, which is not proven to be due to causes and conditions which are characteristic of and peculiar to any particular trade, occupation or employment and which is not aggravated or accelerated by an occupational disease, the claim is not compensable. *Thompson v. Burlington Indus.*, 59 N.C. App. 539, 297 S.E.2d 122 (1982), cert. denied, — N.C. —, 299 S.E.2d 650 (1983).

**Whether a given illness falls within the general definition set out in subdivision (13)** presents a mixed question of fact and law. The Commission must determine first the nature of the disease from which the plaintiff is suffering — that is, its characteristics, symptoms and manifestations. Ordinarily, such findings will be based on expert medical testimony. Having made appropriate findings of fact, the next question the Commission must answer is whether or not the illness plaintiff has contracted falls within the definition set out in the statute. This latter judgment requires a conclusion of law. *Wood v. J.P. Stevens & Co.*, 297 N.C. 636, 256 S.E.2d 692 (1979); *Harrell v. J.P. Stevens & Co.*, 45 N.C. App. 197, 262 S.E.2d 830, cert. denied, 300 N.C. 196, 269 S.E.2d 623 (1980).

Where, in a hearing before the industrial commission on a claim for workmen's compensation benefits, the critical issue raised by the evidence is whether the calcification of tendons and ligaments in plaintiff's shoulders, resulting in a 10 percent permanent partial disability to both arms, is an occupational disease within the meaning of subdivision (13), this issue engenders two distinct findings of fact which must be made: (1) an explicit description of plaintiff's duties in performing her occupation, and (2) a determination of whether such duties caused the calcification and resulting disability to either or both of plaintiff's arms. *Cannady v. Gold Kist*, 43 N.C. App. 482, 259 S.E.2d 342 (1979).

Whether a given illness falls within the general definitions set out in subsection (13) of this section presents a mixed question of fact and law. *Taylor v. J.P. Stevens & Co.*, 300 N.C.

94, 265 S.E.2d 144 (1980); *Taylor v. Cone Mills Corp.*, 306 N.C. 314, 293 S.E.2d 189 (1982).

**Unless there is a proper finding that plaintiff suffers from an occupational disease**, the analysis required by *Morrison v. Burlington Indus.*, 304 N.C. 1, 282 S.E.2d 458 (1981) and *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E.2d 101 (1981) is inappropriate. *Lumpkins v. Mills*, 56 N.C. App. 653, 289 S.E.2d 848 (1982).

**Denial of compensation may be predicated upon failure of claimant to prove any element of compensability under this section.** *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E.2d 101 (1981).

**Determination of When Disablement Occurred Required.** — Given plaintiff's allegation that she was disabled after the effective date of the present version of subdivision (13), it is incumbent upon the Commission to determine when plaintiff became disabled before it decides which law applies to her claim. Where the Commission heard no evidence on this point and made no factual determination as to the date of disablement, the case must be remanded for a determination of that issue. *Wood v. J.P. Stevens & Co.*, 297 N.C. 636, 256 S.E.2d 692 (1979).

**When Disease "Characteristic" of Profession.** — To be compensable under subdivision (13) of this section, a disease must, *inter alia*, be "characteristic of and peculiar to a particular trade, occupation or employment." A disease is "characteristic" of a profession when there is a recognizable link between the nature of the job and an increased risk of contracting the disease in question. *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979); *Humphries v. Cone Mills Corp.*, 52 N.C. App. 612, 279 S.E.2d 56, cert. denied, 304 N.C. 390, 285 S.E.2d 832 (1981); *Anderson v. A.M. Smyre Mfg. Co.*, 54 N.C. App. 337, 283 S.E.2d 433 (1981).

**Qualifying Disease Compensable Even if Also "Injury by Accident".** — If an employee contracts an infectious disease as a result of his employment and it falls within either the schedule of diseases set out in the statute or the general definition of "occupational disease" in subdivision (13), it should be treated as a compensable event regardless of the fact that it might also qualify as an "injury by accident" under § 97-2(6). *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979).

**Circumstances Showing Connection Between Disease and Occupation.** — In the case of occupational diseases proof of a causal connection between the disease and the employee's occupation must of necessity be based on circumstantial evidence. Among the circumstances which may be considered are the following: (1) the extent of exposure to the disease or disease-causing agents during employ-

ment, (2) the extent of exposure outside employment, and (3) absence of the disease prior to the work-related exposure as shown by the employee's medical history. *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979); *Hansel v. Sherman Textiles*, 49 N.C. App. 1, 270 S.E.2d 585 (1980), rev'd on other grounds, 304 N.C. 44, 283 S.E.2d 101 (1981).

**Exposure to Environmental Irritants.** — Where an employee is exposed in his work place to environmental irritants which in fact hasten the onset of a disabling condition which did not previously exist, such aggravation is tantamount to causation for purposes of subdivision (13) of this section, and the resulting disability is an occupational disease thereunder. *Walston v. Burlington Indus.*, 49 N.C. App. 301, 271 S.E.2d 516 (1980), rev'd on other grounds, 304 N.C. 670, 285 S.E.2d 822 (1982).

**Time of disablement** for the purpose of deciding which version of the Workers' Compensation Act to apply runs from the date the claimant was incapable of working due to a later diagnosed occupational disease. *Taylor v. J.P. Stevens & Co.*, 300 N.C. 94, 265 S.E.2d 144 (1980).

**Expert Testimony as to Technical Terms.** — While the construction of a statute is ultimately a question of law for the courts, expert opinion testimony as to the meaning of technical terms used in a statute is clearly competent. Expert testimony may be received as an aid to proper interpretation if the statute or rule (a) used technical terms not generally understood or (b) is ambiguous or indefinite. *Taylor v. Cone Mills Corp.*, 306 N.C. 314, 293 S.E.2d 189 (1982).

**When Serum Hepatitis Compensable Injury.** — Because serum hepatitis is not expressly mentioned in the schedule of diseases contained in this section, it is a compensable injury only if it falls within the general definition set out in subdivision (13). *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979).

**Serum Hepatitis Held Compensable Injury.** — See *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979).

**Judicial Notice as to Essential Characteristics of Byssinosis Inappropriate.** — The Commission erred in assuming that byssinosis is an irritation of the pulmonary air passages without hearing evidence and making findings of fact as to the nature of claimant's illness, which is required of the Commission in determining whether a given illness falls within the general definition set out in subdivision (13). The causes and development of byssinosis, and the structural and functional changes produced by the disease, are still the subject of scientific debate, and the Supreme Court has never before considered a case involving byssinosis. Under these circum-

stances judicial notice as to the essential characteristics of the disease is inappropriate. *Wood v. J.P. Stevens & Co.*, 297 N.C. 636, 256 S.E.2d 692 (1979).

**Respiratory surfaces of the lungs are "external contact surfaces" of the body** as contemplated by subdivision (13) of this section as it existed prior to the 1971 amendment. *Taylor v. Cone Mills Corp.*, 306 N.C. 314, 293 S.E.2d 189 (1982).

**Burden of Proving Hearing Loss.** — Under subdivision (28) of this section, 90 decibels, A scale, is a noise level that plaintiff has the burden of showing in order to recover. The 90 decibels measurement is not an affirmative defense that defendant must prove. *McCuiston v. Addressograph-Multigraph Corp.*, 59 N.C. App. 76, 295 S.E.2d 490 (1982), cert. granted, 307 N.C. 469, 299 S.E.2d 221 (1983).

A careful reading of subdivision (28) of this section, and the placement of the 90 decibels requirement in the subpart that defines the elements of recovery, lead to the conclusion that a plaintiff-employee must show that he was exposed to that level of noise before he can recover. If 90 decibels were an affirmative defense the General Assembly clearly could have said that as it did in § 97-12, where the party claiming the defense of employee intoxication on the job has the burden of showing it. It is the task of the General Assembly to define the elements of recovery under the Workers' Compensation Act, and the Supreme Court cannot by judicial declarations amend the act. *McCuiston v. Addressograph-Multigraph Corp.*, 59 N.C. App. 76, 295 S.E.2d 490 (1982), cert. granted, 307 N.C. 469, 299 S.E.2d 221 (1983).

**Award for Total Disability Not Authorized Where 40 to 50 Percent Not Occupational in Origin.** — Industrial Commission does not have authority to award compensation for total disability when 40 to 50 percent of claimant's disablement is not occupational in origin and was not aggravated or accelerated by any occupational disease. *Morrison v. Burlington Indus.*, 304 N.C. 1, 282 S.E.2d 458 (1981).

**Award for Partial Disability Upheld.** — Where evidence supported Industrial Commission's conclusion that claimant was totally disabled and that 55 percent of her disability was due to an occupational disease and 45 percent of her disability was due to other physical infirmities, it was not error for the Commission to award claimant compensation for a 55 percent partial disability rather than for total disability. *Morrison v. Burlington Indus.*, 304 N.C. 1, 282 S.E.2d 458 (1981).

**Finding of Total Disability Proper.** — Evidence that plaintiff, age 58, had a fifth grade education and had no training to do any work other than textile work; that prior to his

employment in textile mills, plaintiff had no lung disease or breathing difficulties; that during his employment he developed respiratory problems; that plaintiff was diagnosed as having byssinosis; and that he was 50 percent to 70 percent disabled for impairment and totally disabled to perform his former textile employment was evidence supporting the Commission's findings and conclusion that plaintiff was totally disabled due to an occupational disease. *Anderson v. A.M. Smyre Mfg. Co.*, 54 N.C. App. 337, 283 S.E.2d 433 (1981).

**Applied** in *Clark v. Burlington Indus.*, 49

N.C. App. 269, 271 S.E.2d 101 (1980).

**Stated** in *Goodman v. Linn-Corriher Corp.*, 53 N.C. App. 612, 281 S.E.2d 458 (1981); *West v. Bladenboro Cotton Mills, Inc.*, — N.C. App. —, 302 S.E.2d 645 (1983).

**Cited** in *Morrison v. Burlington Indus.*, 47 N.C. App. 50, 266 S.E.2d 741 (1980); *Taylor v. J.P. Stevens & Co.*, 57 N.C. App. 643, 292 S.E.2d 277 (1982); *Hundley v. Fieldcrest Mills*, 58 N.C. App. 184, 292 S.E.2d 766 (1982); *Taylor v. J.P. Stevens & Co.*, 307 N.C. 392, 298 S.E.2d 681 (1983).

## § 97-54. "Disablement" defined.

### CASE NOTES

**Section 97-61.5 is in conflict with this section and § 97-58(a)**, thereby establishing an exception. This exception makes the diagnosis of asbestosis or silicosis the same as disablement. The disease must therefore have developed within two years of the last exposure. *Roberts v. Southeastern Magnesia & Asbestos Co.*, — N.C. App. —, 301 S.E.2d 742 (1983).

**Silicosis and Asbestosis Disablement Means Inability to Work Near Dust.** — Unlike the case of disablement from other occupational diseases, disablement from silicosis

and asbestosis is measured from the time a claimant can no longer work at dusty trades, not from the time he can no longer work at any job. *Taylor v. J.P. Stevens & Co.*, 300 N.C. 94, 265 S.E.2d 144 (1980).

**Applied** in *Dowdy v. Fieldcrest Mills, Inc.*, 59 N.C. App. 696, 298 S.E.2d 82 (1982).

**Quoted** in *Taylor v. J.P. Stevens & Co.*, 300 N.C. 94, 265 S.E.2d 144 (1980); *McKee v. Crescent Spinning Co.*, 54 N.C. App. 558, 284 S.E.2d 175 (1981).

## § 97-55. "Disability" defined.

### CASE NOTES

**Applied** in *Dowdy v. Fieldcrest Mills, Inc.*, 59 N.C. App. 696, 298 S.E.2d 82 (1982).

**Quoted** in *Taylor v. J.P. Stevens & Co.*, 300 N.C. 94, 265 S.E.2d 144 (1980); *McKee v.*

*Crescent Spinning Co.*, 54 N.C. App. 558, 284 S.E.2d 175 (1981).

**Stated** in *Hyatt v. Waverly Mills*, 56 N.C. App. 14, 286 S.E.2d 837 (1982).

## § 97-57. Employer liable.

### CASE NOTES

**Function of Section.** — The rule under this section, assigning liability to the employee where the employee was last injuriously exposed, serves to eliminate the need for complex and expensive litigation of the issue of relative contribution by each of several employers to a plaintiff's occupational disease. The possibility that some employers may bear a disproportionate share of the total liability for occupational disease is a problem for the leg-

islature, not the courts, to consider. *Fraday v. Groves Thread*, 56 N.C. App. 61, 286 S.E.2d 844, cert. granted, 305 N.C. 585, 292 S.E.2d 570 (1982).

**Effect of Preexisting Condition.** — An employer must take his employee as he finds him, and the employer will be liable for the full extent of the employee's compensable injury even where a preexisting condition substantially contributes to the degree of the injury.

Fraday v. Groves Thread, 56 N.C. App. 61, 286 S.E.2d 844, cert. granted, 305 N.C. 585, 292 S.E.2d 570 (1982).

The statutory term "last injuriously exposed" means an exposure which proximately augmented the disease to any extent, however slight. Rutledge v. Tultex Corp./Kings Yarn, — N.C. —, 301 S.E.2d 359 (1983).

It is not necessary that claimant show that the conditions of employment caused or significantly contributed to occupational disease. She need only show: (1) that she has a compensable occupational disease and (2) that she was "last injuriously exposed to the hazards of such disease" in defendant's employment. Rutledge v. Tultex Corp./Kings Yarn, — N.C. —, 301 S.E.2d 359 (1983).

The Commission erred in requiring plaintiff to prove that her last employment was the cause of her occupational disease as this section assesses liability to the employer in

whose employment the employee was last injuriously exposed, however minimal the exposure, to the hazards of the occupational disease. Rutledge v. Tultex Corp., 56 N.C. App. 345, 289 S.E.2d 72, cert. granted, 306 N.C. 558, 294 S.E.2d 224 (1982).

**Portion of Disability Due to Industrial Disease Not Chargeable to Age and Education.** — Where an industrial disease renders an employee actually incapacitated to earn any wages, the employer may not ask that a portion of the disability be charged to employee's advanced age and poor learning on the ground that if it were not for these factors he might still retain some earning capacity. Anderson v. A.M. Smyre Mfg. Co., 54 N.C. App. 337, 283 S.E.2d 433 (1981).

**Applied in** Roberts v. Southeastern Magnesia & Asbestos Co., — N.C. App. —, 301 S.E.2d 742 (1983).

## § 97-58. Claims for certain diseases restricted; time limit for filing claims.

(a) Except as otherwise provided in G.S. 97-61.6, an employer shall not be liable for any compensation for asbestosis unless disablement or death results within 10 years after the last exposure to that disease, or, in case of death, unless death follows continuous disablement from such disease, commencing within the period of 10 years limited herein, and for which compensation has been paid or awarded or timely claim made. An employer shall not be liable for any compensation for lead poisoning unless disablement or death results within two years after the last exposure to that disease, or, in case of death, unless death follows continuous disablement from such disease, commencing within the period of two years limited herein, and for which compensation has been paid or awarded or timely claim made.

(1935, c. 123; 1945, c. 762; 1955, c. 525, s. 6; 1963, c. 553, s. 2; 1973, c. 1060, s. 3; 1981, c. 734, s. 1.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amendment, effective July 1, 1981, and applicable to claims filed with the Industrial Commission on

and after that date, rewrote subsection (a).

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

## CASE NOTES

**Section 97-61.5 is in conflict with § 97-54 and this section,** thereby establishing an exception. This exception makes the diagnosis of asbestosis or silicosis the same as disablement. The disease must therefore have developed within two years of the last exposure. Roberts v. Southeastern Magnesia & Asbestos Co., — N.C. App. —, 301 S.E.2d 742 (1983).

**The purpose of the notice-of-injury requirement** is two-fold. It allows the employer to provide immediate medical diag-

nosis and treatment with a view to minimizing the seriousness of the injury, and it facilitates the earliest possible investigation of the circumstances surrounding the injury. Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979).

**Report and Notice, etc. —**

Reading subsection (b) in conjunction with § 97-22, a claim for compensation under the act is barred if the employer is not notified within 30 days of the date the claimant is informed of

the diagnosis unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby. *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979).

**Appeal of Notice Issue.** — An employer who fails to raise the issue of notice at the hearing before the compensation board may not raise it on appeal. *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979).

In an action by the dependents of an employee, who died of hepatitis, to recover death benefits, the employer waived its right to notice of the employee's disease where it failed to raise that issue at the hearing before the Industrial Commission; moreover, under the circumstances of the case it was unrealistic to assume that the employer did not immediately receive notice of the diagnosis of the employee's disease where the employee continued to work in the same laboratory in which he contracted the disease, and where his duties were changed after he "suffered" the disease, so that he no longer handled blood. *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979).

**Disablement Dates from Time, etc. —**

With reference to occupational diseases the time within which an employee must give notice or file claim begins to run when the employee is first informed by competent medical authority of the nature and work-related cause of the disease. *Taylor v. J.P. Stevens & Co.*, 300 N.C. 94, 265 S.E.2d 144 (1980).

**The two-year time limit for filing claims under subsection (c) is a condition precedent** with which claimants must comply in order to confer jurisdiction on the Industrial Commission to hear the claim. *Poythress v. J.P. Stevens & Co.*, 54 N.C. App. 376, 283 S.E.2d 573 (1981), cert. denied, 305 N.C. 153, 289 S.E.2d 380 (1982); *Clary v. A.M. Smyre Mfg. Co.*, — N.C. App. —, 300 S.E.2d 704 (1983).

Subsection (c) of this section does not establish a defense to a claim for workers' compensation, but is a condition precedent with which claimants must comply in order to confer jurisdiction on the Industrial Commission to hear the claim. *Clary v. A.M. Smyre Mfg. Co.*, — N.C. App. —, 300 S.E.2d 704 (1983).

**Two factors trigger the onset of the two-year period** in the case of an occupational disease. Time begins running when an employee has suffered: (1) injury from an occupational disease which (2) renders the employee incapable of earning the wages the employee was receiving at the time of the incapacity by injury. *Taylor v. J.P. Stevens & Co.*, 300 N.C. 94, 265 S.E.2d 144 (1980); *Dowdy v. Fieldcrest Mills, Inc.*, 59 N.C. App. 696, 298 S.E.2d 82 (1982).

With reference to occupational diseases the time within which an employee must give

notice or file claim begins to run when the employee is first informed by competent medical authority of the nature and work-related cause of the disease. *McCall v. Cone Mills Corp.*, — N.C. App. —, 300 S.E.2d 245 (1983); *Clary v. A.M. Smyre Mfg. Co.*, — N.C. App. —, 300 S.E.2d 704 (1983).

**It is not enough that the worker be told a medical name for his disease**, which may be meaningless to him, without a statement of its causal relationship to an extra-hazardous occupation. *McKee v. Crescent Spinning Co.*, 54 N.C. App. 558, 284 S.E.2d 175 (1981), cert. denied, 305 N.C. 301, 291 S.E.2d 150 (1982).

**No Duty to Inquire and Discover Relationship of Disease to Employment.** — The legislature never intended that a claimant for workers' compensation benefits would have to make a correct medical diagnosis of his own condition prior to notification by other medical authority of his disease in order to timely make his claim; likewise, plaintiff cannot be expected to inquire further and discover the relationship of his condition to his employment. *McKee v. Crescent Spinning Co.*, 54 N.C. App. 558, 284 S.E.2d 175 (1981), cert. denied, 305 N.C. 301, 291 S.E.2d 150 (1982).

**Allowing Employee to Work after Employer Learns of Health Problems.** — It is inconceivable that our statutes and case law would dictate the harsh result of denying an employee's claim for occupational disease when disability is due to his employment, and his employer allows him to continue working for over two years after learning of the employee's work-related health problems. The period of limitations in such case would not date from when the employee learns of the disease. *Dowdy v. Fieldcrest Mills, Inc.*, 59 N.C. App. 696, 298 S.E.2d 82 (1982).

**Last Exposure Rule Inapplicable to Diseases Other Than Silicosis, Asbestosis.** — A worker claiming disability from an occupational disease other than silicosis or asbestosis under the North Carolina Workers' Compensation Act, is not required to prove the disability arose within one year from the last exposure to hazardous working conditions. *Taylor v. J.P. Stevens & Co.*, 300 N.C. 94, 265 S.E.2d 144 (1980).

**The dependents' claim for compensation would not be barred by the employee's failure to file within the statutory period** where the dependents were not parties to the proceeding brought by the employee. *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979).

**Employer's Reliance upon Subsection (c) Not Estopped by Failure under § 97-92(a).** — The prescribed penalty against an employer for the neglectful omission to report to the Industrial Commission an employee's absence under § 97-92(a) is not the tolling of a "statute

of limitation" or a bar, either through estoppel or waiver, to the defendant's reliance upon subsection (c) of this section. *Poythress v. J.P. Stevens & Co.*, 54 N.C. App. 376, 283 S.E.2d 573 (1981), cert. denied, 305 N.C. 153, 289 S.E.2d 380 (1982).

**Applied in** *Taylor v. J.P. Stevens & Co.*, 43 N.C. App. 216, 258 S.E.2d 426 (1979); *Eller v.*

*Porter-Hayden Co.*, 48 N.C. App. 610, 269 S.E.2d 284 (1980); *Perdue v. Daniel Int'l, Inc.*, 59 N.C. App. 517, 296 S.E.2d 845 (1982).

**Cited in** *Gragg v. W.M. Harris & Son*, 54 N.C. App. 607, 284 S.E.2d 183 (1981); *Payne v. Cone Mills Corp.*, — N.C. App. —, 299 S.E.2d 847 (1983).

## § 97-59. Employer to pay for treatment.

Medical, surgical, hospital, nursing services, medicine, sick travel, rehabilitation services and other treatment as may reasonably be required to tend to lessen the period of disability or provide needed relief shall be paid by the employer in cases in which awards are made for disability or damage to organs as a result of an occupational disease after bills for same have been approved by the Industrial Commission.

In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary. (1935, c. 123; 1945, c. 762; 1973, c. 1061; 1981, c. 339.)

**Effect of Amendments.** — The 1981 amendment rewrote this section.

**Legal Periodicals.** — For survey of 1981

administrative law, see 60 N.C.L. Rev. 1165 (1982).

## CASE NOTES

**Section Controls Over § 97-25.** — This section, which is a more recent and specific statute dealing with awards of medical benefits in cases involving occupational disease, controls over § 97-25, which is an older and more general statute. *Smith v. American & Efrid Mills*, 305 N.C. 507, 290 S.E.2d 634 (1982).

**Grounds for Award of Medical Benefits.** — This section states two grounds upon which the Commission shall extend medical benefits; if either is found to exist by the Commissioner, an award for medical benefits must be made. *Smith v. American & Efrid Mills*, 305 N.C. 507, 290 S.E.2d 634 (1982).

**There is no provision in the Act allowing the Commission to limit the award of medical expenses** under this section to the period of time in which disability is paid; moreover, upon

finding that the treatment would provide needed relief, it is not necessary under this section for the Commission to determine that such treatment would also lessen the period of disability. *Smith v. American & Efrid Mills*, 305 N.C. 507, 290 S.E.2d 634 (1982).

**Prior Approval Only Required Where Practicable.** — The requirement in this section of prior approval of medical treatment applies only in cases where it is reasonably practicable to seek such prior approval. *Smith v. American & Efrid Mills*, 305 N.C. 507, 290 S.E.2d 634 (1982).

**Cited in** *Smith v. American & Efrid Mills*, 51 N.C. App. 480, 277 S.E.2d 83 (1981); *Robinson v. J.P. Stevens & Co.*, 57 N.C. App. 619, 292 S.E.2d 144 (1982).

## § 97-61.5. Hearing after first examination and report; removal of employee from hazardous occupation; compensation upon removal from hazardous occupation.

(b) If the Industrial Commission finds at the first hearing that the employee has either asbestosis or silicosis or if the parties enter into an agreement to the effect that the employee has silicosis or asbestosis, it shall by order remove the employee from any occupation which exposes him to the hazards of asbestosis

or silicosis, and if the employee thereafter engages in any occupation which exposes him to the hazards of asbestosis or silicosis without having obtained the written approval of the Industrial Commission as provided in G.S. 97-61.7, neither he, his dependents, personal representative nor any other person shall be entitled to any compensation for disablement or death resulting from asbestosis or silicosis; provided, that if the employee is removed from the industry the employer shall pay or cause to be paid as in this subsection provided to the employee affected by such asbestosis or silicosis a weekly compensation equal to sixty-six and two-thirds percent ( $66\frac{2}{3}\%$ ) of his average weekly wages before removal from the industry, but not more than the amount established annually to be effective October 1 as provided in G.S. 97-29 or less than thirty dollars (\$30.00) a week, which compensation shall continue for a period of 104 weeks. Payments made under this subsection shall be credited on the amounts payable under any final award in the cause entered under G.S. 97-61.6. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 2; c. 1354; 1957, c. 1217; c. 1396, s. 8; 1963, c. 604, s. 6; 1967, c. 84, s. 7; 1969, c. 143, s. 6; 1971, c. 281, s. 5; 1973, c. 515, s. 6; c. 759, s. 5; 1981, c. 276, s. 1; c. 378, s. 1.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendments, it is not set out.

**Effect of Amendments.** — The first 1981 amendment substituted "the amount established annually to be effective October 1 as provided in G.S. 97-29" for "eighty dollars

(\$80.00)" near the end of the first sentence of subsection (b).

The second 1981 amendment, effective July 1, 1981, substituted "thirty dollars (\$30.00)" for "twenty dollars (\$20.00)" near the end of the first sentence of subsection (b).

#### CASE NOTES

**Legislative Intent.** — There is no indication that the legislature intended to prohibit any recovery whatsoever to those employees who refused to remove themselves from contact with asbestos after being diagnosed as having asbestosis. The statutory language merely prohibits recovery for actual partial incapacity if the employee, after receiving the initial compensation in the form of the 104 week installment payments, is shown to have remained in a job where he or she is exposed to asbestos. *Roberts v. Southeastern Magnesia & Asbestos Co.*, — N.C. App. —, 301 S.E.2d 742 (1983).

The intent of the legislature in providing for an automatic 104 installment payments was to encourage employees to remove themselves from hazardous exposure to asbestos and to provide for employee rehabilitation. *Roberts v. Southeastern Magnesia & Asbestos Co.*, — N.C. App. —, 301 S.E.2d 742 (1983).

This section is in conflict with §§ 97-54

and 97-58(a), thereby establishing an exception. This exception makes the diagnosis of asbestosis or silicosis the same as disablement. The disease must therefore have developed within two years of the last exposure. *Roberts v. Southeastern Magnesia & Asbestos Co.*, — N.C. App. —, 301 S.E.2d 742 (1983).

**Purpose of Section.** — One of the purposes of this section is the compensation of employees for the incurable nature of the disease of asbestosis. *Roberts v. Southeastern Magnesia & Asbestos Co.*, — N.C. App. —, 301 S.E.2d 742 (1983).

It is clear from the language of this section and § 97-61.7 that a diagnosis of asbestosis, for purposes of determining eligibility to receive benefits, is the equivalent of a finding of actual disability. *Roberts v. Southeastern Magnesia & Asbestos Co.*, — N.C. App. —, 301 S.E.2d 742 (1983).

### § 97-61.6. Hearing after third examination and report; compensation for disability and death from asbestosis or silicosis.

After receipt by the employer and employee of the advisory medical committee's third report, the Industrial Commission, unless it has approved an agreement between the employee and employer, shall set a final hearing in the

cause, at which it shall receive all competent evidence bearing on the cause, and shall make a final disposition of the case, determining what compensation, if any, the employee is entitled to receive in addition to the 104 weeks already received.

Where the incapacity for work resulting from asbestosis or silicosis is found to be total, the employer shall pay, or cause to be paid, to the injured employee during such total disability a weekly compensation in accordance with G.S. 97-29.

When the incapacity for work resulting from asbestosis or silicosis is partial, the employer shall pay, or cause to be paid, to the affected employee, a weekly compensation equal to sixty-six and two-thirds percent ( $66\frac{2}{3}\%$ ) of the difference between his average weekly wages at the time of his last injurious exposure, and the average weekly wages which he is able to earn thereafter, but not more than the amount established annually to be effective October 1 as provided in G.S. 97-29, a week, and provided that the total compensation so paid shall not exceed a period of 196 weeks, in addition to the 104 weeks for which the employee has already been compensated.

Provided, however, should death result from asbestosis or silicosis within two years from the date of last exposure, or should death result from asbestosis or silicosis, or from a secondary infection or diseases developing from asbestosis or silicosis within 350 weeks from the date of last exposure and while the employee is entitled to compensation for disablement due to asbestosis or silicosis, either partial or total, then in either of these events, the employer shall pay, or cause to be paid compensation in accordance with G.S. 97-38.

Provided further that if the employee has asbestosis or silicosis and dies from any other cause, the employer shall pay, or cause to be paid by one of the methods set forth in G.S. 97-38 compensation for any remaining portion of the 104 weeks specified in G.S. 97-61.5 for which the employee has not previously been paid compensation, and in addition shall pay compensation for such number of weeks as the percentage of disability of the employee bears to 196 weeks. If the employee was totally disabled as a result of asbestosis or silicosis, compensation shall be paid for any remaining portion of the 104 weeks specified in G.S. 97-61.5 for which the employee has not previously been paid compensation, and in addition shall be paid for an additional 300 weeks. (1935, c. 123; 1945, c. 762; 1955, c. 525, s. 2; c. 1354; 1957, c. 1271; 1963, c. 604, s. 7; 1965, c. 907; 1967, c. 84, s. 8; 1969, c. 143, s. 7; 1971, c. 281, s. 6; c. 631; 1973, c. 515, s. 7; c. 759, s. 6; c. 1308, ss. 6, 7; 1979, c. 246; 1981, c. 276, s. 1.)

**Effect of Amendments.**—The 1981 amendment substituted "the amount established annually to be effective October 1 as provided in

G.S. 97-29" for "eighty dollars (\$80.00)" in the third paragraph.

## § 97-61.7. Waiver of right to compensation as alternative to forced change of occupation.

### CASE NOTES

It is clear from the language of § 97-61.5 and this section that a diagnosis of asbestosis, for purposes of determining eligibility to receive benefits, is the equivalent of a finding of

actual disability. *Roberts v. Southeastern Magnesia & Asbestos Co.*, — N.C. App. —, 301 S.E.2d 742 (1983).

## **§ 97-69. Examination by advisory medical committee; inspection of medical reports.**

### **CASE NOTES**

Cited in *Ward v. Beaunit Corp.*, 56 N.C. App. 128, 287 S.E.2d 464 (1982).

## **§ 97-71. Filing report; right of hearing on report.**

### **CASE NOTES**

Cited in *Harrell v. J.P. Stevens & Co.*, 45 N.C. App. 197, 262 S.E.2d 830 (1980).

## **§ 97-72. Appointment of advisory medical committee; terms of office; duties and functions; salaries and expenses.**

(a) There shall be an advisory medical committee consisting of three members, who shall be licensed physicians in good professional standing and peculiarly qualified in the diagnosis and/or treatment of occupational diseases. They shall be appointed by the Industrial Commission with the approval of the Governor, and one of them shall be designated as chairman of the committee by the Industrial Commission. The members of committee shall be appointed to serve terms as follows: one for a term of two years, one for a term of four years, and one for a term of six years. Upon the expiration of each term as above mentioned the Industrial Commission shall appoint a successor for a term of six years; except that the terms of the members first appointed shall expire June 30, 1936. The function of the committee shall be to conduct examinations and make reports as required by G.S. 97-61 and 97-68 to 97-71, and to assist in any postmortem examinations provided for in G.S. 97-67 when so directed by the Industrial Commission. Members of the committee shall devote to the duties of the office so much of their time as may be required in the conducting of examinations with reasonable promptness, and they shall attend hearings as scheduled by the Industrial Commission when their attendance is desired for the purpose of examining and cross-examining them respecting any report or reports made by them.

(b) The members of the advisory medical committee shall be paid one hundred dollars (\$100.00) per month and not to exceed three dollars (\$3.00) per film examined. The fee per film shall be determined and approved by the Secretary of Human Resources. (1935, c. 123; 1955, c. 525, s. 7; 1981, c. 562, s. 2.)

**Effect of Amendments.** — The 1981 amendment designated the first and second paragraphs as subsections (a) and (b) and rewrote subsection (b).

Session Laws 1981, c. 562, § 10, contains a severability clause.

## § 97-73. Expenses of making examinations.

### CASE NOTES

**Cited in** Ward v. Beaunit Corp., 56 N.C. App. 128, 287 S.E.2d 464 (1982).

## § 97-77. North Carolina Industrial Commission created; members appointed by Governor; terms of office; chairman.

### CASE NOTES

#### **Jurisdiction Limited.** —

The Industrial Commission has only the limited power and jurisdiction delegated to it by

statute, as it is purely a creation of the General Assembly. Buck v. Proctor & Gamble Mfg. Co., 58 N.C. App. 804, 295 S.E.2d 243 (1982).

## § 97-78. Salaries and expenses; secretary and other clerical assistance; annual report.

(a) The salaries of the chairman and each of the other commissioners shall be fixed by the General Assembly in the Budget Appropriation Act.

(1929, c. 120, s. 52; 1931, c. 274, s. 9; 1941, c. 358, s. 2; 1947, c. 823; 1957, c. 541, s. 6; 1971, c. 527, s. 1; c. 1147, s. 1; 1983, c. 717, s. 20.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** — Session Laws 1983, c. 717, s. 1, provides: "This act may be cited as the Separation of Powers Act of 1983."

**Effect of Amendments.** — The 1983 amend-

ment, effective July 11, 1983, substituted "General Assembly in the Budget Appropriation Act" for "Governor, subject to the approval of the Advisory Budget Commission, such salaries to be payable in monthly installments" at the end of subsection (a).

## § 97-79. Offices and supplies; deputies with power to subpoena witnesses and to take testimony; meetings; hearings.

(b) The Commission may appoint deputies who shall have the same power to issue subpoenas, administer oaths, conduct hearings, hold persons, firms or corporations in contempt as provided in Chapter 5A of the General Statutes, take evidence, and enter orders, opinions, and awards based thereon as is possessed by the members of the Commission, and such deputy or deputies shall be subject to the State Personnel System.

(1929, c. 120, s. 53; 1931, c. 274, s. 10; 1951, c. 1059, s. 7; 1955, c. 1026, s. 11; 1971, c. 527, s. 2; c. 1147, s. 2; 1981 (Reg. Sess., 1982), c. 1243, s. 1.)

**Only Part of Section Set Out.** — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

**Effect of Amendments.** — The 1981 (Reg.

Sess., 1982) amendment inserted "hold persons, firms or corporations in contempt as provided in Chapter 5A of the General Statutes" in subsection (b).

## § 97-80. Rules and regulations; subpoena of witnesses; examination of books and records; depositions; costs.

(a) The Commission may make rules, not inconsistent with this Article, for carrying out the provisions of this Article. Processes and procedure under this Article shall be as summary and simple as reasonably may be. The Commission or any member thereof, or any person deputized by it, shall have the power, for the purpose of this Article, to tax costs against the parties, and to subpoena witnesses, administer or cause to have administered oaths, hold persons, firms or corporations in contempt as provided in Chapter 5A of the General Statutes, and to examine or cause to be examined such parts of the books and records of the parties to a proceeding as relate to questions in dispute. Any party to a proceeding under this Article may, upon application to the Commission, which application shall set forth the materiality of the evidence to be given, cause the depositions of witnesses residing within or without the State to be taken, the costs to be taxed as other costs by Commission. Such depositions shall be taken after giving the notice and in the manner prescribed by law for depositions in action at law, except that they shall be directed to the Commission, the commissioner, or the deputy commissioner before whom the proceedings may be pending.

(1929, c. 120, s. 54; 1977, cc. 456, 505; 1981 (Reg. Sess., 1982), c. 1243, s. 2.)

**Only Part of Section Set Out.** — As subsections (b) and (c) were not changed by the amendment, they are not set out.

**Effect of Amendments.** — The 1981 (Reg. Sess., 1982) amendment inserted "hold persons, firms or corporations in contempt as provided in Chapter 5A of the General Statutes," in the

third sentence of subsection (a). The amendatory act directed that the words be inserted in the second sentence of subsection (a), but the third sentence was plainly intended, and the amendment has been given effect according to its obvious intent.

### CASE NOTES

#### **Construction, etc.** —

In accord with original. See *Shore v. Chatham Mfg. Co.*, 54 N.C. App. 678, 284 S.E.2d 179 (1981), cert. denied, 304 N.C. 729, 287 S.E.2d 902 (1982).

**Attorney's Travel Expenses in Taking Deposition Out-of-State.** — The travel expenses of the attorney who took a deposition of a witness out-of-state by order of the Com-

missioner were part of the cost of taking the deposition under this section, and should have been so taxed by the full commission. *Cloutier v. State*, 57 N.C. App. 239, 291 S.E.2d 362 (1982), cert. denied, 306 N.C. 555, 294 S.E.2d 222 (1982).

**Stated** in *Caesar v. Piedmont Publishing Co.*, 46 N.C. App. 619, 265 S.E.2d 474 (1980).

## § 97-83. In event of disagreement, Commission is to make award after hearing.

### CASE NOTES

**Quoted** in *Samuel v. Claude Puckett/Lincoln Used Cars*, 55 N.C. App. 463, 285 S.E.2d 876 (1982).

## § 97-84. Determination of disputes by Commission or deputy.

### CASE NOTES

**Exclusive Jurisdiction of Commission.** — Industrial Commission has exclusive original jurisdiction of the rights and remedies afforded by this Chapter. *Carpenter v. Hawley*, 53 N.C. App. 715, 281 S.E.2d 783, cert. denied and appeal dismissed, 304 N.C. 587, 289 S.E.2d 564 (1981).

**Function of the Commission necessarily includes determining paternity of an illegitimate child** when such a determination is necessary to resolve a dispute as to who is entitled to the compensation due under this Chapter. *Carpenter v. Hawley*, 53 N.C. App. 715, 281 S.E.2d 783, cert. denied and appeal dismissed, 304 N.C. 587, 289 S.E.2d 564 (1981).

**Proper Exercise of Fact-Finding Authority Essential.** —

In accord with original. See *Cannady v. Gold Kist*, 43 N.C. App. 482, 259 S.E.2d 342 (1979).

**Specific findings of fact, etc.** —

Specific findings covering the crucial questions of fact upon which a plaintiff's right to compensation depends are required, and the importance of this responsibility cannot be overstated. *Cannady v. Gold Kist*, 43 N.C. App. 482, 259 S.E.2d 342 (1979).

Where the commission awards compensation for disablement due to an occupational disease encompassed by § 97-53(13), the opinion and award must contain explicit findings as to the characteristics, symptoms and manifestations of the disease from which the plaintiff suffers, as well as a conclusion of law as to whether the disease falls within the statutory provision. *Moore v. J.P. Stevens & Co.*, 47 N.C. App. 744, 269 S.E.2d 159, cert. denied, 301 N.C. 401, 274 S.E.2d 226 (1980).

The Industrial Commission must make

specific findings of fact as to each material fact upon which the rights of the parties in a case involving a claim for compensation depend. *Moore v. J.P. Stevens & Co.*, 47 N.C. App. 744, 269 S.E.2d 159, cert. denied, 301 N.C. 401, 274 S.E.2d 226 (1980); *Walston v. Burlington Indus.*, 49 N.C. App. 301, 271 S.E.2d 516 (1980), cert. granted, 302 N.C. 221, 277 S.E.2d 71 (1981), rev'd on other grounds, 304 N.C. 670, 285 S.E.2d 822 (1982).

Where the record contains conflicting evidence concerning the claimant's capacity to work because of his disability, the Commission is required to make findings of fact which support its conclusion as to the presence or absence of disability as defined by § 97-2(9). *Priddy v. Cone Mills Corp.*, 58 N.C. App. 720, 294 S.E.2d 743 (1982).

Although the Industrial Commission is free to accept or reject any or all of plaintiff's evidence in making its award, it must make specific findings as to the facts upon which a compensation claim is based, including the extent of a claimant's disability. The order must contain more than mere recitals of medical opinion to resolve these basic issues. *Priddy v. Cone Mills Corp.*, 58 N.C. App. 720, 294 S.E.2d 743 (1982).

**Cause May Be Remanded for Findings.** —

If the findings of fact of the commission are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the cause must be remanded to the commission for proper findings of fact. *Moore v. J.P. Stevens & Co.*, 47 N.C. App. 744, 269 S.E.2d 159, cert. denied, 301 N.C. 401, 274 S.E.2d 226 (1980).

## § 97-85. Review of award.

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

### CASE NOTES

**Plenary Powers of Commission.** —

The plenary powers of the Commission are such that upon review, it may adopt, modify, or reject the findings of fact of the hearing commissioner, and in doing so may weigh the evidence and make its own determination as to the

weight and credibility of the evidence. *Hollar v. Montclair Furn. Co.*, 48 N.C. App. 489, 269 S.E.2d 667 (1980).

**Whether "good ground be shown therefore," etc.** —

In accord with original. See *Thompson v.*

Burlington Indus., 59 N.C. App. 539, 297 S.E.2d 122 (1982), cert. denied, — N.C. —, 299 S.E.2d 650 (1983).

**Full Commission Not Bound by Findings on Review.** — The full Commission, upon reviewing an award by the hearing commissioner, is not bound by findings of fact supported by the evidence, but may reconsider evidence and adopt or reject findings and conclusions of the hearing commissioner. *Robinson v. J.P. Stevens & Co.*, 57 N.C. App. 619, 292 S.E.2d 144 (1982).

**Applied** in *Wood v. J.P. Stevens & Co.*, 297 N.C. 636, 256 S.E.2d 692 (1979); *Yelverton v. Kemp Furn. Co.*, 51 N.C. App. 675, 277 S.E.2d 441 (1981).

**Quoted** in *Hyatt v. Waverly Mills*, 56 N.C. App. 14, 286 S.E.2d 837 (1982).

**Stated** in *Peeler v. State Hwy. Comm'n*, 48 N.C. App. 1, 269 S.E.2d 153 (1980); *Harrell v. J.P. Stevens & Co.*, 54 N.C. App. 582, 284 S.E.2d 343 (1981).

## § 97-86. Award conclusive as to facts; appeal; certified questions of law.

### CASE NOTES

#### Scope of Review. —

In accord with 2nd paragraph in original. See *Eller v. Porter-Hayden Co.*, 48 N.C. App. 610, 269 S.E.2d 284, cert. denied, 301 N.C. 527, 273 S.E.2d 452 (1980).

In accord with 3rd paragraph in original. See *King v. Exxon Co.*, 46 N.C. App. 750, 266 S.E.2d 37 (1980); *Peeler v. State Hwy. Comm'n*, 48 N.C. App. 1, 269 S.E.2d 153 (1980), aff'd, 302 N.C. 183, 273 S.E.2d 705 (1981); *McLean v. Roadway Express, Inc.*, 307 N.C. 99, 296 S.E.2d 456 (1982).

In accord with 8th paragraph in original. See *Hollar v. Montclair Furn. Co.*, 48 N.C. App. 489, 269 S.E.2d 667 (1980).

In accord with 11th paragraph in original. See *Ivory v. Greer Bros.*, 45 N.C. App. 455, 263 S.E.2d 290 (1980); *Taylor v. M.L. Hatcher Pick-Up & Delivery Serv.*, 45 N.C. App. 682, 263 S.E.2d 788 (1980); *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 265 S.E.2d 389 (1980).

In accord with 12th paragraph in original. See *King v. Forsyth County*, 45 N.C. App. 467, 263 S.E.2d 283 (1980); *Barham v. Food World, Inc.*, 300 N.C. 329, 266 S.E.2d 676, rehearing denied, 300 N.C. 562, 270 S.E.2d 105 (1980); *Walston v. Burlington Indus.*, 49 N.C. App. 301, 271 S.E.2d 516 (1980), cert. granted, 302 N.C. 221, 277 S.E.2d 71 (1981), rev'd on other grounds, 304 N.C. 670, 285 S.E.2d 822 (1982); *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E.2d 101 (1981); *Chandler v. Nello L. Teer Co.*, 53 N.C. App. 766, 281 S.E.2d 718 (1981), aff'd, 305 N.C. 292, 287 S.E.2d 890 (1982); *Rutledge v. Tultex Corp.*, 56 N.C. App. 345, 289 S.E.2d 72, cert. granted, 306 N.C. 558, 294 S.E.2d 224 (1982); *Hundley v. Fieldcrest Mills*, 58 N.C. App. 184, 292 S.E.2d 766 (1982).

In accord with 13th paragraph in original. See *Gamble v. Borden, Inc.*, 45 N.C. App. 506, 263 S.E.2d 280 (1980).

In accord with 18th paragraph in original. See *Porterfield v. RPC Corp.*, 27 N.C. App. 140, 266 S.E.2d 760 (1980); *Peeler v. State Hwy. Comm'n*, 48 N.C. App. 1, 269 S.E.2d 153 (1980), aff'd, 302 N.C. 183, 273 S.E.2d 705 (1981).

If the finding of fact is supported by the evidence, the decision of the full Commission must be affirmed. *Brown v. J.P. Stevens & Co.*, 49 N.C. App. 118, 270 S.E.2d 602 (1980), cert. denied, 304 N.C. 192, 285 S.E.2d 96 (1981).

Upon review of the opinion and award of the full Commission, the Court of Appeals does not weigh the evidence, but may only determine whether there is evidence in the record to support the findings made by the Commission. If there is any evidence of substance which directly or by reasonable inference tends to support the findings, this court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary. *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 266 S.E.2d 760 (1980).

Conclusions of law entered by the Industrial Commission are not binding on the Court of Appeals, and are reviewable for purposes of determining their evidentiary basis and the reasonableness of the legal inferences made therefrom. *Walston v. Burlington Indus.*, 49 N.C. App. 301, 271 S.E.2d 516 (1980), cert. granted, 302 N.C. 221, 277 S.E.2d 71 (1981), rev'd on other grounds, 304 N.C. 670, 285 S.E.2d 822 (1982).

A conclusion of law is made no less reviewable by virtue of the fact that it is denominated a finding of fact. *Walston v. Burlington Indus.*, 49 N.C. App. 301, 271 S.E.2d 516 (1980), cert. granted, 302 N.C. 221, 277 S.E.2d 71

(1981), rev'd on other grounds, 304 N.C. 670, 285 S.E.2d 822 (1982).

Appellate review of opinions and awards of the Commission is strictly limited to the discovery and correction of legal errors. *Godley v. County of Pitt*, 306 N.C. 357, 293 S.E.2d 167 (1982).

As a general rule, an opinion and award of the Industrial Commission is conclusive on appeal if its findings of fact are supported by any competent evidence and the conclusions of law are supported by the findings. *Priddy v. Cone Mills Corp.*, 58 N.C. App. 720, 294 S.E.2d 743 (1982).

#### **Raising Question of Commission's Jurisdiction. —**

The reviewing court is not bound by the findings of jurisdictional facts by the Industrial Commission, and must make its own finding from a consideration of all the evidence in the case. *Lloyd v. Jenkins Context Co.*, 46 N.C. App. 817, 266 S.E.2d 35 (1980).

#### **Commission's Jurisdiction Not Suspended by Appeal. —**

An appeal of an award of the Industrial Commission does not suspend that agency's authority to accept notification of an employee's decision to select his own doctor; neither does an appeal deprive the Commission of its jurisdiction to accept the submission of a claim. It may well be that the determination of the particular claim will be delayed until the outcome of the appeal. Nevertheless, the Commission has jurisdiction to receive the claim and is, in fact, the only agency vested with that jurisdiction. *Schofield v. Great Atl. & Pac. Tea Co.*, 299 N.C. 582, 264 S.E.2d 56 (1980).

#### **Matters to Be Considered on Appeal. —**

This section, in effect, requires appellate courts to limit their review of workers' compensation awards for legal errors to a two-fold determination of whether the Commission's findings are supported by any competent evidence and whether its subsequent legal conclusions are justified by those findings. *Buck v. Procter & Gamble Mfg. Co.*, 52 N.C. App. 88, 278 S.E.2d 268 (1981).

Scope of review of workers' compensation awards made by the Industrial Commission is limited (1) to a determination of whether the Commission's findings of fact are supported by any competent evidence, and (2) to a determination of whether the Commission's findings of fact support its conclusions of law. *Hilliard v. Apex Cabinet Co.*, 54 N.C. App. 173, 282 S.E.2d 828 (1981), rev'd on other grounds, 305 N.C. 593, 290 S.E.2d 682 (1982).

Appellate court's review in a workers' compensation proceeding is simply to determine whether the Industrial Commission's findings are supported by any competent evidence and whether its subsequent legal conclusions are justified by those findings. *Anderson v. A.M.*

*Smyre Mfg. Co.*, 54 N.C. App. 337, 283 S.E.2d 433 (1981).

**Commission's legal interpretation of a particular provision is persuasive, although not binding**, and should be accorded some weight on appeal and not idly cast aside, since that administrative body hears and decides all questions arising under the Workers' Compensation Act in the first instance. *Deese v. Southern Lawn & Tree Expert Co.*, 306 N.C. 275, 293 S.E.2d 140 (1982).

#### **Patent Error of Law Must Be Shown. —**

An opinion and award entered by the Commission may not be disturbed on appeal unless a patent error of law exists therein. *Hoffman v. Ryder Truck Lines*, 306 N.C. 502, 293 S.E.2d 807 (1982).

**Conclusions of the Commission will not be disturbed if justified by findings of fact.** *Robinson v. J.P. Stevens & Co.*, 57 N.C. App. 619, 292 S.E.2d 144 (1982).

#### **Commission Sole Judge, etc. —**

In accord with original. See *McNinch v. Henredon Indus., Inc.*, 51 N.C. App. 250, 276 S.E.2d 756 (1981); *Yelverton v. Kemp Furn. Co.*, 51 N.C. App. 675, 277 S.E.2d 441 (1981).

By authority of this section the Commission is the sole judge of the credibility and weight to be accorded to the evidence and testimony before it. Its findings of fact may be set aside on appeal only when there is a complete lack of competent evidence to support them. *Mayo v. City of Washington*, 51 N.C. App. 402, 276 S.E.2d 747 (1981).

It is not for a reviewing court to weigh the evidence before the Industrial Commission in a workers' compensation case. *Mayo v. City of Washington*, 51 N.C. App. 402, 276 S.E.2d 747 (1981).

It is not the function of any appellate court to retry the facts found by the Commission or weigh the evidence received by it and decide anew the issue of compensability of an employee's claim. *Buck v. Procter & Gamble Mfg. Co.*, 52 N.C. App. 88, 278 S.E.2d 268 (1981).

#### **Authority to Find Facts, etc. —**

The Commission is the sole fact-finding agency in cases in which it has jurisdiction. *Yelverton v. Kemp Furn. Co.*, 51 N.C. App. 675, 277 S.E.2d 441 (1981).

#### **The findings of fact of the Industrial, etc. —**

In accord with 2nd paragraph in original. See *Fann v. Burlington Indus.*, 59 N.C. App. 512, 296 S.E.2d 819 (1982).

In accord with 6th paragraph in original. See *McNinch v. Henredon Indus., Inc.*, 51 N.C. App. 250, 276 S.E.2d 756 (1981).

In accord with 22nd paragraph in original. See *Thompson v. Burlington Indus.*, 59 N.C. App. 539, 297 S.E.2d 122 (1982), cert. denied, — N.C. —, 299 S.E.2d 650 (1983).

In accord with 23rd paragraph in original. See *Hansel v. Sherman Textiles*, 49 N.C. App. 1, 270 S.E.2d 585 (1980), rev'd on other grounds, 304 N.C. 44, 283 S.E.2d 101 (1981); *Yelverton v. Kemp Furn. Co.*, 51 N.C. App. 675, 277 S.E.2d 441 (1981).

In accord with 27th paragraph in original. See *Long v. Asphalt Paving Co.*, 47 N.C. App. 564, 268 S.E.2d 1 (1980); *Walston v. Burlington Indus.*, 49 N.C. App. 301, 271 S.E.2d 516 (1980), cert. granted, 302 N.C. 221, 277 S.E.2d 71 (1981), rev'd on other grounds, 304 N.C. 670, 285 S.E.2d 822 (1982); *Robinson v. J.P. Stevens & Co.*, 57 N.C. App. 619, 292 S.E.2d 144 (1982).

If the totality of the evidence, viewed in the light most favorable to the complainant, tends directly or by reasonable inference to support the Commission's findings, these findings are conclusive on appeal even though there may be plenary evidence to support findings to the contrary. *Mayo v. City of Washington*, 51 N.C. App. 402, 276 S.E.2d 747 (1981).

Under this section, the Industrial Commission is the fact-finding body and the findings of fact made by the Commission are conclusive on appeal, both before the Court of Appeals and in the Supreme Court, if supported by competent evidence; this is so even though there is evidence which would support a finding to the contrary. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E.2d 101 (1981).

Industrial Commission's findings of fact are binding on a reviewing court if supported by competent evidence, and may be set aside on appeal only when there is a complete lack of competent evidence to support them. *Carrington v. Housing Auth.*, 54 N.C. App. 158, 282 S.E.2d 541 (1981).

The findings and conclusions of the full Commission are binding on Court of Appeals if adequately supported by the record. *Robinson v. J.P. Stevens & Co.*, 57 N.C. App. 619, 292 S.E.2d 144 (1982).

Except as to questions of jurisdiction, the rule is that the findings of fact made by the Commission are conclusive on appeal when supported by competent evidence. This is so even though there is evidence to support a contrary finding of fact. *McLean v. Roadway Express, Inc.*, 307 N.C. 99, 296 S.E.2d 456 (1982).

Whether evidence shows a "reasonable

ground" to defend is a matter reviewable by Court of Appeals. *Robinson v. J.P. Stevens & Co.*, 57 N.C. App. 619, 292 S.E.2d 144 (1982).

**More recitals of medical opinion are not sufficiently specific** to enable a reviewing court to judge the propriety of the Commission's order, and therefore cannot properly form the basis for the conclusion of law as to compensation. *Harrell v. J.P. Stevens & Co.*, 54 N.C. App. 582, 284 S.E.2d 343 (1981).

**Remand Where Findings Insufficient.** —

In accord with 2nd paragraph in original. See *Walston v. Burlington Indus.*, 49 N.C. App. 301, 271 S.E.2d 516 (1980), cert. granted, 302 N.C. 221, 277 S.E.2d 71 (1981), rev'd on other grounds, 304 N.C. 670, 285 S.E.2d 822 (1982).

In accord with 3rd paragraph in original. See *Hundley v. Fieldcrest Mills*, 58 N.C. App. 184, 292 S.E.2d 766 (1982); *Priddy v. Cone Mills Corp.*, 58 N.C. App. 720, 294 S.E.2d 743 (1982).

**Dismissal Where Notice of Appeal Untimely.** — Defendant's purported appeal from a workers' compensation proceeding must be dismissed where notice of appeal was filed after expiration of the 30-day period provided by this section. *Fisher v. E.I. Du Pont De Nemours*, 54 N.C. App. 176, 282 S.E.2d 543 (1981).

**Dismissal of Appeal as Interlocutory.** — Appeal must be dismissed as interlocutory where the Industrial Commission determines only that plaintiff sustained an injury by accident and no final award has been entered. *Fisher v. E.I. Du Pont De Nemours*, 54 N.C. App. 176, 282 S.E.2d 543 (1981).

**Quoted in** *Humphries v. Cone Mills Corp.*, 52 N.C. App. 612, 279 S.E.2d 56 (1981); *Key v. McLean Trucking*, — N.C. App. —, 300 S.E.2d 280 (1983).

**Cited in** *Harrell v. J.P. Stevens & Co.*, 45 N.C. App. 197, 262 S.E.2d 830 (1980); *Church v. G.G. Parsons Trucking Co.*, 304 N.C. 193, 288 S.E.2d 803 (1981); *Bingham v. Smith's Transf. Corp.*, 55 N.C. App. 538, 286 S.E.2d 570 (1982); *Ward v. Beaunit Corp.*, 56 N.C. App. 128, 287 S.E.2d 464 (1982); *In re Vandiford*, 56 N.C. App. 224, 287 S.E.2d 912 (1982); *West v. Bladenboro Cotton Mills, Inc.*, — N.C. App. —, 302 S.E.2d 645 (1983).

## § 97-86.1. Payment of award pending appeal in certain cases.

### CASE NOTES

**Stated in** *Smith v. American & Efrid Mills*, 305 N.C. 507, 290 S.E.2d 634 (1982).

**Cited in** *West v. Bladenboro Cotton Mills, Inc.*, — N.C. App. —, 302 S.E.2d 645 (1983).

## § 97-86.2. Interest on awards after hearing.

When, in a worker's compensation case, a hearing or hearings have been held and an award made pursuant thereto, if there is an appeal from that award by the employer or carrier which results in the affirmance of that award or any part thereof which remains unpaid pending appeal, the insurance carrier or employer shall pay interest on the final award from the date the initial award was filed at the Industrial Commission until paid at the legal rate of interest provided in G.S. 24-1. If interest is paid it shall not be a part of, or in any way increase attorneys' fees, but shall be paid in full to the claimant. (1981, c. 242, s. 1.)

**Editor's Note.** — Session Laws 1981, c. 242, s. 2, makes this section effective upon ratification and applicable to awards made on and after that date. The act was ratified April 23, 1981.

**Legal Periodicals.** — For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

## § 97-87. Filing agreements approved by Commission or awards; judgment in accordance therewith; discharge or restoration of lien.

### CASE NOTES

Cited in *Weydener v. Carolina Village*, 45 N.C. App. 549, 263 S.E.2d 329 (1980).

## § 97-88. Expenses of appeals brought by insurers.

### CASE NOTES

**This section is applicable only, etc.** —

This section requires that there be a hearing or proceeding brought by the insurer from which the insurer is ordered to pay an award. *Taylor v. J.P. Stevens & Co.*, 57 N.C. App. 643, 292 S.E.2d 277 (1982), modified, 307 N.C. 392, 298 S.E.2d 681 (1983).

**"Commission" and "Court" Not Used Interchangeably.** — Use of the wording "Commission or court" on three separate occasions does not mean that the Commission and the court are interchangeable nor that the Commission can award attorney fees for services rendered before the Court of Appeals, while the Court of Appeals can award such fees for services rendered before the Industrial Commission. *Buck v. Procter & Gamble Mfg. Co.*, 58 N.C. App. 804, 295 S.E.2d 243 (1982).

**Discretion of Commission.** — This section

leaves the award of attorney's fees to the Commission's discretion. *Robinson v. J.P. Stevens & Co.*, 57 N.C. App. 619, 292 S.E.2d 144 (1982); *Taylor v. J.P. Stevens & Co.*, 57 N.C. App. 643, 292 S.E.2d 277 (1982), modified, 307 N.C. 392, 298 S.E.2d 681 (1983).

The Commission may exercise limited discretion when the Court of Appeals approves an award of attorney fees but certifies its decision to the Commission with instructions to decide the exact amount to be awarded. In such a case, the Commission may determine only the amount of the award and not whether the award should be made at all. It follows that the Court of Appeals is the only body which can decide whether to allow attorney fees for services rendered on an appeal taken to the Court of Appeals. *Buck v. Procter & Gamble Mfg. Co.*, 58 N.C. App. 804, 295 S.E.2d 243 (1982).

The Commission, in its discretion, can award attorney fees only when an appeal is before it to review a hearing commissioner's decision. In such a situation the amount of the award for attorney fees is limited to the value of those services rendered on the appeal taken to the Industrial Commission. *Buck v. Procter & Gamble Mfg. Co.*, 58 N.C. App. 804, 295 S.E.2d 243 (1982).

The language of both this section and § 97-88.1 clearly indicates that an award of attorneys' fees is not required to be granted. Such language places the decision of whether to award attorneys' fees within the sound discretion of the Industrial Commission. *Taylor v. J.P. Stevens Co.*, 307 N.C. 392, 298 S.E.2d 681 (1983).

While this section provides the commission with the authority to allow attorneys' fees, even for work done in furtherance of an appeal before an appellate court, the decision to grant or deny a request for such an award will not be disturbed in the absence of an abuse of discretion. *Taylor v. J.P. Stevens Co.*, 307 N.C. 392,

298 S.E.2d 681 (1983).

**Section only authorizes the Commission to make awards for hearings before it.** *Taylor v. J.P. Stevens & Co.*, 57 N.C. App. 643, 292 S.E.2d 277 (1982), modified, 307 N.C. 392, 298 S.E.2d 681 (1983).

**Commission is not authorized to award fees in connection with appeal to Supreme Court.** *Taylor v. J.P. Stevens & Co.*, 57 N.C. App. 643, 292 S.E.2d 277 (1982), modified, 307 N.C. 392, 298 S.E.2d 681 (1983).

**Where defendants appealed to full Commission and were ordered to compensate plaintiff, the prerequisites for an award pursuant to this section were fulfilled.** *Robinson v. J.P. Stevens & Co.*, 57 N.C. App. 619, 292 S.E.2d 144 (1982).

**When Decision Must Be Affirmed.** — On review, the Commission's decision must be upheld unless there is an abuse of discretion. *Taylor v. J.P. Stevens & Co.*, 57 N.C. App. 643, 292 S.E.2d 277 (1982), modified, 307 N.C. 392, 298 S.E.2d 681 (1983).

## § 97-88.1. Attorney's fees at original hearing.

### CASE NOTES

**Legislative Intent.** — The General Assembly did not intend to deter an employer with legitimate doubt regarding the employee's credibility, based on substantial evidence of conduct by the employee inconsistent with his alleged claim, from compelling the employee to sustain his burden of proof. *Sparks v. Mountain Breeze Restaurant & Fish House, Inc.*, 55 N.C. App. 663, 286 S.E.2d 575 (1982).

The language of this section clearly shows the legislature did not intend to require that attorneys' fees be awarded. Instead the statute was written to enable the Industrial Commission to award attorneys' fees in those cases it deems proper. *Taylor v. J.P. Stevens Co.*, 307 N.C. 392, 298 S.E.2d 681 (1983).

**Purpose.** — The evident purpose of this section is to deter stubborn, unfounded litigiousness, which is inharmonious with the primary consideration of the Workers' Compensation Act, compensation for injured employees. *Sparks v. Mountain Breeze Restaurant & Fish House, Inc.*, 55 N.C. App. 663, 286 S.E.2d 575 (1982).

**Discretion of Industrial Commission.** —

The language of both § 97-88 and this section clearly indicates that an award of attorneys' fees is not required to be granted. Such language places the decision of whether to award attorneys' fees within the sound discretion of the Industrial Commission. *Taylor v. J.P. Stevens Co.*, 307 N.C. 392, 298 S.E.2d 681 (1983).

**Test.** — The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness. *Sparks v. Mountain Breeze Restaurant & Fish House, Inc.*, 55 N.C. App. 663, 286 S.E.2d 575 (1982); *Donnell v. Cone Mills Corp.*, — N.C. App. —, 299 S.E.2d 436 (1983).

**Whether the evidence shows a "reasonable ground" to defend is a matter reviewable by Court of Appeals.** *Robinson v. J.P. Stevens & Co.*, 57 N.C. App. 619, 292 S.E.2d 144 (1982).

**Stated in** *West v. Bladenboro Cotton Mills, Inc.*, — N.C. App. —, 302 S.E.2d 645 (1983).

**Cited in** *Taylor v. J.P. Stevens & Co.*, 57 N.C. App. 643, 292 S.E.2d 277 (1982), modified, 307 N.C. 392, 298 S.E.2d 681 (1983).

**§ 97-89. Commission may appoint qualified physician to make necessary examinations; expenses; fees.**

**CASE NOTES**

**This section does not provide for examination by an additional physician.** *Clark v. Burlington Indus.*, 49 N.C. App. 269, 271 S.E.2d

101 (1980), cert. denied, 301 N.C. 719, 276 S.E.2d 283 (1981).

**§ 97-90. Legal and medical fees to be approved by Commission; misdemeanor to receive fees unapproved by Commission, or to solicit employment in adjusting claims; agreement for fee or compensation.**

(e) The fees provided for in subsection (a) of this section shall be approved by the Commission no later than June 1 of the year in which the Commission exercises its authority under subsection (a) of this section, but shall not become effective until July 1 following such approval. (1929, c. 120, s. 64; 1955, c. 1026, s. 4; 1959, cc. 1268, 1307; 1973, c. 520, s. 4; 1981, c. 521, s. 4.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amendment added subsection (e).

**CASE NOTES**

**All Bills to Be Submitted to and Approved by Commission.** — The superior court had no authority to order defendants to pay medical bills incurred by plaintiff for treatment of her work-related injury, though the Industrial Commission had ordered that defendants pay all such bills, since the bills in question had not been submitted to or approved

by the Industrial Commission. *Weydener v. Carolina Village*, 45 N.C. App. 549, 263 S.E.2d 329 (1980).

**Applied** in *Cloutier v. State*, 57 N.C. App. 239, 291 S.E.2d 362 (1982).

**Cited** in *Donnell v. Cone Mills Corp.*, — N.C. App. —, 299 S.E.2d 436 (1983).

**§ 97-92. Employer's record and report of accidents; records of Commission not open to public; supplementary report upon termination of disability; penalty for refusal to make report; when insurance carrier liable.**

**CASE NOTES**

**Employer's Report Alone Insufficient for Jurisdiction.** — Filing of employer's report (Form 19) is insufficient to invoke the jurisdiction of the Commission where the employee has not filed the claim required under § 97-24. *Perdue v. Daniel Int'l, Inc.*, 59 N.C. App. 517,

296 S.E.2d 845 (1982), cert. denied, — N.C. —, 299 S.E.2d 647 (1983).

**Quoted** in *Clary v. A.M. Smyre Mfg. Co.*, — N.C. App. —, 300 S.E.2d 704 (1983).

**Cited** in *Poythress v. J.P. Stevens & Co.*, 54 N.C. App. 376, 283 S.E.2d 573 (1981).

### **§ 97-93. Employers required to carry insurance or prove financial ability to pay for benefits.**

Every employer subject to the provisions of this Article relative to the payment of compensation shall either:

- (1) Insure and keep insured his liability thereunder in any authorized corporation, association, organization, or in any mutual insurance association formed by a group of employers so authorized, or
- (2) Furnish to the Industrial Commission satisfactory proof of his financial ability either alone or through membership in a group comprised of two or more employers which agree to pool their liabilities under this Article, to pay direct the compensation in the amount and manner and when due, as provided for in this Article. Payment of dividends to the members of any group comprised of two or more employers which agree to pool their liabilities under this Article shall not be contingent upon the maintenance or continuance of membership in such pools.

In the case of subdivision (2) above, the Commission may require the deposit of an acceptable security, indemnity, or bond to secure the payment of the compensation liabilities as they are incurred. A group of two or more employers formed for the purpose of demonstrating financial ability to pay direct the compensation in the amount and manner and when due shall be governed in all respects by this Article and such rules of the Commission as may be promulgated hereunder. (1929, c. 120, s. 67; 1943, c. 543; 1973, c. 1291, s. 12; 1979, c. 345; 1983, c. 728.)

**Effect of Amendments.** — The 1983 amendment, effective July 11, 1983, added the second sentence of subdivision (2).

### **§ 97-99. Law written into each insurance policy; form of policy to be approved by Commissioner of Insurance; cancellation; single catastrophe hazards.**

#### **CASE NOTES**

**Cited in** *Graves v. ABC Roofing Co.*, 55 N.C. App. 252, 284 S.E.2d 718 (1981).

#### **ARTICLE 3.**

#### ***Security Funds.***

### **§ 97-110. Contributions to stop when stock fund equals 4% of loss reserves; resumption of contributions.**

When the aggregate amount of all such payments into the stock fund, together with accumulated interest thereon, less all its expenditures and known liabilities, becomes equal to four per centum (4%) of the loss reserves of all stock carriers for the payment of benefits under the Workers' Compensation Act as of December 31, next preceding, no further contributions to said

fund shall be required to be made; provided, however, that whenever, thereafter, the amount of said fund shall be reduced below four per centum (4%) of such loss reserves as of said date by reason of payments from and known liabilities of said stock fund, then such contribution to said fund shall be resumed forthwith, and shall continue until said fund, over and above its known liabilities, shall be equal to four per centum (4%) of such reserves. (1935, c. 228, s. 6; 1979, c. 714, s. 2; 1983, c. 628, s. 1.)

**Effect of Amendments.** — The 1983 amendment, effective June 27, 1983, substituted "four per centum (4%)" for "five per centum (5%)" throughout this section.

### **§ 97-117. Contributions to stop when mutual fund exceeds 4% of loss reserves.**

Whenever the mutual fund less all known liabilities, shall exceed four per centum (4%) of the loss reserves of all mutual carriers for the payments of losses under the Workers' Compensation Act, as of December 31, next preceding, no further contributions shall be required to be made to the fund; Provided, however, that whenever, thereafter, the amount of the fund shall be reduced below four per centum (4%) of the loss reserves as of that date by reason of payments from and known liabilities of the mutual fund, then the contributions to the fund shall be resumed immediately, and shall continue until the fund, over and above its known liabilities, shall be equal to four per centum (4%) of the reserves. (1935, c. 228, s. 13; 1979, c. 714, s. 2; 1983, c. 628, s. 2.)

**Effect of Amendments.** — The 1983 amendment, effective June 27, 1983, rewrote this section.

**Chapter 99.****Libel and Slander.****§ 99-1. Libel against newspaper; defamation by or through radio or television station; notice before action.**

Cited in *Lamb v. Wedgewood S. Corp.*, —  
N.C. —, 302 S.E.2d 868 (1983).

**§ 99-2. Effect of publication or broadcast in good faith and retraction.**

Cited in *Lamb v. Wedgewood S. Corp.*, —  
N.C. —, 302 S.E.2d 868 (1983).

Chapter 99A.

Civil Remedies for Criminal Actions.

§ 99A-1. Recovery of damages for interference with property rights.

CASE NOTES

**Owner May Collect, etc. —**  
This section created a right of action in the owner, his agent or a bailee of stolen property for recovery of damages from one who is criminally guilty of receiving stolen property. *Noell v. Winston*, 51 N.C. App. 455, 276 S.E.2d 766, cert. denied, 303 N.C. 315, 281 S.E.2d 652 (1981).

**Deletion of Attorney's Name from Appointment Lists. —** Plaintiff attorney's allegations that defendant members of a county

bar association committee had deleted plaintiff's name from indigent defendant appointment lists and that the district bar had not adopted a plan authorizing defendants to formulate rules for appointment of counsel failed to state a claim for damages based on a denial of due process or trespass against plaintiff's property rights under this section. *Noell v. Winston*, 51 N.C. App. 455, 276 S.E.2d 766, cert. denied, 303 N.C. 315, 281 S.E.2d 652 (1981).

## Chapter 99B.

### Products Liability.

Sec.

99B-5 to 99B-9. [Reserved.]

99B-10. Immunity for donated food.

#### § 99B-1. Definitions.

**Legal Periodicals.** — For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

For survey of 1981 tort law, see 60 N.C.L. Rev. 1465 (1982).

For discussion of the "reasonable notice" aspect of warranty law, in light of *Maybank v. S.S. Kresge*, 302 N.C. 129, 273 S.E.2d 681 (1981), see 61 N.C.L. Rev. 177 (1982).

For article, "North Carolina's New Products

Liability Act: A Critical Analysis," see 16 Wake Forest L. Rev. 171 (1980).

For a symposium on the North Carolina Commercial Code, see 18 Wake Forest L. Rev. 161 (1982).

For comment, "The Crashworthy Vehicle: Heading For a Collision in the North Carolina Courts," see 18 Wake Forest L. Rev. 711 (1982).

#### CASE NOTES

**Strict Liability.** — This Chapter does not adopt strict liability in product liability cases. *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E.2d 504 (1980); *Seese v. Volkswagenwerk*, 648 F.2d 833 (3rd Cir.), cert. denied, 454 U.S. 867, 102 S. Ct. 330, 70 L. Ed.

2d 168 (1981).

**Period of Limitations.** — Section 1-50(6) was enacted with this Chapter to provide a period of limitations for actions to which this Chapter applies. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982).

#### § 99B-2. Liability of seller and manufacturer.

**Legal Periodicals.** — For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

For article, "North Carolina's New Products Liability Act: A Critical Analysis," see 16 Wake Forest L. Rev. 171 (1980).

For note on requirement of privity and

express warranties, see 16 Wake Forest L. Rev. 857 (1980).

For a symposium on the North Carolina Commercial Code, see 18 Wake Forest L. Rev. 161 (1982).

#### CASE NOTES

**Act Inapplicable to Purchaser's Employee.** — The protections of the Products Liability Act would not extend to the employee of a purchaser where the employee is covered by workers' compensation insurance. *Davis v. Siloo Inc.*, 47 N.C. App. 237, 267 S.E.2d 354, cert. denied, 301 N.C. 234, 283 S.E.2d 131 (1980).

**Essential elements of an action for products liability** based upon negligence include (1) evidence of a standard of care owed by the reasonably prudent person in similar circumstances; (2) breach of that standard of care; (3) injury caused directly or proximately by the breach, and; (4) loss because of the injury. *McCullum v. Grove Mfg. Co.*, 58 N.C. App. 283, 293 S.E.2d 632, cert. granted, 306 N.C. 742, 295 S.E.2d 760 (1982), aff'd, — N.C. —, 300 S.E.2d 374 (1983) (decided under law applicable prior to effective date of this Chapter).

*S.E.2d 760 (1982), aff'd, — N.C. —, 300 S.E.2d 374 (1983) (decided under law applicable prior to effective date of this Chapter).*

**Principles of Negligence Govern.** — In products liability cases, the duty of the manufacturer in tort must be determined by the principles of negligence. The doctrine of strict liability except for a few exceptional situations has not been adopted. *McCullum v. Grove Mfg. Co.*, 58 N.C. App. 283, 293 S.E.2d 632, cert. granted, 306 N.C. 742, 295 S.E.2d 760 (1982), aff'd, — N.C. —, 300 S.E.2d 374 (1983) (decided under law applicable prior to effective date of this Chapter).

**Liability for Sale of Inherently Dangerous Product.** — Liability may be imposed upon a manufacturer who sells a product that is

inherently dangerous. *McCollum v. Grove Mfg. Co.*, 58 N.C. App. 283, 293 S.E.2d 632, cert. granted, 306 N.C. 742, 295 S.E.2d 760 (1982), *aff'd*, — N.C. —, 300 S.E.2d 374 (1983) (decided under law applicable prior to effective date of this Chapter).

**Manufacturer of a machine which is dangerous because of the way in which it functions**, and patently so, owes to those who use it a duty merely to make it free from latent defects and concealed dangers. In a case against such a manufacturer, the plaintiff must prove the existence of a latent defect or of a danger not known to the plaintiff or other users. *McCollum v. Grove Mfg. Co.*, 58 N.C. App. 283, 293 S.E.2d 632, cert. granted, 306 N.C. 742, 295 S.E.2d 760 (1982), *aff'd*, — N.C. —, 300 S.E.2d 374 (1983) (decided under law applicable prior to effective date of this Chapter).

**Protection against Obvious Defects Not Required.** — A manufacturer has no duty to equip his product with safety devices to protect against defects and dangers that are obvious. In cases dealing with a manufacturer's liability for injuries to remote users, the courts have always stressed the duty of guarding against hidden defects and of giving notice of concealed dangers. *McCollum v. Grove Mfg. Co.*, 58 N.C. App. 283, 293 S.E.2d 632, cert. granted, 306 N.C. 742, 295 S.E.2d 760 (1982), *aff'd*, — N.C. —, 300 S.E.2d 374 (1983) (decided under law applicable prior to effective date of this Chapter).

**Standard of Care in Product Design.** — As to the standard of care, a manufacturer is under a duty to those who use his product to exercise that degree of care in its design and manufacture that a reasonably prudent man would use in similar circumstances. *McCollum v. Grove Mfg. Co.*, 58 N.C. App. 283, 293 S.E.2d 632, cert. granted, 306 N.C. 742, 295 S.E.2d 760 (1982), *aff'd*, — N.C. —, 300 S.E.2d 374 (1983) (decided under law applicable prior to effective date of this Chapter).

**Liability under Crashworthiness Theory.** — In a products liability action an automobile

manufacturer was held liable under a crashworthiness theory for the additional injuries resulting from a product's negligent design, even though the defect which caused the injuries to be enhanced, a negligently designed window retention system, was not the same defect that caused the accident. *Seese v. Volkswagenwerk*, 648 F.2d 833 (3rd Cir.), cert. denied, 454 U.S. 867, 102 S. Ct. 330, 70 L. Ed. 2d 168 (1981).

**In action to recover for death of farm worker who died after drinking pesticide**, trial court properly entered summary judgment for the seller of the pesticide where plaintiff did not present any specific facts tending to show that the seller knew or should have known that manufacturer's written warnings on the product's label were inadequate, nor did plaintiff demonstrate that seller should have known that purchaser would not appreciate the possible harm involved in using a toxic pesticide which was packaged in a clear plastic container and looked like water. *Ziglar v. E.I. Du Pont De Nemours & Co.*, 53 N.C. App. 147, 280 S.E.2d 510, cert. denied, 304 N.C. 393, 285 S.E.2d 838 (1981), decided under law applicable prior to effective date of this Chapter.

In action to recover for wrongful death of a farm laborer who drank a toxic pesticide, trial court erred in entering summary judgment for the manufacturer of the pesticide where evidence raised questions for the jury as to whether the manufacturer exercised the required degree of due care in its general manufacture and packaging of the pesticide, whether the manufacturer failed to provide adequate warnings on the product's label to notify others of its toxicity, and whether the manufacturer's first aid instructions on the product's label were ambiguous and incomplete. *Ziglar v. E.I. Du Pont De Nemours & Co.*, 53 N.C. App. 147, 280 S.E.2d 510, cert. denied, 304 N.C. 393, 285 S.E.2d 838 (1981), decided under law applicable prior to effective date of this Chapter.

**Applied in** *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982).

### § 99B-3. Alteration or modification of product.

**Legal Periodicals.** — For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

For article, "North Carolina's New Products

Liability Act: A Critical Analysis," see 16 Wake Forest L. Rev. 171 (1980).

### § 99B-4. Injured parties' knowledge or reasonable care.

**Legal Periodicals.** — For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

For article, "North Carolina's New Products

Liability Act: A Critical Analysis," see 16 Wake Forest L. Rev. 171 (1980).

## CASE NOTES

**Defense of Contributory Negligence Reaffirmed.** — This section specifically reaffirms the applicability of contributory negligence as a defense in product liability actions. *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E.2d 504 (1980).

**What Constitutes Contributory Negligence.** — Plaintiff may be contributorily negligent if his conduct ignores unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for

his own safety. *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E.2d 504 (1980).

**The defense of contributory negligence is not invariably barred by defendant's failure to warn** of a danger when, as in this case, the facts indicate that plaintiff, in the exercise of ordinary care, should have known of the danger of injury independent of any warning by defendant. *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E.2d 504 (1980).

§§ 99B-5 to 99B-9: Reserved for future codification purposes.

**§ 99B-10. Immunity for donated food.**

(a) Notwithstanding the provisions of Article 12 of Chapter 106 of the General Statutes, or any other provision of law, any person, including but not limited to a seller, farmer, processor, distributor, wholesaler or retailer of food, who donates an item of food for use or distribution by a nonprofit organization or nonprofit corporation shall not be liable for civil damages or criminal penalties resulting from the nature, age, condition, or packaging of the donated food, unless it is established that the donor knew or had reasonable grounds to believe that the food was adulterated as defined in G.S. 106-129 at the time the donor made the gift.

(b) Nothing in this section limits the liability of the donee organization or corporation accepting the food. (1979, 2nd Sess., c. 1188, s. 1.)

## Chapter 99C.

### Actions Relating to Skier Safety and Skiing Accidents.

Sec.	Sec.
99C-1. Definitions.	99C-4. Competition.
99C-2. Duties of ski operators and skiers.	99C-5. Operation of passenger tramway.
99C-3. Violation constitutes negligence.	

#### § 99C-1. Definitions.

When used in this Chapter, unless the context otherwise requires:

- (1) "Competitor" means a skier actually engaged in competition or in practice therefor with the permission of the ski area operator on any slope or trail or portion thereof designated by the ski area operator for the purpose of competition.
- (2) "Passenger" means any person who is being transported or is awaiting transportation, or being conveyed on a passenger tramway or is moving from the disembarkation point of a passenger tramway or is in the act of embarking upon or disembarking from a passenger tramway.
- (3) "Passenger Tramway" shall mean any device used to transport passengers uphill on skis, or in cars on tracks, or suspended in the air, by the use of steel cables, chains, belts or ropes. Such definition shall include such devices as a chair lift, J Bar, or platter pull, rope tow, and wire tow.
- (4) "Ski Area" means all the ski slopes, ski trails, and passenger tramways, that are administered or operated as a ski area enterprise within this State.
- (5) "Ski Area Operator" means a person, corporation, or organization that is responsible for the safe operation and maintenance of the ski area.
- (6) "Skier" means any person who is wearing skis or any person who for the purpose of skiing is on a designated and clearly marked ski slope or ski trail that is located at a ski area, or any person who is a passenger or spectator at a ski area. (1981, c. 939, s. 1.)

**Cross References.** — As to regulation of aerial passenger tramways, chair lifts and similar devices, see § 95-116 et seq.

**Editor's Note.** — Session Laws 1981, c. 939, s. 3, makes this Chapter effective Oct. 1, 1981.

#### § 99C-2. Duties of ski operators and skiers.

(a) A ski area operator shall be responsible for the maintenance and safe operation of any passenger tramway in his ski area and insure that such is in conformity with the rules and regulations prescribed and adopted by the North Carolina Department of Labor pursuant to G.S. 95-120(1) as such appear in the North Carolina Administrative Procedures Act. The North Carolina Department of Labor shall conduct certifications and inspections of passenger tramways.

A ski area operator's responsibility regarding passenger tramways shall include, but is not limited to, insuring operating personnel are adequately trained and are adequate in number; meeting all standards set forth for terminals, stations, line structures, and line equipment; meeting all rules and regulations regarding the safe operation and maintenance of all passenger lifts and tramways, including all necessary inspections and record keeping.

- (b) A skier and/or a passenger shall have the following responsibilities:
- (1) To know the range of his own abilities to negotiate any ski slope or trail and to ski within the limits of such ability;
  - (2) To maintain control of his speed and course at all times when skiing and to maintain a proper lookout so as to be able to avoid other skiers and visible objects;
  - (3) To stay clear of snow grooming equipment, all vehicles, lift towers, signs, and any other equipment on the ski slopes and trails;
  - (4) To heed all posted information and other warnings and to refrain from acting in a manner which may cause or contribute to the injury of the skier or others;
  - (5) To wear retention straps, ski brakes, or other devices to prevent runaway skis;
  - (6) Before beginning to ski from a stationary position or before entering a ski slope or trail from the side, to avoid moving skiers already on the ski slope or trail;
  - (7) To not move uphill on any passenger tramway or use any ski slope or trail while such person's ability to do so is impaired by the consumption of alcohol or by the use of any narcotic or other drug or while such person is under the influence of alcohol or any narcotic or any drug;
  - (8) If involved in a collision with another skier or person, to not leave the vicinity of the collision before giving his name and current address to an employee of the ski area operator, a member of the ski patrol, or the other skier or person with whom the skier collided, except in those cases when medical treatment is required; in which case, said information shall be provided as soon as practical after the medical treatment has been obtained. If the other person involved in the collision is unknown, the skier shall leave the personal identification required by this subsection with the ski area operator;
  - (9) Not to embark upon or disembark from a passenger tramway except at an area that is designated for such purpose;
  - (10) Not to throw or expel any object from a passenger tramway;
  - (11) Not to perform any action that interferes with the operation or running of a passenger tramway;
  - (12) Not to use such tramway unless he has the ability to use it with reasonable safety;
  - (13) Not to engage willfully or negligently in any type conduct that contributes to or causes injury to another person or his properties;
  - (14) Not to embark upon a passenger tramway without the authority of the ski area operator.
- (c) A ski area operator shall have the following responsibilities:
- (1) To mark all trails and maintenance vehicles and to furnish such vehicles with flashing or rotating lights that shall be in operation whenever the vehicles are working or moving in the ski area;
  - (2) To mark with a visible sign or other warning implement the location of any hydrant or similar equipment that is used in snowmaking operations and located anywhere in the ski area;
  - (3) To indicate the relative degree of difficulty of a slope or trail by appropriate signs. Such signs are to be prominently displayed at the base of a slope where skiers embark on a passenger tramway serving the slope or trail, or at the top of a slope or trail. The signs must be of the type that have been approved by the National Ski Areas Association and are in current use by the industry;
  - (4) To post at or near the top of or entrance to, any designated slope or trail, signs giving reasonable notice of unusual conditions on the slope or trail;

- (5) To provide adequate ski patrols;
- (6) To mark clearly any hidden rock, hidden stump, or any other hidden hazard known by the ski area operator to exist;
- (7) Not to engage willfully or negligently in any type conduct that contributes to or causes injury to another person or his properties. (1981, c. 939, s. 1.)

### § 99C-3. Violation constitutes negligence.

A violation of any responsibility placed on the skier, passenger or ski area operator as set forth in G.S. 99C-2, to the extent such violation proximately causes injury to any person or damage to any property, shall constitute negligence on the part of the person violating the provisions of that section. (1981, c. 939, s. 1.)

### § 99C-4. Competition.

The ski area operator shall, prior to the beginning of a competition, allow each competitor a reasonable visual inspection of the course or area where the competition is to be held. The competitor shall be held to assume risk of all course conditions including, but not limited to, weather and snow conditions, course construction or layout, and obstacles which a visual inspection should have revealed. No liability shall attach to a ski area operator for injury or death of any competitor proximately caused by such assumed risk. (1981, c. 939, s. 1.)

### § 99C-5. Operation of passenger tramway.

The operation of a passenger tramway shall not constitute the operation of a common carrier. (1981, c. 939, s. 1.)

## Chapter 100.

### Monuments, Memorials and Parks.

#### Article 1.

#### Approval of Memorials, Works of Art, etc.

#### Sec.

#### Sec.

100-2. Approval of memorials before acceptance by State; regulation of existing memorials, etc.; "work of art" defined; highway markers.

100-3. Approval of design, etc., of certain bridges and other structures.

100-4. Governor to accept works of art

approved by North Carolina Historical Commission.

100-5. Duties as to buildings erected or remodeled by State.

100-6. Disqualification to vote on work of art, etc.; vacancy.

100-7. Construction.

100-8. Memorials to persons within 25 years of death; acceptance of commemorative funds for useful work.

#### ARTICLE 1.

#### *Approval of Memorials, Works of Art, etc.*

#### § 100-2. Approval of memorials before acceptance by State; regulation of existing memorials, etc.; "work of art" defined; highway markers.

No memorial or work of art shall hereafter become the property of the State by purchase, gift or otherwise, unless such memorial or work of art or a design of the same, together with the proposed location of the same, shall first have been submitted to and approved by the North Carolina Historical Commission; nor shall any memorial or work of art, until so submitted and approved, be contracted for, placed in or upon or allowed to extend over any property belonging to the State. No existing memorial or work of art owned by the State shall be removed, relocated, or altered in any way without approval of the North Carolina Historical Commission. The term "work of art" as used in this section shall include any painting, portrait, mural decoration, stained glass, statue, bas-relief, sculpture, monument, tablet, fountain, or other article or structure of a permanent character intended for decoration or commemoration. This section, however, shall not apply to markers set up by the Board of Transportation in cooperation with the Department of Natural Resources and Community Development and the Department of Cultural Resources as provided by Chapter 197 of the Public Laws of 1935. (1941, c. 341, s. 2; 1957, c. 65, s. 11; 1973, c. 476, s. 48; c. 507, s. 5; c. 1262, s. 86; 1977, c. 771, s. 4; 1979, 2nd Sess., c. 1306, ss. 3, 4.)

**Effect of Amendments.** — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "the North Carolina Historical Commission" for "the Art Commission or the North Carolina Historical Commission as appropri-

ate" in the first and second sentences. The amendment also corrected an error by substituting "statue" for "statute" in the third sentence.

#### § 100-3. Approval of design, etc., of certain bridges and other structures.

No bridge, arch, gate, fence or other structure intended primarily for ornamental or memorial purposes and which is paid for either wholly or in part by appropriation from the State treasury, or which is to be placed on or allowed

to extend over any property belonging to the State, shall be begun unless the design and proposed location thereof shall have been submitted to the North Carolina Historical Commission and approved by it. Furthermore, no existing structures of the kind named and described in the preceding part of this section owned by the State, shall be removed or remodeled without submission of the plans therefor to the North Carolina Historical Commission and approval of said plans by the North Carolina Historical Commission. This section shall not be construed as amending or repealing Chapter 197 of the Public Laws of 1935. (1941, c. 341, s. 3; 1973, c. 476, s. 48; 1979, 2nd Sess., c. 1306, s. 3.)

**Effect of Amendments.** — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "the North Carolina Historical Com-

mission" for "the Art Commission or the North Carolina Historical Commission as appropriate" in three places.

#### **§ 100-4. Governor to accept works of art approved by North Carolina Historical Commission.**

The Governor of North Carolina is hereby authorized to accept, in the name of the State of North Carolina, gifts to the State of works of art as defined in G.S. 100-2. But no work of art shall be so accepted unless and until the same shall have been first submitted to the North Carolina Historical Commission and by it judged worthy of acceptance. (1941, c. 341, s. 4; 1973, c. 476, s. 48; 1979, 2nd Sess., c. 1306, s. 3.)

**Effect of Amendments.** — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "the North Carolina Historical Com-

mission" for "the Art Commission or the North Carolina Historical Commission as appropriate" in the second sentence.

#### **§ 100-5. Duties as to buildings erected or remodeled by State.**

Upon request of the Governor and the Board of Public Buildings and Grounds, the North Carolina Historical Commission shall act in an advisory capacity relative to the artistic character of any building constructed, erected, or remodeled by the State. The term "building" as used in this section shall include structures intended for human occupation, and also bridges, arches, gates, walls, or other permanent structures of any character not intended primarily for purposes of decoration or commemoration. (1941, c. 341, s. 5; 1973, c. 476, s. 48; 1979, 2nd Sess., c. 1306, s. 3.)

**Effect of Amendments.** — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "the North Carolina Historical Com-

mission" for "the Art Commission or the North Carolina Historical Commission as appropriate" in the first sentence.

#### **§ 100-6. Disqualification to vote on work of art, etc.; vacancy.**

Any member of the North Carolina Historical Commission who shall be employed by the State to execute a work of art or structure of any kind requiring submission to the North Carolina Historical Commission, or who shall take part in a competition for such work of art or structure, shall be disqualified from voting thereon, and the temporary vacancy thereby created may be filled by appointment by the Governor. (1941, c. 341, s. 6; 1973, c. 476, s. 48; 1979, 2nd Sess., c. 1306, s. 3.)

**Effect of Amendments.** — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "the North Carolina Historical Commission" for "the Art Commission or the North Carolina Historical Commission as appropriate" in two places.

## § 100-7. Construction.

The provisions of this Article shall not be construed to include exhibits of an educational nature arranged by museums or art galleries administered by the State or any of its agencies or institutions, or to prevent the placing of portraits of officials, officers, or employees of the State in the offices or buildings of the departments, agencies, or institutions with which such officials, officers, or employees are or have been connected. But upon request of such museums or agencies, the North Carolina Historical Commission shall act in an advisory capacity as to the artistic qualities and appropriations of memorial exhibits or works of art submitted to it. (1941, c. 341, s. 7; 1973, c. 476, s. 48; 1979, 2nd Sess., c. 1306, s. 3.)

**Effect of Amendments.** — The 1979, 2nd Sess., amendment, effective July 1, 1981, substituted "the North Carolina Historical Commission" for "the Art Commission or the North Carolina Historical Commission as appropriate" in the second sentence.

## § 100-8. Memorials to persons within 25 years of death; acceptance of commemorative funds for useful work.

No monument, statue, tablet, painting, or other article or structure of a permanent nature intended primarily to commemorate any person or persons shall be purchased from State funds or shall be placed in or upon or allowed to extend over State property within 25 years after the death of the person or persons so commemorated: Provided, nevertheless, that nothing in this Article shall be interpreted as prohibiting the acceptance of funds by State agencies or institutions from individuals or societies who wish to commemorate some person or persons by providing funds for educational, health, charitable, or other useful work. The agency or institution to which such funds are offered for memorial enterprises shall exercise its discretion as to the acceptance and expenditure of such funds. Nothing in this Article shall be interpreted as prohibiting the erection on the lands of the Cliffs of the Neuse State Park an appropriate tablet or plaque honoring the life and memory of the late Lionel Weil of Wayne County. Nothing in this Article shall be interpreted as prohibiting the erection on the lands of the Morrow Mountain State Park an appropriate tablet or plaque honoring the life and memory of the late James McKnight Morrow of Stanly County. Nothing in this Article shall be interpreted as prohibiting the erection on the lands of the Cliffs of the Neuse State Park an appropriate tablet or plaque, of such size and containing such language, as may be agreed upon by the donors and Director of State Parks, honoring the Whitfield heirs for their contributions to the establishment of the said park. (1941, c. 341, s. 8; 1957, c. 181; 1961, c. 976; 1963, c. 1128; 1979, 2nd Sess., c. 1306, s. 4.)

**Effect of Amendments.** — The 1979, 2nd Sess., amendment, effective July 1, 1980, corrected an error by substituting "statue" for "statute" near the beginning of the first sentence.

Chapter 101.  
Names of Persons.

Sec.  
101-8. Resumption of name by widow.

§ 101-2. Procedure for changing name; petition; notice.

**Cross References.** — As to effect of changing name upon registration to vote, see § 163-69.1.

§ 101-8. Resumption of name by widow.

A woman at any time after she is widowed, may resume the use of her maiden name or the name of a prior deceased husband or of a previously divorced husband upon application to the clerk of superior court of the county in which she resides, setting forth her intention to do so. The application shall set forth the full name of the last husband of the applicant, shall include a copy of his death certificate, and shall be signed by the applicant in her full name. The clerks of court of the several counties of this State shall record and index such applications in the manner required by the Administrative Office of the Courts. (1979, c. 768; 1981, c. 564, s. 2.)

**Effect of Amendments.** — The 1981 amendment, effective July 1, 1981, deleted "and forward a copy of the same to the State Regis-

trar of Vital Statistics on a form provided by him" from the end of the third sentence.

## Chapter 103.

### Sundays, Holidays and Special Days.

Sec.

103-2. Hunting on Sunday.

103-4. Dates of public holidays.

103-8. Indian solidarity week.

#### § 103-2. Hunting on Sunday.

If any person shall, except in defense of his own property, hunt on Sunday, having with him a shotgun, rifle, or pistol, he shall be guilty of a misdemeanor and pay a fine not exceeding fifty dollars (\$50.00) or [be] imprisoned not exceeding 30 days. Provided, that the provisions hereof shall not be applicable to military reservations, the jurisdiction of which is exclusively in the federal government. Wildlife protectors are granted authority to enforce the provisions of this section. (1868-9, c. 18, ss. 1, 2; Code, s. 3783; Rev., s. 3842; C. S., s. 3956; 1945, c. 1047; 1967, c. 1003; 1979, c. 830, s. 13.)

**Effect of Amendments.** — The 1979 amendment, effective July 1, 1980, added the last sentence.

#### § 103-4. Dates of public holidays.

(a) The following are declared to be legal public holidays:

(1) New Year's Day, January 1.

(1a) Martin Luther King, Jr.'s, Birthday, January 15.

(2) Robert E. Lee's Birthday, January 19.

(3) Washington's Birthday, the third Monday in February.

(3a) Greek Independence Day, March 25.

(4) Anniversary of signing of Halifax Resolves, April 12.

(5) Confederate Memorial Day, May 10.

(6) Anniversary of Mecklenburg Declaration of Independence, May 20.

(7) Memorial Day, the last Monday in May.

(8) Easter Monday.

(9) Independence Day, July 4.

(10) Labor Day, the first Monday in September.

(11) Columbus Day, the second Monday in October.

(11a) Yom Kippur.

(12) Veterans Day, November 11.

(13) Tuesday after the first Monday in November in years in which a general election is to be held.

(14) Thanksgiving Day, the fourth Thursday in November.

(15) Christmas Day, December 25.

Provided that Easter Monday and Memorial Day, the last Monday in May, shall be a holiday for all State and national banks only.

(1881, c. 294; Code, s. 3784; 1891, c. 58; 1899, c. 410; 1901, c. 25; Rev., s. 2838; 1907, c. 996; 1909, c. 888; 1919, c. 287; C. S., s. 2959; 1935, c. 212; 1959, c. 1011; 1969, c. 521; 1973, c. 53; 1979, c. 84; 1981, c. 135; 1983, c. 1.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amend-

ment added subdivision (3a) of subsection (a).

The 1983 amendment, effective Jan. 17, 1983, inserted subdivision (1a) of subsection (a).

**§ 103-8. Indian solidarity week.**

The last full week in September of each year is designated as Indian solidarity week in North Carolina. (1981, c. 769.)

## Chapter 104.

### United States Lands.

#### § 104-7. Acquisition of lands for public buildings; cession of jurisdiction; exemption from taxation.

##### CASE NOTES

**Applied** in *State v. Graham*, 47 N.C. App. 303, 267 S.E.2d 56 (1980).

Chapter 104C.

Atomic Energy, Radioactivity and Ionizing Radiation.

§§ 104C-4, 104C-5: Recodified as §§ 104E-1 to 104E-23, effective July 1, 1975.

**Editor's Note. —** Session Laws 1975, c. 718, s. 8, was amended by Session Laws 1981, c. 393, so as to delete the provision for expiration of the act.

## Chapter 104D.

### Southern Interstate Nuclear Compact.

Sec.

Sec.

104D-1. Compact entered into; form of compact.

members and alternate members of Southern States Energy Board.

104D-2. Appointment of North Carolina

104D-6. [Repealed.]

### § 104D-1. Compact entered into; form of compact.

The Southern States Energy Compact is hereby enacted into law and entered into with all other jurisdictions legally joining therein in the form substantially as follows:

#### SOUTHERN STATES ENERGY COMPACT

ARTICLE I. Policy and Purpose. The party states recognize that the proper employment and conservation of energy and employment of energy-related facilities, materials, and products, within the context of a responsible regard for the environment, can assist substantially in the industrialization of the South and the development of a balanced economy for the region. They also recognize that optimum benefit from and acquisition of energy resources and facilities require systematic encouragement, guidance, and assistance from the party states on a cooperative basis. It is the policy of the party states to undertake such cooperation on a continuing basis; it is the purpose of this compact to provide the instruments and framework for such a cooperative effort to improve the economy of the South and contribute to the individual and community well-being of the region's people.

ARTICLE II. The Board. (a) There is hereby created an agency of the party states to be known as the "Southern States Energy Board" (hereinafter called the Board). The Board shall be composed of three members from each party state, one of whom shall be appointed or designated in each state to represent the Governor, the State Senate and the State House of Representatives, respectively. Each member shall be designated or appointed in accordance with the law of the state which he represents and shall serve and be subject to removal in accordance with such law. Any member of the Board may provide for the discharge of his duties and the performance of his functions thereon, either for the duration of his membership or for any lesser period of time, by a deputy or assistant, if the laws of his state make specific provision therefor. The federal government may be represented without vote if provision is made by federal law for such representation.

(b) Each party state shall be entitled to one vote on the Board, to be determined by majority vote of each member or member's representative from the party state present and voting on any question. No action of the Board shall be binding unless taken at a meeting at which a majority of all party states are represented and unless a majority of the total number of votes on the Board are cast in favor thereof.

(c) The Board shall have a seal.

(d) The Board shall elect annually, from among its members, a chairman, a vice-chairman, and a treasurer. The Board shall appoint an Executive Director who shall serve at its pleasure and who shall also act as secretary, and who, together with the treasurer, shall be bonded in such amounts as the Board may require.

(e) The Executive Director, with the approval of the Board, shall appoint and remove or discharge such personnel as may be necessary for the performance

of the Board's functions irrespective of the civil service, personnel or other merit system laws of any of the party states.

(f) The Board may establish and maintain, independently or in conjunction with any one or more of the party states, a suitable retirement system for its full-time employees. Employees of the Board shall be eligible for social security coverage in respect of old age and survivors insurance provided that the Board takes such steps as may be necessary pursuant to federal law to participate in such program of insurance as a governmental agency or unit. The Board may establish and maintain or participate in such additional programs of employee benefits as may be appropriate.

(g) The Board may borrow, accept or contract for the services of personnel from any state or the United States or any subdivision or agency thereof, from any interstate agency, or from any institution, person, firm or corporation.

(h) The Board may accept for any of its purposes and functions under this compact any and all donations, and grants of money, equipment, supplies, materials, and services (conditional or otherwise) from any state or the United States or any subdivision or agency thereof, or interstate agency, or from any institution, person, firm or corporation, and may receive, utilize, and dispose of the same.

(i) The Board may establish and maintain such facilities as may be necessary for the transaction of its business. The Board may acquire, hold, and convey real and personal property and any interest therein.

(j) The Board shall adopt bylaws, rules and regulations for the conduct of its business, and shall have the power to amend and rescind these bylaws, rules, and regulations. The Board shall publish its bylaws, rules, and regulations in convenient form and shall file a copy thereof, and shall also file a copy of any amendment thereto, with the appropriate agency or officer in each of the party states.

(k) The Board annually shall make to the Governor of each party state, a report covering the activities of the Board for the preceding year, and embodying such recommendations as may have been adopted by the Board, which report shall be transmitted to the legislature of said state. The Board may issue such additional reports as it may deem desirable.

**ARTICLE III. Finances.** (a) The Board shall submit to the executive head or designated officer or officers of each party state a budget of its estimated expenditures for such period as may be required by the laws of that jurisdiction for presentation to the legislature thereof.

(b) Each of the Board's budgets of estimated expenditures shall contain specific recommendations of the amount or amounts to be appropriated by each of the party states. One-half of the total amount of each budget of estimated expenditures shall be apportioned among the party states in equal shares; one quarter of each such budget shall be apportioned among the party states in accordance with the ratio of their populations to the total population of the entire group of party states based on the last decennial federal census; and one quarter of each such budget shall be apportioned among the party states on the basis of the relative average per capita income of the inhabitants in each of the party states based on the latest computations published by the federal census-taking agency. Subject to appropriations by their respective legislatures, the Board shall be provided with such funds by each of the party states as are necessary to provide the means of establishing and maintaining facilities, a staff of personnel, and such activities as may be necessary to fulfill the powers and duties imposed upon and entrusted to the Board.

(c) The Board may meet any of its obligations in whole or in part with funds available to it under Article II(h) of this Compact, provided that the Board takes specific action setting aside such funds prior to the incurring of any obligation to be met in whole or in part in this manner. Except where the Board makes use of funds available to it under Article II(h) hereof, the Board shall

not incur any obligation prior to the allotment of funds by the party jurisdictions adequate to meet the same.

(d) The Board shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the Board shall be subject to the audit and accounting procedures established under its bylaws. However, all receipts and disbursements of funds handled by the Board shall be audited yearly by a qualified public accountant and the report of the audit shall be included in and become a part of the annual report of the Board.

(e) The accounts of the Board shall be open at any reasonable time for inspection.

ARTICLE IV. Advisory Committees. The Board may establish such advisory and technical committees as it may deem necessary, membership on which to include but not be limited to private citizens, expert and lay personnel, representatives of industry, labor, commerce, agriculture, civic associations, medicine, education, voluntary health agencies, and officials of local, state and federal government, and may cooperate with and use the services of any such committees and the organizations which they represent in furthering any of its activities under this Compact.

ARTICLE V. Powers. The Board shall have the power to:

- (1) Ascertain and analyze on a continuing basis the position of the South with respect to energy, energy-related industries, and environmental concerns.
- (2) Encourage the development, conservation and responsible use of energy and energy-related facilities, installations, and products as part of a balanced economy and healthy environment.
- (3) Collect, correlate, and disseminate information relating to civilian uses of energy and energy-related materials and products.
- (4) Conduct, or cooperate in conducting, programs of training for state and local personnel engaged in any aspect of:
  - a. Energy, environment, and application of energy, environmental, and related concerns to industry, medicine, or education or the promotion or regulation thereof.
  - b. The formulation or administration of measures designed to promote safety in any matter related to the development, use or disposal of energy and energy-related materials, products, installations, or wastes.
- (5) Organize and conduct, or assist and cooperate in organizing and conducting, demonstrations of energy product, material, or equipment use and disposal and of proper techniques or processes for the application of energy resources to the civilian economy or general welfare.
- (6) Undertake such nonregulatory functions with respect to sources of radiation as may promote the economic development and general welfare of the region.
- (7) Study industrial, health, safety, and other standards, laws, codes, rules, regulations, and administrative practices in or related to energy and environmental fields.
- (8) Recommend such changes in, or amendments or additions to, the laws, codes, rules, regulations, administrative procedures and practices or ordinances of the party states in any of the fields of its interest and competence as in its judgment may be appropriate. Any such recommendation shall be made through the appropriate state agency with due consideration of the desirability of uniformity but shall also give appropriate weight to any special circumstances which may justify variations to meet local conditions.
- (9) Prepare, publish and distribute, with or without charge, such reports, bulletins, newsletters or other material as it deems appropriate.

- (10) Cooperate with the United States Department of Energy or any agency successor thereto, any other officer or agency of the United States, and any other governmental unit or agency or officer thereof, and with any private persons or agencies in any of the fields of its interests.
- (11) Act as licensee of the United States Government or any party state with respect to the conduct of any research activity requiring such license and operate such research facility or undertake any program pursuant thereto.
- (12) a. Ascertain from time to time such methods, practices, circumstances, and conditions as may bring about the prevention and control of energy and environmental incidents in the area comprising the party states, to coordinate the environmental and other energy-related incident prevention and control plans and the work relating thereto of the appropriate agencies of the party states and to facilitate the rendering of aid by the party states to each other in coping with energy and environmental incidents.  
b. The Board may formulate and, in accordance with need from time to time, revise a regional plan or regional plans for coping with energy and environmental incidents within the territory of the party states as a whole or within any subregion or subregions of the geographic area covered by this Compact.

ARTICLE VI. Supplementary Agreements. (a) To the extent that the Board has not undertaken an activity or project which would be within its power under the provisions of Article V of this Compact, any two or more of the party states (acting by their duly constituted administrative officials) may enter into supplementary agreements for the undertaking and continuance of such an activity or project. Any such agreement shall specify its purpose or purposes; its duration and the procedure for termination thereof or withdrawal therefrom; the method of financing and allocating the costs of the activity or project; and such other matters as may be necessary or appropriate. No such supplementary agreement entered into pursuant to this Article shall become effective prior to its submission to and approval by the Board. The Board shall give such approval unless it finds that the supplementary agreement or the activity or project contemplated thereby is inconsistent with the provisions of this Compact or a program or activity conducted by or participated in by the Board.

(b) Unless all of the party states participate in a supplementary agreement, any cost or costs thereof shall be borne separately by the states party thereto. However, the Board may administer or otherwise assist in the operation of any supplementary agreement.

(c) No party to a supplementary agreement entered into pursuant to this Article shall be relieved thereby of any obligation or duty assumed by said party state under or pursuant to this Compact, except that timely and proper performance of such obligation or duty by means of the supplementary agreement may be offered as performance pursuant to the Compact.

ARTICLE VII. Other Laws and Relationships. Nothing in this Compact shall be construed to:

- (1) Permit or require any person or other entity to avoid or refuse compliance with any law, rule, regulation, order or ordinance of a party state or subdivision thereof now or hereafter made, enacted or in force.
- (2) Limit, diminish or otherwise impair jurisdiction exercised by the United States Department of Energy, any agency successor thereto, or any other federal department, agency or officer pursuant to and in conformity with any valid and operative act of Congress.
- (3) Alter the relations between and respective internal responsibilities of the government of a party state and its subdivisions.

- (4) Permit or authorize the Board to exercise any regulatory authority or to own or operate any nuclear reactor for the generation of electric energy; nor shall the Board own or operate any facility or installation for industrial or commercial purposes.

ARTICLE VIII. Eligible Parties, Entry into Force and Withdrawal. (a) Any or all of the states of Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia, the Commonwealth of Puerto Rico, and the United States Virgin Islands shall be eligible to become party to this Compact.

(b) As to any eligible party state, this Compact shall become effective when its legislature shall have enacted the same into law: Provided that it shall not become initially effective until enacted into law by seven states.

(c) Any party state may withdraw from this Compact by enacting a statute repealing the same, but no such withdrawal shall become effective until the Governor of the withdrawing state shall have sent formal notice in writing to the Governor of each other party state informing said Governors of the action of the legislature in repealing the Compact and declaring an intention to withdraw.

ARTICLE IX. Severability and Construction. The provisions of this Compact and of any supplementary agreement entered into hereunder shall be (severable) and if any phrase, clause, sentence or provision of this Compact or such supplementary agreement is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this Compact or such supplementary agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this Compact or any supplementary agreement entered into hereunder shall be held contrary to the constitution of any state participating therein, the Compact or such supplementary agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters. The provisions of this Compact and of any supplementary agreement entered into pursuant thereto shall be liberally construed to effectuate the purposes thereof. (1965, c. 858, s. 1; 1983, c. 282, s. 1.)

**Effect of Amendments.** — The 1983 amendment, effective May 6, 1983, rewrote this section.

## **§ 104D-2. Appointment of North Carolina members and alternate members of Southern States Energy Board.**

(a) North Carolina members of the Southern States Energy Board shall be appointed as follows:

- (1) One member to be appointed by the Governor.
- (2) One member of the House of Representatives to be appointed by the Speaker of the House of Representatives.
- (3) One member of the Senate to be appointed by the President of the Senate.

(b) Members shall serve at the pleasure of the original appointing authority and until their successors are appointed.

(c) Each appointing authority is authorized to appoint an alternate member who may serve at and for such time as the regular member shall designate and

shall have the same power and authority as the regular member when so serving. (1965, c. 858, s. 2; 1983, c. 282, s. 2.)

**Effect of Amendments.**— The 1983 amendment, effective May 6, 1983, rewrote this section.

**§ 104D-6:** Repealed by Session Laws 1983, c. 282, s. 3, effective May 6, 1983.

## Chapter 104E.

### North Carolina Radiation Protection Act.

Sec.	Sec.
104E-5. Definitions.	other sources of ionizing radiation.
104E-6.1. Conveyance of land used for low-level radioactive waste landfill facility to State.	104E-10.1. Additional requirements for low-level radioactive waste facilities.
104E-6.2. Local ordinances prohibiting low-level radioactive waste facilities invalid; petition to establish facility.	104E-10.2. Conveyance of property used for radioactive material disposal.
104E-7. Radiation Protection Commission — creation and powers.	104E-16. Nonreverting Radiation Protection Fund.
104E-9. Powers and functions of Department of Human Resources.	104E-18. Security for emergency response and perpetual maintenance costs.
104E-10. Licensing of by-product, source, and special nuclear materials and	104E-19. Fees.
	104E-21. Conflicting laws.
	104E-23. Penalties; injunctive relief.
	104E-24. Administrative penalties.

**Cross References.** — As to review and evaluation of the programs and functions authorized under this Chapter, see § 143-34.26.

**Repeal of Chapter.** —

The provision of Session Laws 1977, c. 712, as amended, tentatively repealing this Chapter

effective July 1, 1983, was itself repealed by Session Laws 1981, c. 932, s. 1.

**Editor's Note.** —

Session Laws 1975, c. 718, s. 8, was amended by Session Laws 1981, c. 393, so as to delete the provision for expiration of the act.

## § 104E-5. Definitions.

Unless a different meaning is required by the context, the following terms as used in this Chapter shall have the meanings hereinafter respectively ascribed to them:

- (9a) "Low-level radioactive waste" means radioactive waste not classified as high-level radioactive waste or spent nuclear fuel as defined by the U.S. Nuclear Regulatory Commission, transuranic waste, or byproduct material as defined in Section 11(e) (2) of the Atomic Energy Act of 1954, as amended.
- (9b) "Low-level radioactive waste facility" means a facility for the storage, collection, processing, treatment, recycling, recovery or disposal of low-level radioactive waste.
- (9c) "Low-level radioactive waste landfill facility" means any facility or any portion of a facility for disposal of low-level radioactive waste on or in land in accordance with rules promulgated under this Chapter.
- (18) "Transuranic waste" means waste containing more than 10 nanocuries of radioactive materials with atomic numbers of 93 or higher per gram of waste. (1975, c. 718, s. 1; 1981, c. 704, s. 8.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amendment added subdivisions (9a), (9b), (9c), and (18),

Session Laws 1981, c. 704, ss. 1 and 2, provides:

"Section 1. Short title. This act may be referred to as the Waste Management Act of 1981.

"Sec. 2. Purpose. The purpose of this act is to

provide for a comprehensive system for management of hazardous and low-level radioactive waste in North Carolina as reflected in the 1981 Report of the Governor's Task Force on Waste Management."

Session Laws 1981, c. 704, s. 26, provides that the act shall be liberally construed to carry out the policies set forth in the act.

Session Laws 1981, c. 704, s. 27, contains a severability clause.

### **§ 104E-6.1. Conveyance of land used for low-level radioactive waste landfill facility to State.**

(a) No land may be used as a low-level radioactive waste landfill facility until fee simple title to the land has been conveyed to the State of North Carolina. In consideration for such conveyance, the State shall enter into a lease agreement with the grantor for a term equal to the estimated life of the facility in which the State will be the lessor and the grantor the lessee. Such lease agreement shall specify that for an annual rent of fifty dollars (\$50.00), the lessee shall be allowed to use the land for the development and operation of a low-level radioactive waste landfill facility. Such lease agreement shall provide that the lessor or any person authorized by the lessor shall have at all times the right to enter without a search warrant or permission of the lessee upon any and all parts of the premises for monitoring, inspection and all other purposes necessary to carry out the provisions of Chapter 104E. The lessee shall remain fully liable for all damages, losses, personal injury or property damage which may result or arise out of the lessee's operation of the facility, and for compliance with regulatory requirements concerning insurance, bonding for closure and post-closure costs, monitoring and other financial or health and safety requirements as required by applicable law and regulations. The State, as lessor, shall be immune from liability except as otherwise provided by statute. The lease shall be transferrable with the written consent of the lessor, which consent will not be unreasonably withheld. In the case of such a transfer of the lease, the transferee shall be subject to all terms and conditions that the State deems necessary to ensure compliance with applicable laws and regulations. If the lessee or any successor in interest fails in any material respect to comply with any applicable law, regulation, or permit condition, or with any term or condition of the lease, the State may terminate the lease after giving the lessee written notice specifically describing the failure to comply and upon providing the lessee a reasonable time to comply. If the lessee does not effect compliance within the reasonable time allowed, the State may reenter and take possession of the premises.

(b) Notwithstanding the termination of the lease by either the lessee or the lessor for any reason, the lessee shall remain liable for, and be obligated to perform all acts necessary or required by law, regulation, permit conditions or the lease for the permanent closure of the site until the site has either been permanently closed or until a substitute operator has been secured and assumed the obligations of the lessee.

(c) In the event of changes in laws or regulations applicable to the facility which make continued operation by the lessee impossible or economically infeasible, the lessee shall have the right to terminate the lease upon giving the State reasonable notice of not less than six months, in which case the lessor shall have the right to secure a substitute lessee and operator.

(d) In the event of termination of the lease by the lessor as provided in subsection (a) of this section, or by the lessee as provided in subsection (c) of this section, the lessee shall be paid the fair market value of any improvements made to the leased premises less the costs to the lessor resulting from termination of the lease and securing a substituted lessee and operator; provided, that the lessor shall have no obligation to secure a substitute lessee or operator and may require the lessee to permanently close the facility. (1981, c. 704, s. 9.)

**Editor's Note.** — As to short title and purpose of Session Laws 1981, c. 704, see note to § 104E-5.

Session Laws 1981, c. 704, s. 26, provides that

the act shall be liberally construed to carry out the policies set forth in the act.

Session Laws 1981, c. 704, s. 27, contains a severability clause.

## **§ 104E-6.2. Local ordinances prohibiting low-level radioactive waste facilities invalid; petition to establish facility.**

(a) Notwithstanding any authority heretofore granted to counties, municipalities, or other local authorities to adopt local ordinances, including those regulating land use, any local ordinance which prohibits or has the effect of prohibiting the establishment or operation of a low-level radioactive waste facility or a low-level radioactive waste landfill facility which the Governor's Waste Management Board and the Governor have approved pursuant to the procedures in subsections (b) and (c), shall be invalid from June 26, 1981, but only to the extent necessary to effectuate the purposes of this Article. For the purpose of this section, the Governor's Waste Management Board shall include, in addition to the members enumerated in G.S. 143B-216.12(a), two members appointed by the local governing body (i) of the city in which the proposed site is located or (ii) of the county in which the proposed site is located (if the proposed site is outside city limits), as the case may be. The terms of the members appointed by the local governing body shall end upon the final determination made by the Governor under this section.

(b) When a low-level radioactive waste facility would be prevented from construction or operation by a county, municipal, or other local ordinance(s), the developer or operator of the facility may petition the Governor's Waste Management Board to review the matter. After receipt of a petition, the board shall hold a hearing in accordance with the procedures in subsection (c) and shall recommend to the Governor that he either approve or disapprove the establishment and operation of the facility.

After receiving a written recommendation from the board, if the Governor makes the four findings set forth in subsection (c) of this section he shall approve the establishment or operation of the facility. If the Governor does not make all of the four findings set forth in subsection (c) of this section he shall disapprove the establishment or operation of the facility. The Governor shall affirm or disaffirm the findings of the board and may make additional findings. The decision of the Governor shall be final unless a party to the action shall, pursuant to G.S. 7A-29, file a written appeal within 30 days of the date of such decision. The record on appeal shall include all materials and information submitted to or considered by the Governor in accordance with subsection (c) of this section. The scope of judicial review shall be limited to questions of abuse of discretion.

(c) When a petition as described in subsection (b) of this section has been filed with the Governor's Waste Management Board, the board shall hold a public hearing to consider the petition. Such hearing shall be held in the affected locality in accordance with G.S. 150A, Article 2, within a reasonable time after receipt of the petition by the board. The board shall publish notice of the hearing twice a week for two successive weeks in a newspaper of general circulation in the county where the proposed site is located. The final notice shall appear at least 15 days but not more than 25 days before the hearing date. Any interested person may appear before the board at the hearing to offer testimony. In addition to testimony before the board, any interested person may submit written material to the board for its consideration. No later than 60 days after the hearing, the board shall present its written recommendation to the Governor to approve or disapprove the facility. Before recommending

that the Governor approve the facility, the board must make the following findings:

- (1) That the proposed facility is needed in order to establish adequate capability for the management of low-level radioactive waste generated in North Carolina and therefore serves the interest of the citizens of the State as a whole;
- (2) That all legally required State and federal permits or approvals have been issued by the appropriate State and federal agencies;
- (3) That local citizens and elected officials have had adequate opportunity to participate in the siting process;
- (4) That the construction and operation of the facility will not pose an unreasonable health or environmental risk to the surrounding locality and that the facility developer or operator has taken or consented to take any reasonable measures to avoid or manage foreseeable risks and to comply to the maximum feasible extent with any applicable ordinances.

The board's written recommendation shall include a complete transcript of the hearing, all written material presented to the board regarding the site location and the specific findings required in this subsection and any minority positions on the recommendation and the specific findings required in this subsection. The Governor shall issue his decision within a reasonable time following receipt of the recommendation from the board and may consider any additional information he deems relevant. The Governor's decision shall be in writing and shall identify the material submitted to him by the board plus any additional materials used in arriving at his decision. (1981, c. 704, s. 9.)

**Editor's Note.** — As to short title and purpose of Session Laws 1981, c. 704, see note to § 104E-5.

Session Laws 1981, c. 704, s. 26, provides that

the act shall be liberally construed to carry out the policies set forth in the act.

Session Laws 1981, c. 704, s. 27, contains a severability clause.

## § 104E-7. Radiation Protection Commission — creation and powers.

There is hereby created the North Carolina Radiation Protection Commission of the Department of Human Resources with the power to promulgate rules and regulations to be followed in the administration of a radiation protection program. All rules and regulations for radiation protection that were adopted by the Commission for Health Services and are not inconsistent with the provisions of this Chapter shall remain in full force and effect unless and until repealed or superseded by action of the Radiation Protection Commission. The Radiation Protection Commission is authorized:

- (9) To adopt regulations establishing financial responsibility requirements for maintenance, operation and long-term care of low-level radioactive waste facilities, including insurance during the operation of the facility and adequate assurance of availability of funds for facility closure and post-closure monitoring and corrective measures. (1975, c. 718, s. 1; 1979, c. 694, s. 3; 1981, c. 704, s. 10.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amendment added subdivision (9).

As to short title and purpose of Session Laws 1981, c. 704, see note to § 104E-5.

Session Laws 1981, c. 704, s. 26, provides that the act shall be liberally construed to carry out the policies set forth in the act.

Session Laws 1981, c. 704, s. 27, contains a severability clause.

## § 104E-9. Powers and functions of Department of Human Resources.

The Department of Human Resources is authorized:

- (8) To establish annual fees for activities under this Chapter based on actual administrative costs to be applied to training, enforcement, and inspection pursuant to the provisions of this Chapter and to charge and collect fees from operators of low-level radioactive waste landfill facilities pursuant to the provisions of this Chapter. (1975, c. 718, s. 1; 1979, c. 694, s. 4; 1981, c. 704, s. 10.1.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amendment added subdivision (8).

As to short title and purpose of Session Laws 1981, c. 704, see note to § 104E-5.

Session Laws 1981, c. 704, s. 26, provides that the act shall be liberally construed to carry out the policies set forth in the act.

Session Laws 1981, c. 704, s. 27, contains a severability clause.

## § 104E-10. Licensing of by-product, source, and special nuclear materials and other sources of ionizing radiation.

(d) Within five days of receiving an application for a license or an amendment to a license to operate a low-level radioactive waste facility, the Department shall notify the clerk to the board of county commissioners or, if the facility is located within a city, the city clerk where the facility is proposed to be located. Prior to the issuance of a license or an amendment of an existing license the Department shall issue public notice. The Radiation Protection Commission or a designee shall conduct a public hearing in any county in which a person proposes to operate a radioactive waste processing or disposal facility, as defined by regulation by the Commission, or to enlarge an existing facility for such processing or disposal. Notice and the public hearing shall be in accordance with Chapter 150A. (1975, c. 718, s. 1; 1979, c. 694, s. 1; 1981, c. 704, s. 11.1.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amendment added the first sentence of subsection (d).

As to short title and purpose of Session Laws 1981, c. 704, see note to § 104E-5.

Sessions Laws 1981, c. 704, s. 26, provides that the act shall be liberally construed to carry out the policies set forth in the act.

Sessions Laws 1981, c. 704, s. 27, contains a severability clause.

## § 104E-10.1. Additional requirements for low-level radioactive waste facilities.

An applicant for a permit for a low-level radioactive facility shall satisfy the department that:

- (1) Any low-level radioactive waste facility heretofore constructed or operated by the applicant (or any parent or subsidiary corporation if the applicant is a corporation) has been operated in accordance with sound waste management practices and in substantial compliance with federal and State laws and regulations; and

- (2) The applicant (or any parent or subsidiary corporation if the applicant is a corporation) is financially qualified to operate the subject low-level radioactive waste facility. (1981, c. 704, s. 11.)

**Editor's Note.** — As to short title and purpose of Session Laws 1981, c. 704, see note to § 104E-5.

Session Laws 1981, c. 704, s. 26, provides that

the act shall be liberally construed to carry out the policies set forth in the act.

Session Laws 1981, c. 704, s. 27, contains a severability clause.

## § 104E-10.2. Conveyance of property used for radioactive material disposal.

A license to dispose of radioactive waste materials on land shall include a legal description of the disposal site that would be sufficient as a description in an instrument of conveyance. The license to dispose of radioactive waste materials shall not be effective unless the owner of the disposal site files a certified copy of the license in the register of deeds' office in the county or counties in which the site is located. The register of deeds shall record the certified copy of the license and index it in the grantor index under the name of the owner of the land. When any such site is sold, leased, conveyed or transferred in any manner, the deed or other instrument of transfer shall contain in the description section in no smaller type than that used in the body of the deed or instrument a statement that the property has been used as a disposal site for radioactive waste materials and a reference by book and page to the recordation of the license. (1981, c. 480, s. 1.)

**Editor's Note.** — Session Laws 1981, c. 480, s. 5, makes this section effective Oct. 1, 1981.

## § 104E-16. Nonreverting Radiation Protection Fund.

(a) There is hereby established under the control and direction of the Department a Nonreverting Radiation Protection Fund which shall be used to defray the expenses of any project or activity for:

- (1) Emergency response to and decontamination of radiation accidents as provided in G.S. 104E-9(5), or
- (2) Perpetual maintenance and custody of radioactive materials as the Department may undertake.

In addition to any moneys that shall be appropriated or otherwise made available to it, the Fund may be maintained by fees, charges, penalties or other moneys paid to or recovered by or on behalf of the Department under the provisions of this Chapter. Any moneys paid to or recovered by or on behalf of the Department as fees, charges, penalties or other payments authorized by this Chapter shall be paid to the Radiation Protection Fund in an amount equal to the sum expended for the projects or activities in subdivisions (1) and (2) above.

(b) All moneys collected from low-level radioactive waste landfills according to the provisions of G.S. 104E-19(b) shall be paid to the Fund. Such moneys shall be separately accounted for and shall be available to defray the costs to the State for monitoring and care of low-level radioactive waste landfill facilities after the termination of the period during which the facility operator is required by applicable State and federal statutes and regulations to remain responsible for post-closure monitoring and care. The establishment of this Fund shall in no way be construed to relieve or reduce the liability of facility operators or any other persons for damages caused by the facility. The Fund shall be maintained by fees collected pursuant to the provisions of G.S. 104E-19(b). (1975, c. 718, s. 1; 1981, c. 704, s. 11.2.)

**Effect of Amendments.** — The 1981 amendment designated the former provisions of this section as subsection (a), and added subsection (b). The amendment also inserted "Nonreverting" preceding "Radiation Protection Fund" near the beginning of the introductory paragraph of subsection (a).

As to short title and purpose of Session Laws 1981, c. 704, see note to § 104E-5.

Session Laws 1981, c. 704, s. 26, provides that the act shall be liberally construed to carry out the policies set forth in the act.

Session Laws 1981, c. 704, s. 27, contains a severability clause.

## § 104E-18. Security for emergency response and perpetual maintenance costs.

(a) No person shall use, manufacture, produce, transport, transfer, receive, acquire, own, possess or dispose of radioactive material until that person shall have procured and filed with the Department such bond, insurance or other security as the Commission may by regulation require. Such bond, insurance or other security shall:

- (1) Run in favor of the Radiation Protection Fund in the amount of the estimated total cost as established by the Commission that may be incurred by the State in any project or activity stated in G.S. 104E-16, and
  - (2) Have as indemnitor on such bond or insurance an insurance company licensed to do business in the State of North Carolina.
- (1975, c. 718, s. 1; 1981, c. 704, s. 12.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amendment substituted "own, possess or dispose of radioactive material" for "own or possess radioactive material" near the middle of the first sentence of the introductory paragraph of subsection (a). The amendatory act referred to

the "second sentence" of subsection (a), but the "second line" was plainly intended.

As to short title and purpose of Session Laws 1981, c. 704, see note to § 104E-5.

Session Laws 1981, c. 704, s. 26, provides that the act shall be liberally construed to carry out the policies set forth in the act.

Session Laws 1981, c. 704, s. 27, contains a severability clause.

## § 104E-19. Fees.

(a) In order to meet the anticipated costs of administering the educational and training programs in G.S. 104E-11(c) and of enforcing and carrying out the inspection provisions in G.S. 104E-7(7) and 104E-11(a), the Department is authorized to charge and collect such reasonable fees as it may by rule or regulation establish.

(b) The Department is authorized to charge and collect fees from operators of low-level radioactive waste landfill facilities. Such fees shall be used to establish a fund sufficient for each individual facility to defray the anticipated costs to the State for monitoring and care of the facility after the termination of the period during which the facility operator is required by applicable State and federal statutes or regulations to remain responsible for post-closure monitoring and care. In establishing any such fees, consideration shall be given to the size of the facility, the nature of the low-level radioactive waste and the projected life of the facility. (1975, c. 718, s. 1; 1981, c. 704, s. 13.)

**Effect of Amendments.** — The 1981 amendment designated the former section as subsection (a) and added subsection (b). The amendment also substituted "it" for "the Commission" near the end of subsection (a).

As to short title and purpose of Session Laws 1981, c. 704, see note to § 104E-5.

Session Laws 1981, c. 704, s. 26, provides that the act shall be liberally construed to carry out the policies set forth in the act.

Session Laws 1981, c. 704, s. 27, contains a severability clause.

## § 104E-21. Conflicting laws.

(a) Ordinances, resolutions or regulations, now or hereafter in effect, of the governing body of a municipality or county or board of health relating to by-product, source and special nuclear materials shall not be superseded by this Chapter. Provided, that such ordinances or regulations are and continue to be consistent and compatible with the provisions of this Chapter, as amended, and rules and regulations promulgated by the Commission.

(b) It is the intent of the General Assembly to prescribe a uniform system for the management of low-level radioactive waste and to place limitations upon the exercise by all units of local government in North Carolina of the power to regulate the management of low-level radioactive waste by special, local or private acts or resolutions as provided in G.S. 143B-216.10(b). (1975, c. 718, s. 1; 1981, c. 704, s. 25.)

**Effect of Amendments.** — The 1981 amendment designated the former provisions of this section as subsection (a), and added subsection (b).

As to short title and purpose of Session Laws 1981, c. 704, see note to § 104E-5.

Session Laws 1981, c. 704, s. 26, provides that the act shall be liberally construed to carry out the policies set forth in the act.

Session Laws 1981, c. 704, s. 27, contains a severability clause.

## § 104E-23. Penalties; injunctive relief.

(a) Any person who violates the provisions of G.S. 104E-15 or 104E-20, or who hinders, obstructs, or otherwise interferes with any authorized representative of the Department in the discharge of his official duties in making inspections as provided in G.S. 104E-11, or in impounding materials as provided in G.S. 104E-14, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished as provided by law. Any person who willfully violates the provisions of G.S. 104E-10.2 shall be guilty of a misdemeanor and, upon conviction, shall be punished as provided by law.

(1975, c. 718, s. 1; 1979, c. 694, s. 5; 1981, c. 480, s. 2.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amendment, effective Oct. 1, 1981, added the second sentence of subsection (a).

## § 104E-24. Administrative penalties.

(a) The Department may impose an administrative penalty on any person:

- (1) Who fails to comply with this Chapter, any order issued hereunder, or any rules adopted pursuant to this Chapter;
- (2) Who refuses to allow an authorized representative of the Radiation Protection Commission or the Department of Human Resources a right of entry as provided for in G.S. 104E-11 or impounding materials as provided for in G.S. 104E-14.

(b) Each day of a continuing violation shall constitute a separate violation. Such penalty shall not exceed ten thousand dollars (\$10,000) per day. In determining the amount of the penalty, the Department shall consider the degree and extent of the harm caused by the violation. Any person assessed a penalty shall be notified of the assessment by registered or certified mail, and the notice shall specify the reasons for the assessment.

(c) Any person wishing to contest a penalty or order issued under this section shall be entitled to an administrative hearing and judicial review in accordance with the procedures outlined in G.S. 150A-23 through 150A-52.

(d) The Secretary may bring a civil action in the superior court of the county in which such violation is alleged to have occurred to recover the amount of administrative penalty whenever a person:

- (1) Who has not requested an administrative hearing fails to pay the penalty within 60 days after being notified of such penalty, or
- (2) Who has requested an administrative hearing fails to pay the penalty within 60 days after service of a written copy of the decision as provided in G.S. 150A-36. (1981, c. 704, s. 14.)

**Editor's Note.** — As to short title and purpose of Session Laws 1981, c. 704, see note to § 104E-5.

Session Laws 1981, c. 704, s. 26, provides that

the act shall be liberally construed to carry out the policies set forth in the act.

Session Laws 1981, c. 704, s. 27, contains a severability clause.

## Chapter 104F.

### Southeast Interstate Low-Level Radioactive Waste Management Compact.

Sec.	Sec.
104F-1. Compact entered into; form of compact.	104F-3. Violation a misdemeanor.
104F-2. Appointment of members to the Southeast Interstate Low-Level Radioactive Waste Management Commission.	104F-4. Advisory Committee.
	104F-5. Withdrawal from compact.

#### § 104F-1. Compact entered into; form of compact.

The Southeast Interstate Low-Level Radioactive Waste Management Compact is enacted into law and entered into with all other jurisdictions legally joining therein in the form substantially as follows:

#### Southeast Interstate Low-Level Radioactive Waste Management Compact

##### ARTICLE I. Policy and purpose

There is hereby created the Southeast Interstate Low-Level Radioactive Waste Management Compact. The party states recognize and declare that each state is responsible for providing for the availability of capacity either within or outside the state for disposal of low-level radioactive waste generated within its borders, except for waste generated as a result of defense activities of the federal government or federal research and development activities. They also recognize that the management of low-level radioactive waste is handled most efficiently on a regional basis. The party states further recognize that the Congress of the United States, by enacting the Low-Level Radioactive Waste Policy Act (P.L. 96-573), has provided for and encouraged the development of low-level radioactive waste compacts as a tool for disposal of such waste. The party states recognize that the safe and efficient management of low-level radioactive waste generated within the region requires that sufficient capacity to dispose of such waste be properly provided.

It is the policy of the party states to: enter into a regional low-level radioactive waste management compact for the purpose of providing the instrument and framework for a cooperative effort, provide sufficient facilities for the proper management of low-level radioactive waste generated in the region, promote the health and safety of the region, limit the number of facilities required to effectively and efficiently manage low-level radioactive waste generated in the region, encourage the reduction of the amounts of low-level waste generated in the region, distribute the costs, benefits and obligations of successful low-level radioactive waste management equitably among the party states, and ensure the ecological management of low-level radioactive wastes.

Implicit in the congressional consent to this compact is the expectation by the Congress and the party states that the appropriate federal agencies will actively assist the Compact Commission and the individual party states to this compact by:

1. Expedient enforcement of federal rules, regulations and laws; and
2. Imposition of sanctions against those found to be in violation of federal rules, regulations and laws; and

3. Timely inspection of their licensees to determine their capability to adhere to such rules, regulations and laws; and
4. Timely provision of technical assistance to this compact in carrying out their obligations under the Low-Level Radioactive Waste Policy Act, as amended.

#### ARTICLE II. Definitions

As used in this compact, unless the context clearly requires a different construction:

(a) "Commission" or "Compact Commission" means the Southeast Interstate Low-Level Radioactive Waste Management Commission.

(b) "Facility" means a parcel of land, together with the structures, equipment and improvements thereon or appurtenant thereto, which is used or is being developed for the treatment, storage or disposal of low-level radioactive waste.

(c) "Generator" means any person who produces or possesses low-level radioactive waste in the course of or as an incident to manufacturing, power generation, processing, medical diagnosis and treatment, research, or other industrial or commercial activity. This does not include persons who provide a service to generators by arranging for the collection, transportation, storage or disposal of wastes with respect to such waste generated outside the region.

(d) "High-level waste" means irradiated reactor fuel, liquid wastes from reprocessing irradiated reactor fuel and solids into which such liquid wastes have been converted, and other high-level radioactive waste as defined by the U.S. Nuclear Regulatory Commission.

(e) "Host state" means any state in which a regional facility is situated or is being developed.

(f) "Low-level radioactive waste" or "waste" means radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel or by-product material as defined in section 11e.(2) of the Atomic Energy Act of 1954, or as may be further defined by federal law or regulation.

(g) "Party state" means any state which is a signatory party to this compact.

(h) "Person" means any individual, corporation, business enterprise or other legal entity (either public or private).

(i) "Region" means the collective party states.

(j) "Regional facility" means (1) a facility as defined in this Article which has been designated, authorized, accepted or approved by the Commission to receive waste or (2) the disposal facility in Barnwell County, South Carolina, owned by the State of South Carolina and as licensed for the burial of low-level radioactive waste on July 1, 1982, but in no event shall this disposal facility serve as a regional facility beyond December 31, 1992.

(k) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands or any other territorial possession of the United States.

(l) "Transuranic wastes" means waste material containing transuranic elements with contamination levels as determined by the regulations of (1) the U.S. Nuclear Regulatory Commission or (2) any host state, if it is an agreement state under section 274 of The Atomic Energy Act of 1954.

(m) "Waste management" means the storage, treatment or disposal of waste.

#### ARTICLE III. Rights and obligations

The rights granted to the party states by this compact are additional to the rights enjoyed by sovereign states, and nothing in this compact shall be construed to infringe upon, limit or abridge those rights.

(a) Subject to any license issued by the U.S. Nuclear Regulatory Commission or a host state each party state shall have the right to have all wastes generated within the borders stored, treated, or disposed of, as applicable at regional facilities, and additionally shall have the right of access to facilities

made available to the region through agreements entered into by the Commission pursuant to Article IV (e)(9). The right of access by a generator within a party state to any regional facility is limited by its adherence to applicable state and federal law and regulation.

(b) If no operating regional facility is located within the borders of a party state and the waste generated within its borders must therefore be stored, treated, or disposed of at a regional facility in another party state, the party state without such facilities may be required by the host state or states to establish a mechanism which provides compensation for access to the regional facility according to terms and conditions established by the host states and approved by a two-thirds vote of the Commission.

(c) Each party state shall establish the capability to regulate, license and ensure the maintenance and extended care of any facility within its borders. Host states are responsible for the availability, the subsequent post closure observation and maintenance, and the extended institutional control of their regional facilities, in accordance with the provisions of Article V, section (b).

(d) Each party state shall establish the capability to enforce any applicable federal or state laws and regulations pertaining to the packaging and transportation of waste generated within or passing through its borders.

(e) Each party state shall provide to the Commission on an annual basis, any data and information necessary to the implementation of the Commission's responsibilities. Each party state shall establish the capability to obtain any data and information necessary to meet its obligation herein defined.

(f) Each party state shall, to the extent authorized by federal law, require generators within its borders to use the best available waste management technologies and practices to minimize the volumes of wastes requiring disposal.

#### ARTICLE IV. The Commission

(a) There is hereby created the Southeast Interstate Low-Level Radioactive Waste Management Commission, ("the Commission" or "Compact Commission"). The Commission shall consist of two voting members from each party state to be appointed according to the laws of each state. The appointing authorities of each state must notify the Commission in writing of the identity of its members and any alternates. An alternate may act on behalf of the member only in the member's absence.

(b) Each Commission member shall be entitled to one vote. No action of the Commission shall be binding unless a majority of the total membership cast their vote in the affirmative, or unless a greater than majority vote is specifically required by any other provision of this compact.

(c) The Commission shall elect from among its members a presiding officer. The Commission shall adopt and publish, in convenient form, by-laws which are consistent with this compact.

(d) The Commission shall meet at least once a year and shall also meet upon the call of the presiding officer, by petition of a majority of the party states, or upon the call of a host state. All meetings of the Commission shall be open to the public.

(e) The Commission has the following duties and powers:

- (1) To receive and approve the application of a nonparty state to become an eligible state in accordance with Article VII (b); and
- (2) To receive and approve the application of an eligible state to become a party state in accordance with Article VII (c); and
- (3) To submit an annual report and other communications to the governors and to the presiding officer of each body of the legislature of the party states regarding the activities of the Commission; and
- (4) To develop and use procedures for determining, consistent with considerations for public health and safety, the type and number of regional facilities which are presently necessary and which are

projected to be necessary to manage waste generated within the region; and

- (5) To provide the party states with reference guidelines for establishing the criteria and procedures for evaluating alternative locations for emergency or permanent regional facilities; and
- (6) To develop and adopt within one year after the Commission is constituted as provided for in Article VII, section (d), procedures and criteria for identifying a party state as a host state for a regional facility as determined pursuant to the requirements of this Article. In accordance with these procedures and criteria, the Commission shall identify a host state for the development of a second regional disposal facility within three years after the Commission is constituted as provided for in Article VII, section (d) and shall seek to ensure that such facility is licensed and ready to operate as soon as required but in no event later than 1991.

In developing criteria, the Commission must consider the following: the health, safety, and welfare of the citizens of the party states; the existence of regional facilities within each party state; the minimization of waste transportation; the volumes and types of wastes generated within each party state; and the environmental, economic and ecological impacts on the air, land, and water resources of the party states.

The Commission shall conduct such hearings; require such reports, studies, evidence and testimony; and do what is required by its approved procedures in order to identify a party state as a host state for a needed facility; and

- (7) In accordance with the procedures and criteria developed pursuant to section (e)(6) of this Article, to designate, by a two-thirds vote, a host state for the establishment of a needed regional facility. The Commission shall not exercise this authority unless the party states have failed to voluntarily pursue the development of such facility. The Commission shall have the authority to revoke the membership of a party state that willfully creates barriers to the siting of a needed regional facility; and
- (8) To require of and obtain from party states, eligible states seeking to become party states, and non-party states seeking to become eligible states, data and information necessary to the implementation of Commission responsibilities; and
- (9) Notwithstanding any other provision of this compact, to enter into agreements with any person, state, or similar regional body or group of states for the importation of waste into the region and for the right of access to facilities outside the region for waste generated within the region. Such authorization to import requires a two-thirds majority vote of the Commission, including an affirmative vote of both representatives of the host state in which any affected regional facility is located. This shall be done only after an assessment of the affected facilities' capability to handle such wastes; and
- (10) To act or appear on behalf of any party state or states, only upon written request of both members of the Commission for such state or states, as an intervenor or party in interest before Congress, state legislatures, any court of law, or federal, state or local agency, board or commission which has jurisdiction over the management of wastes. The authority to act, intervene or otherwise appear shall be exercised by the Commission only after approval by a majority vote of the Commission; and
- (11) To revoke the membership of a party state in accordance with Article VII (f).

(f) The Commission may establish such advisory committees as it deems necessary for the purpose of advising the Commission on any and all matters pertaining to the management of low-level radioactive waste.

(g) The Commission may appoint or contract for and compensate such limited staff necessary to carry out its duties and functions. The staff shall serve at the Commission's pleasure irrespective of the civil service, personnel or other merit laws of any of the party states or the federal government and shall be compensated from funds of the Commission. In selecting any staff, the Commission shall assure that the staff has adequate experience and formal training to carry out such functions as may be assigned to it by the Commission. If the Commission has a headquarters it shall be in a party state.

(h) Funding for the Commission shall be provided as follows:

(1) Each eligible state, upon becoming a party state, shall pay twenty-five thousand dollars (\$25,000) to the Commission which shall be used for costs of the Commission's services.

(2) Each state hosting a regional disposal facility shall annually levy special fees or surcharges on all users of such facility, based upon the volume of wastes disposed of at such facilities, the total of which:

- a. Shall be sufficient to cover the annual budget of the Commission; and
- b. Shall represent the financial commitments of all party states to the Commission; and
- c. Shall be paid to the Commission, provided, however, that each host state collecting such fees or surcharges may retain a portion of the collection sufficient to cover its administrative costs of collection, and that the remainder be sufficient only to cover the approved annual budgets of the Commission.

(3) The Commission shall set and approve its first annual budget as soon as practicable after its initial meeting. Host states for disposal facilities shall begin imposition of the special fees and surcharges provided for in this section as soon as practicable after becoming party states, and shall remit to the Commission funds resulting from collection of such special fees and surcharges within 60 days of their receipt.

(i) The Commission shall keep accurate accounts of all receipts and disbursements. An independent certified public accountant shall annually audit all receipts and disbursements of Commission funds, and submit an audit report to the Commission. Such audit report shall be made a part of the annual report of the Commission required by Article IV (e)(3).

(j) The Commission may accept for any of its purposes and functions any and all donations, grants of money, equipment, supplies, materials and services (conditional or otherwise) from any state or the United States or any subdivision or agency thereof, or interstate agency, or from any institution, person, firm or corporation, and may receive, utilize and dispose of the same. The nature, amount and condition, if any, attendant upon any donation or grant accepted pursuant to this paragraph together with the identity of the donor, grantor or lender, shall be detailed in the annual report of the Commission.

(k) The Commission shall not be responsible for any costs associated with (1) the creation of any facility, (2) the operation of any facility, (3) the stabilization and closure of any facility, (4) the post-closure observation, and maintenance of any facility, or (5) the extended institutional control, after post-closure observation and maintenance of any facility.

(l) As of January 1, 1986, the management of wastes at regional facilities is restricted to wastes generated within the region, and to wastes generated within non-party states when authorized by the Commission pursuant to the provisions of this compact. After January 1, 1986, the Commission may prohibit the exportation of waste from the region for the purposes of management.

- (m) (1) The Commission herein established is a legal entity separate and distinct from the party states, capable of acting in its own behalf, and shall be so liable for its actions. Liabilities of the Commission shall not be deemed liabilities of the party states. Members of the Commission shall not be personally liable for action taken by them in their official capacity.
- (2) Except as specifically provided in this compact, nothing in this compact shall be construed to alter the incidence of liability of any kind for any act, omission, course of conduct, or on account of any causal or other relationships. Generators, transporters of wastes, owners and operators of sites shall be liable for their acts, omissions, conduct, or relationships in accordance with all laws relating thereto.

#### ARTICLE V. Development and operation of facilities

(a) Any party state which becomes a host state in which a regional facility is operated, shall not be designated by the Compact Commission as a host state for an additional regional facility until each party state has fulfilled its obligation, as determined by the Commission, to have a regional facility operated within its borders.

(b) A host state desiring to close a regional facility located within its borders may do so only after notifying the Commission in writing of its intention to do so and the reasons therefor. Such notification shall be given to the Commission at least four years prior to the intended date of closure. Notwithstanding the four year notice requirement herein provided, a host state is not prevented from closing its facility or establishing conditions of use and operations as necessary for the protection of the health and safety of its citizens. A host state may terminate or limit access to its regional facility if it determines Congress has materially altered the conditions of this compact.

(c) Each party state designated as a host state for a regional facility shall take appropriate steps to ensure that an application for a license to construct and operate a facility of the designated type is filed with and issued by the appropriate authority.

(d) No party state shall have any form of arbitrary prohibition on the treatment, storage or disposal of low-level radioactive waste within its borders.

#### ARTICLE VI. Other laws and regulations

(a) Nothing in this compact shall be construed to:

- (1) Abrogate or limit the applicability of any act of Congress or diminish or otherwise impair the jurisdiction of any federal agency expressly conferred thereon by the Congress;
- (2) Abrogate or limit the regulatory responsibility and authority of the U.S. Nuclear Regulatory Commission or of an agreement state under section 274 of the Atomic Energy Act of 1954 in which a regional facility is located;
- (3) Make inapplicable to any person or circumstance any other law of a party state which is not inconsistent with this compact;
- (4) Make unlawful the continued development and operation of any facility already licensed for development or operation on the date this compact becomes effective, except that any such facility shall comply with Article III, Article IV and Article V and shall be subject to any action lawfully taken pursuant thereto;
- (5) Prohibit any storage or treatment of waste by the generator on its own premises;
- (6) Affect any judicial or administrative proceeding pending on the effective date of this compact;
- (7) Alter the relations between, and the respective internal responsibilities of, the government of a party state and its subdivisions;

- (8) Affect the generation, treatment, storage or disposal of waste generated by the atomic energy defense activities of the Secretary of the U.S. Department of Energy or federal research and development activities as defined in P.L. 96-573;
- (9) Affect the rights and powers of any party state and its political subdivisions to regulate and license any facility within its borders or to affect the rights and powers of any party state and its political subdivisions to tax or impose fees on the waste managed at any facility within its borders.

(b) No party state shall pass any law or adopt any regulation which is inconsistent with this compact. To do so may jeopardize the membership status of the party state.

(c) Upon formation of the compact no law or regulation of a party state or of any sub-division or instrumentality thereof may be applied so as to restrict or make more inconvenient access to any regional facility by the generators of another party state than for the generators of the state where the facility is situated.

(d) Restrictions of waste management of regional facilities pursuant to Article IV(1) shall be enforceable as a matter of state law.

ARTICLE VII. Eligible parties, withdrawal, revocation, entry into force, termination

(a) This compact shall have as initially eligible parties the States of Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee and Virginia.

(b) Any state not expressly declared eligible to become a party state to this compact in section (a) of this Article may petition the Commission, once constituted, to be declared eligible. The Commission may establish such conditions as it deems necessary and appropriate to be met by a state wishing to become eligible to become a party state to this compact pursuant to the provisions of this section. Upon satisfactorily meeting such conditions and upon the affirmative vote of two-thirds of the Commission, including the affirmative vote of both representatives of a host state in which any affected regional facility is located, the petitioning state shall be eligible to become a party state to this compact and may become a party state in the same manner as those states declared eligible in section (a) of this Article.

(c) Each state eligible to become a party state to this compact is declared a party state upon enactment of this compact into law by that state and upon payment of the fees required by Article IV (h)(1). The Commission shall be the judge of the qualifications of the party states and of its members and of their compliance with the conditions and requirements of this compact and the laws of the party states relating to the enactment of this compact.

(d) (1) The first three states eligible to become party states to this compact which enact this compact into law and appropriate the fees required by Article IV (h)(1) shall immediately, upon the appointment of their Commission members, constitute themselves as the Southeast Low-Level Radioactive Waste Management Commission, shall cause legislation to be introduced in the Congress which grants the consent of the Congress to this compact, and shall do those things necessary to organize the Commission and implement the provisions of this compact.

(2) All succeeding states eligible to become party states to this compact shall be declared party states pursuant to the provisions of section (c) of this Article.

(3) The consent of the Congress shall be required for full implementation of this compact. The provisions of Article V, section (d) shall not become effective until the effective date of the import ban authorized by Article IV, section (1) as approved by Congress. The Congress may by law withdraw its consent only every five years.

(e) No state which holds membership in any other regional compact for the management of low-level radioactive waste may be considered by the Compact Commission for eligible state status or party state status.

(f) Any party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission, including suspension of its rights under this compact and revocation of its status as a party state. Any sanction shall be imposed only on the affirmative vote of at least two-thirds of the Commission members. Revocation of party state status may take effect on the date of the meeting at which the Commission approves the resolution imposing such sanction, but in no event shall revocation take effect later than 90 days from the date of such meeting. Rights and obligations incurred by being declared a party state to this compact shall continue until the effective date of the sanction imposed or as provided in the resolution of the Commission imposing the sanction.

The Commission shall, as soon as practicable after the meeting at which a resolution revoking status as a party state is approved, provide written notice of the action along with a copy of the resolution to the governors, the Presidents of the Senates, and the Speakers of the Houses of Representatives of the party states, as well as chairmen of the appropriate committees of the Congress.

(g) Any party state may withdraw from this compact by enacting a law repealing the compact, provided that if a regional facility is located within such state, such regional facility shall remain available to the region for four years after the date the Commission receives notification in writing from the governor of such party state of the rescission of the compact. The Commission, upon receipt of the notification, shall as soon as practicable provide copies of such notification to the governors, the Presidents of the Senates, and the Speakers of the Houses of Representatives of the party states as well as the chairmen of the appropriate committees of the Congress.

(h) This compact may be terminated only by the affirmative action of the Congress or by the rescission of all laws enacting the compact in each party state.

#### ARTICLE VIII. Penalties

(a) Each party state, consistently with its own law, shall prescribe and enforce penalties against any person not an official of another state for violation of any provision of this compact.

(b) Each party state acknowledges that the receipt by a host state of waste packaged or transported in violation of applicable laws and regulations can result in imposition of sanctions by the host state which may include suspension or revocation of the violator's right of access to the facility in the host state.

#### ARTICLE IX. Severability and construction

The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared by a court of competent jurisdiction to be contrary to the Constitution of any participating state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any other government, agency, person or circumstance shall not be affected thereby. If any provision of this compact shall be held contrary to the Constitution of any state participating therein, the compact shall remain in full force and effect as to the state affected as to all severable matters. The provisions of this compact shall be liberally construed to give effect to the purposes thereof. (1983, c. 714, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 714, s. 5, makes this Chapter effective upon passage of the 1983-1985 current operations appropriations bill. The bill making appropriations for

current operations, Chapter 761, was ratified on July 15, 1983.

Section 4 of the act provides: "The expenses of the Advisory Committee and the twenty-five

thousand dollars (\$25,000) to be paid by North Carolina pursuant to G.S. 104F-1, Article III(h)(1) shall be paid from the Contingency and Emergency Fund."

## **§ 104F-2. Appointment of members to the Southeast Interstate Low-Level Radioactive Waste Management Commission.**

The Governor shall appoint two members to the Southeast Interstate Low-Level Radioactive Waste Management Commission as established by Article IV of the compact. Members shall serve at the pleasure of the Governor. The Governor may appoint an alternate for each member who may serve at and for such time as each regular member shall designate and who shall have the same power and authority as the regular member when so serving. Each member and alternate shall possess technical or professional qualifications based on training and experience in the management or regulation of low-level radioactive waste sufficient to assure informed judgments when acting as a member of the Commission. (1983, c. 714, s. 2.)

## **§ 104F-3. Violation a misdemeanor.**

Violation of the provisions of this compact by any person not an official of another state is a misdemeanor. (1983, c. 714, s. 2.)

## **§ 104F-4. Advisory Committee.**

The Advisory Committee to the North Carolina Members of the Low-Level Radioactive Waste Management Compact Commission is hereby created. It shall consist of seven voting members, two to be appointed by the Governor, who shall be members of the Radiation Protection Commission, two by the President of the Senate, and two by the Speaker of the House of Representatives. The Chief of the Radiation Protection Section of the Division of Facility Services of the Department of Human Resources shall be an ex officio member. The members shall serve for two-year terms. A vacancy in membership shall be filled by the appointing authority who made the initial appointment. A member whose term expires may be reappointed.

It shall be the duty of the Committee to consult with and advise the State's representatives to the Compact Commission concerning technical and policy matters.

The Governor shall appoint the Committee chairman and he may be reappointed. The Committee shall meet at such times and places as the chairman shall designate. The facilities of the State Legislative Building and the Legislative Office Building shall be available to the Committee, subject to approval of the Legislative Services Commission. Legislative members of the Committee shall be reimbursed for subsistence and travel expenses at the rates set out in G.S. 120-3.1. Members of the Committee who are not officers or employees of the State shall receive compensation and reimbursement for travel and subsistence expenses at the rates specified in G.S. 138-5. Members of the Committee who are officers or employees of the State shall receive reimbursement for travel and subsistence expenses at the rate set out in G.S. 138-6.

Subject to the approval of the Legislative Services Commission, the staff resources of the Legislative Services Commission shall be available to the Committee without cost except for travel, subsistence, supplies, and materials. The Committee may solicit, employ, or contract for technical assistance and clerical assistance and may purchase or contract for the materials and services it needs. (1983, c. 714, s. 3.)

**§ 104F-5. Withdrawal from compact.**

If any member refuses to accept its designation as a host state, then North Carolina shall immediately withdraw from the Compact subject to the provisions of G.S. 104F-1, Article VII(g) and take appropriate action to limit access to any facility located in this State.

If North Carolina determines at any time that any member state is not acting in good faith in complying with all of the terms of the Compact, then North Carolina shall withdraw immediately. (1983, c. 714, s. 3.)

## Chapter 105.

### Taxation.

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- 105-66. (Effective July 1, 1984) Bagatelle tables, merry-go-rounds, etc.
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- 105-449.28. [Repealed.]
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## SUBCHAPTER I. LEVY OF TAXES.

## § 105-1. Title and purpose of Subchapter.

**Legal Periodicals.** — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1116 (1981).

## CASE NOTES

**Abortion Funding as Necessary Use and Purpose.** — The funding of elective abortions constitutes a "necessary use and purpose of government" within the meaning of this section, and the appropriation and expenditure of State tax moneys for elective abortions does not

violate N.C. Const., Art. V, § 5. *Stam v. State*, 47 N.C. App. 209, 267 S.E.2d 335 (1980), *aff'd*, 302 N.C. 357, 275 S.E.2d 439 (1981).

*Cited in* *In re Estate of Kapoor*, 303 N.C. 102, 277 S.E.2d 403 (1981).

## ARTICLE 1.

*Schedule A. Inheritance Tax.*

## § 105-2. General provisions.

**Legal Periodicals.** — For article analyzing North Carolina's tenancy by the entirety reform legislation of 1982, see 5 Campbell L. Rev. 1 (1982).

For note comparing federal and North Carolina estate, inheritance, and gift taxation with respect to creation and termination of

tenancies by the entirety, see 15 Wake Forest L. Rev. 307 (1979).

For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

For survey of 1981 tax law, see 60 N.C.L. Rev. 1460 (1982).

## CASE NOTES

**The purpose of the inheritance tax laws** is to raise revenues for the operation of the State government by imposing a tax on the transfer of property when the transfer occurs by reason of death. *In re Estate of Kapoor*, 303 N.C. 102, 277 S.E.2d 403 (1981).

**No Assessment on Basis of Settlement or Compromise Agreements.** — Subdivision (1) makes no provision for assessment of inheritance taxes on the basis of settlement or compromise agreements. *Greene v. Lynch*, 51 N.C. App. 665, 277 S.E.2d 454 (1981).

## § 105-2.1. Internal Revenue Code definition.

As used in this Article, the term "Code" means the Internal Revenue Code as enacted as of April 1, 1983, and includes any provisions enacted as of that date which become effective after that date. (1983, c. 713, s. 62.)

**Editor's Note.** — Session Laws 1983, c. 713, s. 109, makes this section effective for taxable years beginning on or after Jan. 1, 1983.

**§ 105-3. Property exempt.**

The following property shall be exempt from taxation under this Article:

- (1) Property passing to or for the use of any one or more of the following: the United States, any state, territory or any political subdivision thereof, or the District of Columbia, for exclusively public purposes.
- (2) Property passing to religious, charitable, or educational corporations, or to churches, hospitals, orphan asylums, public libraries, religious, benevolent, or charitable organizations, or passing to any trustee or trustees for religious, benevolent, or charitable purposes, where such religious, charitable, or educational institutions, corporations, churches, trusts, etc., are located within the State and not conducted for profit.
- (3) Property passing to religious, educational, or charitable corporations, foundations or trusts, not conducted for profit, incorporated or created or administered under the laws of any other state: If such other state levies no inheritance or estate taxes on property similarly passing from residents of such state to religious, educational or charitable corporations, foundations or trusts incorporated or created or administered under the laws of this State; or if such corporation, foundation or trust is one receiving and disbursing funds donated in this State for religious, educational or charitable purposes.
- (4) The proceeds of all life insurance policies payable to beneficiaries named in subdivisions (1), (2) and (3) of this section. And also proceeds of all policies of insurance and the proceeds of all adjusted service certificates that have been or may be paid by the United States government, or that have been or may be paid on account of policies required to be carried by the United States government or any agency thereof, to the estate, beneficiary, or beneficiaries of any person who has served in the armed forces of the United States or in the merchant marine during the first or second World War or any subsequent military engagement; and proceeds, not exceeding the sum of twenty thousand dollars (\$20,000), of all policies of insurance paid to the estate, beneficiary or beneficiaries of any person whose death was caused by enemy action during the second World War or any subsequent military engagement involving the United States. This provision will be operative only when satisfactory proof that the death was caused by enemy action is filed by the executor, administrator, or beneficiary with the Secretary of Revenue.
- (5) The value of an annuity or other payment receivable by any beneficiary (other than the executor) under (a) an employees' trust (or under a contract or insurance policy purchased by an employees' trust) forming part of a pension, stock bonus, or profit-sharing plan, which at the time of the decedent's separation from employment (whether by death or otherwise), or at the time of termination of the plan if earlier, met the requirements of 26 U.S.C. § 401(a); or (b) a retirement annuity contract purchased by an employer (and not by an employees' trust) pursuant to a plan, which at the time of decedent's separation from employment (by death or otherwise), or at the time of termination of the plan if earlier, met the requirements of 26 U.S.C. § 403(a) or § 403(b). If such amounts payable after the death of the decedent under a plan described in clause (a) or (b) are attributable to any extent to payments or contributions made by the decedent, no exemption shall be allowed for that part of the value of such amounts in the proportion that the total payments or contributions made by the decedent bears to the total payments or contributions made. For purposes of the preceding sentence contributions or payments made by the

decedent's employer or former employer under a trust or plan described in clause (a) or (b) shall not be considered to be contributed by the decedent nor shall any deductible employee contributions within the meaning of 26 U.S.C. § 72(o)(5) be considered to have been contributed by the decedent. For purposes of this subdivision, contributions or payments on behalf of the decedent while he was an employee within the meaning of 26 U.S.C. § 401(c)(1) made under a trust or plan described in clause (a) or (b) shall, to the extent allowable as a deduction under 26 U.S.C. § 404, be considered to be made by a person other than the decedent and, to the extent not so allowable, shall be considered to be made by the decedent. Provided, that the value of such annuities or other payments receivable described in this subdivision shall not be exempt unless the payments received therefrom are or will be subject to income taxation under Article 4 of this Subchapter, and if such payments are not or will not be subject to income taxation under Article 4 of this Subchapter the value of such annuities or other payments receivable shall be included in the gross value of the estate of the decedent and taxable under the provisions of this Article.

- (6) The value of an annuity receivable by any beneficiary (other than the executor) under:
- a. An individual retirement account described in section 408(a) of the Code,
  - b. An individual retirement annuity described in section 408(b) of the Code, or
  - c. A retirement bond described in section 409(a) of the Code.

If any payment to an account described in paragraph a or for an annuity described in paragraph b or a bond described in paragraph c was not allowable as a deduction under 26 U.S.C. § 219 or § 220 and was not a rollover contribution described in 26 U.S.C. §§ 402(a)(5), 403(a)(4), 408(d)(3), or 409(b)(3)(C), the preceding sentence shall not apply to that portion of the value of the amount receivable under such account, annuity, or bond (as the case may be) which bears the same ratio to the total value of the amount so receivable as the total amount which was paid to or for such account, annuity, or bond and which was not allowable as a deduction under 26 U.S.C. § 219 or § 220 and was not such a rollover contribution bears to the total amount paid to or for such account, annuity, or bond. For purposes of this subdivision, the term "annuity" means an annuity contract or other arrangement providing for a series of substantially equal periodic payments to be made to a beneficiary (other than the executor) for his life or over a period extending for at least 36 months after the date of the decedent's death.

- (7) The total value of proceeds of an annuity or other payment receivable by any beneficiary (other than the executor) under a military family protection, or survivor benefit, plan, or other comparable plan, pursuant to Chapter 73 of Title 10 of the United States Code.
- (8) The value of an annuity receivable by any beneficiary, other than the estate, under a federal employee retirement program to which the employee made contributions during his working years. (1939, c. 158, s. 2; 1943, c. 400, s. 1; 1947, c. 501, s. 1; 1951, c. 643, s. 1; 1959, c. 1247; 1973, c. 476, s. 193; 1975, c. 534, s. 1; c. 535; 1977, c. 900, ss. 2, 3; c. 1025; 1979, c. 801, ss. 17-19; 1981 (Reg. Sess., 1982), cc. 1218, 1220; 1983, c. 706, s. 2; c. 713, ss. 63, 64, 82; c. 768, s. 5.2.)

**Editor's Note. —**

Sessions Laws 1983, c. 706, s. 3, provides that the act applies to contributions made and to the estates of decedents dying on or after Jan. 1, 1983.

**Effect of Amendments. —** The first 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, and applicable to estates of decedents dying on or after that date, added subdivision (8).

The second 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, and applicable to estates of decedents dying on and after that date, deleted "(other than a lump sum distribution described in section 402(e)(4) of the United States Internal Revenue Code, determined without regard to the next to the last sentence of section 402(e)(4)(A) of such Code)" following "or other payment" near the beginning of the first sentence of subdivision (5).

The first 1983 amendment, effective Jan. 1, 1983, added the language beginning "nor shall any deductible employee contributions" at the end of the third sentence of subdivision (5).

The second 1983 amendment, effective for taxable years beginning on or after Jan. 1, 1983, substituted "26 U.S.C. § 401(a)" for "section 401(a) of the United States Internal Revenue Code" and "26 U.S.C. § 403(a) or § 403(b)" for "section 403(a) or 403(b) of such Code" in the first sentence of subdivision (5); substituted "26 U.S.C. § 401(c)(1)" for "section 401(c)(1) of the United States Internal Revenue Code" and "26 U.S.C. § 404" for "section 404 of such Code" in the fourth sentence of subdivision (5); in the second paragraph of subdivision (6), substituted "26 U.S.C. § 219 or § 220" for "section 219 or 220 of the Internal Revenue Code of 1954 as amended" preceding "and was not a rollover," substituted "26 U.S.C. §§ 402(a)(5), 403(a)(4), 408(d)(3), or 409(b)(3)(C)" for "section 402(a)(5), 403(a)(4), 408(d)(3), or 409(b)(3)(C) of such Code," and substituted "26 U.S.C. § 219 or § 220" for "section 219 or 220 of such Code" preceding "and was not such a rollover contribution bears"; substituted "Code" for references to the Internal Revenue Code throughout subdivision (6).

The third 1983 amendment, effective July 15, 1983, substituted "26 U.S.C. § 72(o)(5)" for "subsection 72(o)(5) of the United States Internal Revenue Code" in the third sentence of subdivision (5).

**Legal Periodicals. —** For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

## § 105-4. Rate of tax — Class A.

- (b) (1) The surviving spouse of a decedent shall be allowed a credit of three thousand one hundred fifty dollars (\$3,150) against the taxes imposed under this Article. Notwithstanding any other provisions of this Article, the credit allowed by this subdivision shall not exceed the amount of the tax imposed by this Article.
- (2) If there is no surviving spouse or to the extent that a surviving spouse has not used all of the credit allowed under subdivision (1) of this subsection, the remainder of the credit shall be allowed on a pro rata basis according to tax liability to each child under 18 years of age and each child 18 years of age or older, who is mentally incapacitated, or by reason of physical disability is unable to support himself, is unmarried and residing with the decedent in his home at the time of the decedent's death, or who is then institutionalized on account of such mental incapacity or physical disability. Notwithstanding any other provisions of this Article, the credit allowed by this subdivision shall not exceed the amount of the tax imposed by this Article.
- (3) To the extent that minor children and physically and mentally disabled children have not used all of the credit allowed under subdivision (2) of this subsection, the remainder of the credit shall be allowed on a pro rata basis according to tax liability to each of the other Class A beneficiaries. Notwithstanding any other provisions of this Article, the credit allowed by this subdivision shall not exceed the amount of the tax imposed by this Article. (1939, c. 158, s. 3; 1957, c. 1340, s. 1; 1965, c. 583; 1967, c. 1222; 1971, c. 651; 1973, c. 49, s. 1; c. 1142, s. 1; c. 1287, s. 2; 1977, c. 1004; 1979, c. 75; c. 801, ss. 20, 21; 1979, 2nd Sess., c. 1183, s. 1.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendments, it is not set out.

**Effect of Amendments.** — The 1979, 2nd Sess., amendment, effective as to estates of decedents dying on or after July 1, 1980, deleted, at the end of subdivision (3) of subsection (b), "except lineal ancestors of the decedent."

**Legal Periodicals.** — For note comparing federal and North Carolina estate, inheritance, and gift taxation with respect to creation and termination of tenancies by the entirety, see 15 Wake Forest L. Rev. 307 (1979).

For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

#### CASE NOTES

Cited in *In re Estate of Kapoor*, 303 N.C. 102, 277 S.E.2d 403 (1981).

### § 105-5. Rate of tax — Class B.

#### CASE NOTES

Cited in *In re Estate of Kapoor*, 303 N.C. 102, 277 S.E.2d 403 (1981).

### § 105-6. Rate of tax — Class C.

#### CASE NOTES

Cited in *In re Estate of Kapoor*, 303 N.C. 102, 277 S.E.2d 403 (1981).

### § 105-7. Estate tax.

(a) A tax in addition to the inheritance tax imposed by this schedule is hereby imposed upon the transfer of the net estate of every decedent, whether a resident or nonresident of the State, where the inheritance tax imposed by this schedule is less than the maximum state death tax credit allowed by the Federal Estate Tax Act as contained in the Code because of said tax herein imposed. In such case, the inheritance tax provided for by this schedule shall be increased by an estate tax on the net estate so that the aggregate amount of tax due this State shall be the maximum amount of credit allowed under said Federal Estate Tax Act. Said additional tax shall be paid out of the same funds as any other tax against the estate.

(c) The administrative provisions of this schedule, wherever applicable, shall apply to the collection of the tax imposed by this section. The amount of the tax as imposed by subsection (a) of this section shall be computed in full accordance with the Federal Estate Tax Act as contained in the Code. (1939, c. 158, s. 6; 1957, c. 1340, s. 1; 1975, c. 275, s. 1; 1983, c. 713, s. 82.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amendment, effective for taxable years beginning on or after Jan. 1, 1983, substituted "Code" for references to the Internal Revenue Code in subsections (a) and (c).

**Legal Periodicals.** — For note comparing federal and North Carolina estate, inheritance, and gift taxation with respect to creation and termination of tenancies by the entirety, see 15 Wake Forest L. Rev. 307 (1979).

### § 105-7.1. Generation skipping transfer tax.

(a) A tax in addition to any other taxes imposed by this Article or by Article 6 of this Subchapter is hereby imposed upon every generation skipping transfer subject to the tax imposed by Chapter 13 of Subtitle B of the Code where the original transferor is a resident of this State at the date of said original transfer, in an amount equal to the amount allowable as credit for State inheritance taxes under section 2602 of the Code, to the extent such credit exceeds the aggregate amount of all taxes on the same transfer actually paid to the several states of the United States, other than this State.

(b) A tax, in addition to all other taxes imposed by this Article and by Article 6 of this Subchapter, is hereby imposed upon every generation skipping transfer subject to the tax imposed by Chapter 13 of Subtitle B of the Code where the original transferor is not a resident of this State but the transfer includes real or personal property with a situs in this State, in an amount equal to the amount allowable as a credit for state inheritance taxes under section 2602 of the Code, reduced by an amount which bears the ratio to the total state inheritance tax credit allowable for federal generation skipping transfer tax purposes as the value of the transferred property taxable by all other states bears to the value of the gross generation skipping transfer for federal generation skipping transfer tax purposes.

(c) Every person required by the Code to file a return reporting a generation skipping transfer shall file a duplicate copy of said return with the Secretary of Revenue on or before the last day prescribed for filing the federal return.

(f) The administrative provisions of Article 1 and Article 6, wherever applicable, shall apply to the collection of the tax imposed by this section. To the extent that the same are not in conflict with the provisions of this section, the Secretary of Revenue may adopt such rules and regulations as are or may be promulgated with respect to the estate tax, gift tax, or generation skipping transfer tax provisions of the Code. (1979, c. 179, s. 1; 1983, c. 713, s. 82.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amendment, effective for taxable years beginning on

or after Jan. 1, 1983, substituted "Code" for references to the Internal Revenue Code throughout this section.

**Legal Periodicals.** — For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

### § 105-9. Deductions.

**Legal Periodicals.** — For survey of 1980 tax law, see 59 N.C.L. Rev. 1233 (1981).

#### CASE NOTES

**Interest on Estate Tax Deficiency Not Part of Tax.** — Although collected as part of the tax, interest paid on an estate or inheritance tax deficiency is not part of the tax, but something in addition to the tax. *Holt v. Lynch*, 307 N.C. 234, 297 S.E.2d 594 (1982).

**Deduction of Interest on Estate Tax Deficiencies and Money Borrowed to Pay Tax.** — Interest paid with respect to federal estate tax deficiencies and deferred installment of federal estate tax, state inheritance tax deficiencies, and moneys borrowed to pay estate and inheritance tax deficiencies is deductible as

costs of administration under subdivision (8) of this section. *Holt v. Lynch*, 307 N.C. 234, 297 S.E.2d 594 (1982).

**Life Insurance Proceeds Held Deductible Decedent's Debt.** — Where a separation agreement required the decedent to maintain in full force and effect a life insurance trust in the amount of at least \$150,000 for the benefit of decedent's former wife and their children and to make timely payment of all premiums due on the policies placed in said trust, and all premiums due on the policies had been paid at the time of decedent's death, the decedent's "debt"

under the agreement was not the amount of money required to maintain the policies but was the \$150,000 in life insurance proceeds required to fund the trust. Furthermore, the obligation to fund the trust was supported by consideration and was a valid contractual debt where the separation and trust agreements showed an intention by decedent to extend his obligation to provide alimony and child support

beyond the time of his death in exchange for his former wife's relinquishment of her marital claims and all other claims against decedent. Therefore, the life insurance proceeds were a "debt of decedent" deductible from decedent's estate for inheritance tax purposes pursuant to subdivision (4) of this section. In re Estate of Kapoor, 303 N.C. 102, 277 S.E.2d 403 (1981).

### § 105-9.1. As of what date property valued.

For the purposes of this Article, all property shall be valued at its fair market value as of the date of death of the decedent, except that the personal representative of the estate may elect to value the property as of a date six months after the date of death of the decedent, substituting in the case of property distributed, sold, exchanged or otherwise disposed of during the six-month period, the fair market value of such property as of the date of such distribution, sale, exchange, or other disposition. If the personal representative makes this election, the provisions of the Code pertaining to an optional valuation date apply. (1951, c. 643, s. 1; 1953, c. 1302, s. 1; 1971, c. 1054, s. 1; 1983, c. 713, s. 65.)

**Effect of Amendments.** — The 1983 amendment, effective for taxable years beginning on or after Jan. 1, 1983, rewrote the last sentence, which read "In all cases in which such election is made, the provisions of the federal estate tax law and regulations as now existing or as they may be subsequently amended pertaining to

optional valuation date shall be applicable."

**Legal Periodicals.** — For note comparing federal and North Carolina estate, inheritance, and gift taxation with respect to creation and termination of tenancies by the entirety, see 15 Wake Forest L. Rev. 307 (1979).

### § 105-13. Life insurance proceeds.

**Legal Periodicals.** — For survey of 1978 law on taxation, see 57 N.C.L. Rev. 1142 (1979).

### § 105-15. When all heirs, legatees, etc., are discharged from liability.

**Legal Periodicals.** — For survey of 1978 law on taxation, see 57 N.C.L. Rev. 1142 (1979).

### § 105-22. Duties of clerks of superior court.

It shall be the duty of the clerk of the superior court to obtain from any executor or administrator, at the time of the qualification of such executor or administrator, the address of the personal representative qualifying, the names and addresses of the heirs-at-law, legatees, distributees, devisees, etc., as far as practical, the approximate value and character of the property or estate, both real and personal, the relationship of the heirs-at-law, legatees, devisees, etc., to the decedents, and forward the same to the Secretary of Revenue on or before the tenth day of each month. The clerk shall make no report of a death where (i) the estate of a decedent is less than seventy-five thousand dollars (\$75,000) in gross value, including the value of transfers over which the decedent retained any interest as described in G.S. 105-2(3), as well

as the value of any gifts made within three years prior to the date of death of the decedent, as also required by G.S. 105-2(3), and (ii) all the beneficiaries belong to the class (A) as defined in G.S. 105-4(a). Any clerk of the superior court who shall fail, neglect, or refuse to file such monthly reports as required by this section shall be liable to a penalty in the sum of one hundred dollars (\$100.00) to be recovered by the Secretary of Revenue in an action to be brought by the Secretary of Revenue. (1939, c. 158, s. 20; 1943, c. 400, s. 1; 1953, c. 1302, s. 1; 1973, c. 108, s. 49; c. 476, s. 193; c. 1287, s. 2; 1979, c. 801, s. 23; 1981 (Reg. Sess., 1982), c. 1221, s. 1.)

**Effect of Amendments.** — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, and applicable to estates of decedents dying on or after that date, substituted "seventy-five

thousand dollars (\$75,000)" for "twenty thousand dollars (\$20,000)" in the second sentence.

## § 105-23. Information by administrator and executor.

Every administrator shall prepare a statement showing as far as can be ascertained the names of all the heirs-at-law and their relationship to decedent, and every executor shall prepare a like statement, accompanied by a copy of the will, showing the relationship to the decedent of all legatees, distributees, and devisees named in the will, and the age at the time of the death of the decedent of all legatees, distributees, devisees to whom property is bequeathed or devised for life or for a term of years, and the names of those, if any, who have died before the decedent, together with the post-office address of executor, administrator, or trustee. If any of the heirs-at-law, distributees, and devisees are minor children of the decedent, such statement shall also show the age of each of such minor children. The statement shall also contain a complete inventory of all the real property of the decedent located in and outside the State, and of all personal property, wherever situate, of the estate, of all insurance policies upon the life of the decedent, together with an appraisal under oath or affirmation of the value of each class of property embraced in the inventory, and the value of the whole, together with any deductions permitted by this statute, so far as they may be ascertained at the time of filing such statement; and also the full statement of all gifts or advancements made by deed, grant, or sale to any person or corporation, in trust or otherwise, within three years prior to the death of the decedent. The statement herein provided for shall be filed with the Secretary of Revenue at Raleigh, North Carolina, within nine months after the qualification of the executor or administrator, upon blank forms to be prepared by the Secretary of Revenue. If any administrator or executor fails or refuses to comply with any of the requirements of this section, he shall be liable to a penalty in the sum of five hundred dollars (\$500.00), to be recovered by the Secretary of Revenue in an action to be brought by the Secretary of Revenue to collect such sum in the Superior Court of Wake County against such administrator or executor. The Secretary of Revenue, for good cause shown, may remit all or any portion of the penalty imposed under the provisions of this section. Every executor or administrator may make a tentative settlement of the inheritance tax with the Secretary of Revenue, based on the inventory supported by oath or affirmation provided in this section. If any executor, administrator, collector, committee, trustee or any other fiduciary within or without this State holding or having control of any funds, property, trust or estate, the transfer of which becomes taxable under the provisions of this Article, shall fail to file the statement herein required, within the times herein required, the Secretary of Revenue is authorized and shall be required to secure the information herein required from the best sources available, and therefrom assess the taxes levied hereunder, together with the penalties herein and otherwise provided.

Notwithstanding any other provision of this section, no executor, administrator or other personal representative shall be required to file a return hereunder when (i) an estate shall have a gross value of less than seventy-five thousand dollars (\$75,000), including any property transferred by the decedent over which he had retained any interest as described in G.S. 105-2(3), as well as any property transferred within three years prior to the date of the decedent's death, and (ii) all of the beneficiaries belong to the class (A) as defined in G.S. 105-4(a). (1939, c. 158, s. 21; 1947, c. 501, s. 1; 1951, c. 643, s. 1; 1971, c. 1054, s. 4; 1973, c. 476, s. 193; 1979, c. 801, s. 24; 1981 (Reg. Sess., 1982), c. 1221, s. 2.)

**Effect of Amendments.** — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, and applicable to estates of decedents dying on or after that date, substituted "seventy-five thousand dollars (\$75,000)" for "twenty

thousand dollars (\$20,000)" near the middle of the second paragraph.

**Legal Periodicals.** — For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

## **§ 105-24. Access to safe deposits of decedent; withdrawal of bank deposit, etc., payable to either husband or wife or survivor.**

No safe deposit company, trust company, corporation, bank, or other institution, person or persons having in possession or control or custody, in whole or in part, securities, deposits, assets, or property belonging to or standing in the name of a decedent, or belonging to or standing in the joint names of a decedent and one or more persons, shall deliver or transfer the same to any person whatsoever, whether in a representative capacity or not, or to the survivor or to the survivors when held in the joint names of a decedent and one or more persons, without retaining a sufficient portion or amount thereof to pay taxes or interest which would thereafter be assessed thereon under this Article; but the Secretary of Revenue may consent in writing to such delivery or transfer, and such consent shall relieve said safe deposit company, trust company, corporation, bank or other institution, person or persons from the obligation herein imposed. Provided: The clerk of superior court of the resident county of a decedent may authorize in writing any bank, safe deposit company, trust company, or any other institution to transfer to the properly qualified representative of the estate any funds on deposit in the name of the decedent or the decedent and one or more persons when the total amount of such deposit or deposits is three hundred dollars (\$300.00) or less, and when such deposit or deposits compose the total cash assets of the estate. Such authorization shall have the same force and effect as when issued in writing by the Secretary of Revenue. Every safe deposit company, trust company, corporation, bank or other institution, person, or persons engaged in the business of renting lock boxes for the safekeeping of valuable papers and personal effects, or having in their possession or supervision in such lock boxes such valuable papers or personal effects shall, upon the death of any person using or having access to such lock box, as a condition precedent to the opening of such lock box by the executor, administrator, personal representative, lessee or cotenant of such deceased person, require the presence of the clerk of the superior court of the county in which such lock box is located. It shall be the duty of the clerk of the superior court, or his representative, in the presence of an officer or representative of the safe deposit company, trust company, corporation, bank, or other institution, person or persons, to make an inventory of the contents of any such lock box and to furnish a copy of such inventory to the Secretary of Revenue, to the executor, administrator, personal representative, or cotenant of the decedent, and a copy to the safe deposit company, trust company, corpora-

tion, bank, or other institution, person, or persons having possession of such lock box; provided, that for lock boxes to which decedent merely had access the inventory shall include only assets in which the decedent has or had an interest. Notwithstanding any of the provisions of this section any life insurance company may pay the proceeds of any policy upon the life of a decedent to the person entitled thereto as soon as it shall have mailed to the Secretary of Revenue a notice, in such form as the Secretary of Revenue may prescribe, setting forth the fact of such payment; but if such notice be not mailed, all of the provisions of this section shall apply.

Notwithstanding any of the provisions of this section, in any case where a bank deposit has been heretofore made or is hereafter made, or where savings and loan stock has heretofore been issued or is hereafter issued, in the names of two or more persons and payable to either or the survivor or survivors of them, such bank or savings and loan association may, upon the death of either of such persons, allow the person or persons entitled thereto under the provisions of G.S. 41-2.1 to withdraw as much as fifty percent (50%) of such deposit or stock, and the balance thereof shall be retained by the bank or savings and loan association to cover any taxes that may thereafter be assessed against such deposit or stock under this Article. Provided further that where the provisions of G.S. 41-2.1 do apply, in addition to the withdrawal of fifty percent (50%) of such accounts as hereinabove allowed, where such deposits are jointly held by a decedent and spouse with right of survivorship and there has been an appointment by the Clerk of this State of an Administrator or the qualification by an Executor, to the extent the total of any such account did not exceed ten thousand dollars (\$10,000) as of the decedent's death, the balance thereof may be released to the personal representative without requiring a tax waiver from the Secretary of Revenue. When such taxes as may be due on such deposit or stock are paid, or when it is ascertained that there is no liability of such deposit or stock for taxes under this Article, the Secretary of Revenue shall furnish the bank or savings and loan association his written consent for the payment of the retained percentage to the person or persons entitled thereto by law; and the Secretary of Revenue may furnish such written consent to the bank or savings and loan association upon the qualification of a personal representative of the deceased.

Failure to comply with the provisions of this section shall render such safe deposit company, trust company, corporation, bank or other institution, person or persons liable for the amount of the taxes and interest due under this Article on the succession to such securities, deposits, assets, or property, but in any action brought under this provision it shall be a sufficient defense that the delivery or transfer of securities, deposits, assets, or property was made in good faith without knowledge of the death of the decedent and without knowledge of circumstances sufficient to place the defendant on inquiry. (1939, c. 158, s. 21½; 1943, c. 400, s. 1; 1959, c. 1192; 1973, c. 108, s. 50; c. 476, s. 193; c. 1287, s. 2; 1983, c. 198.)

**Effect of Amendments.** — The 1983 amendment, effective April 20, 1983, inserted the

present second sentence of the second paragraph.

## ARTICLE 2.

*Schedule B. License Taxes.***§ 105-33. Taxes under this Article.**

(d) The State license issued under G.S. 105-41, 105-42, 105-45, 105-53, 105-54, 105-55, 105-56, 105-57, 105-58, 105-59 and 105-91 shall be and constitute a personal privilege to conduct the profession or business named in the State license, shall not be transferable to any other person, firm or corporation and shall be construed to limit the person, firm or corporation named in the license to conducting the profession or business and exercising the privilege named in the State license to the county and/or city and location specified in the State license, unless otherwise provided in this Article or schedule. Other license issued for a tax year for the conduct of a business at a specified location shall upon a sale or transfer of the business be deemed a sufficient license for the succeeding purchaser for the conduct of the business specified at such location for the balance of the tax year: Provided, that if the holder of a license under this schedule moves the business for which a license has been paid to another location, a new license may be issued to the licensee at a new location for the balance of the license year, upon surrender of the original license for cancellation and the payment of a fee of five dollars (\$5.00) for each license certificate reissued.

(k) Wherever the business taxed in G.S. 105-61, 105-62, and/or 105-65.2 is of a seasonal character at summer or winter resorts, license may be issued for such seasonal business at one half of the annual license tax for the four months' period from June first to October first in summer resorts and from December first to April first in winter resorts. (1939, c. 158, s. 100; 1943, c. 400, s. 2; 1951, c. 643, s. 2; 1953, c. 981, s. 1; 1963, c. 294, s. 3; 1973, c. 476, s. 193; 1977, c. 657, s. 1; 1981, c. 83, ss. 1, 2.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** — Section 105-56, referred to in this section, was repealed by Session Laws 1981, c. 5, effective July 1, 1981. Section 105-59, also referred to in this section, was repealed by Session Laws 1981 (Reg. Sess. 1982), c. 1282, s.

44, effective April 1, 1983.

**Effect of Amendments.** — The 1981 amendment deleted "105-48" from the list of statutory provisions in the first sentence of subsection (d), and substituted "and/or 105-65.2" for "105-79 and/or 105-84" in the list of statutory provisions in subsection (k).

**§ 105-36.1. Amusements — outdoor theatres.**

(a) Every person, firm or corporation engaged in the business of operating an outdoor or drive-in moving picture show for compensation shall apply for and obtain in advance from the Secretary of Revenue a State license for the privilege of engaging in such business and shall pay a tax in accordance with the following schedule:

For drive-in or outdoor theatres located in or within 10 miles of a corporate limits of cities and towns of

	Car Capacity Up to 150	Car Capacity 150 to 300	Car Capacity 300 to 500	Car Capacity 500 or over
Less than 3,000 pop.	\$ .67 per car	\$ .75 per car	\$ .80 per car	\$ .87 per car
3,000 to 5,000 pop.	.74 per car	.80 per car	.87 per car	.94 per car
5,000 to 10,000 pop.	.80 per car	.87 per car	.95 per car	1.00 per car

	Car Capacity Up to 150	Car Capacity 150 to 300	Car Capacity 300 to 500	Car Capacity 500 or over
10,000 to 20,000 pop.	.87 per car	.94 per car	1.00 per car	1.07 per car
20,000 to 40,000 pop.	.94 per car	1.00 per car	1.07 per car	1.17 per car
40,000 and over	1.00 per car	1.07 per car	1.17 per car	1.34 per car

In addition to the foregoing tax based upon population and car capacity, every operator of a business taxed under this section shall pay a tax of one dollar (1.00) for each seat or seating space provided for patrons outside of motor vehicles driven into the enclosure by patrons. For the purpose of this section, car capacity shall be determined by the number of outlets provided for individual speakers. In the case of drive-in or outdoor theatres not equipped with individual speakers or outlets therefor, but which are equipped with one or more central speakers, the car capacity shall be regarded and rated as 200.

In the case of drive-in or outdoor theatres located within 10 miles of the corporate limits of more than one municipality, the tax herein levied shall be paid in accordance with the rate applicable to the largest of such municipalities.

For the purpose of this section, unincorporated communities shall be regarded as incorporated municipalities, with the corporate limits deemed to extend one mile in every direction from the intersection of the two principal streets in such unincorporated community; and if there is no such intersection, then from the recognized business center of such unincorporated community.

In the case of drive-in or outdoor theatres located more than 10 miles from the corporate limits of any municipality, the tax shall be paid at the rate herein provided for such theatres located within 10 miles of the corporate limits of a municipality having a population of 3,000 to 5,000.

In the case of drive-in or outdoor theatres operating less than six months each year, the tax shall be one half the tax herein levied.

(1949, c. 392, s. 1; 1957, c. 1340, s. 2; 1959, c. 1259, s. 9F; 1973, c. 476, s. 193; 1981, c. 45, s. 1.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amendment, effective July 1, 1981, deleted "or places

where vaudeville exhibitions or performances are given" following "drive-in moving picture show" near the beginning of the first paragraph of subsection (a).

§ 105-37. Amusements — moving pictures — admission.

(a) Every person, firm, or corporation engaged in the business of operating a moving picture show for compensation shall apply for and obtain in advance from the Secretary of Revenue a State license for the privilege of engaging in such business, and shall pay for such State license for each room, hall, or tent used the following tax:

Population of Cities or Towns	Seating Capacity up to 600 Seats	Seating Capacity of 600 to 1200 Seats	Seating Capacity over 1200 Seats
Less than 1,500 . . . . .	\$ 62.50	\$ 75.00	\$ 100.00
1,500 and less than 3,000 . . . . .	100.00	125.00	150.00
3,000 and less			

Population of Cities or Towns	Seating Capacity up to 600 Seats	Seating Capacity of 600 to 1200 Seats	Seating Capacity over 1200 Seats
than 5,000 . . . . .	125.00	150.00	200.00
5,000 and less than 10,000 . . . . .	175.00	200.00	300.00
10,000 and less than 15,000 . . . . .	200.00	300.00	400.00
15,000 and less than 25,000 . . . . .	250.00	400.00	500.00
25,000 and less than 40,000 . . . . .	300.00	500.00	750.00
40,000 or over . . . . .	350.00	700.00	1,200.00

(1939, c. 158, s. 105; 1943, c. 400, s. 2; 1945, c. 708, s. 2; 1947, c. 501, s. 2; 1949, c. 392, s. 1; c. 1201; 1957, c. 1340, s. 2; 1959, c. 1259, s. 9G; 1973, c. 476, s. 193; 1977, c. 657, s. 1; 1979, c. 801, ss. 25-27; 1981, c. 45, ss. 2, 3.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amendment, effective July 1, 1981, deleted "or place where vaudeville exhibitions or performances are given or operating a theatre or opera house where public exhibitions or performances are given" following "moving picture show" near the beginning of the introductory paragraph of subsection (a).

# **§ 105-37.1. Amusements — forms of amusement not otherwise taxed.**

(a) Every person, firm or corporation engaged in the business of giving, offering or managing any form of entertainment or amusement not otherwise taxed or specifically exempted in this Article, for which an admission is charged, shall pay an annual license tax for each room, hall, tent or other place where such admission charges are made, graduated according to population, as follows:

In cities or towns of less than 1,500 population . . . . .	\$10.00
In cities or towns of 1,500 and less than 3,000 population . . .	15.00
In cities or towns of 3,000 and less than 5,000 population . . .	20.00
In cities or towns of 5,000 and less than 10,000 population . .	25.00
In cities or towns of 10,000 and less than 15,000 population . .	30.00
In cities or towns of 15,000 and less than 25,000 population . .	40.00
In cities or towns of 25,000 population or over . . . . .	50.00

In addition to the license tax levied in the above schedule, such person, firm, or corporation shall pay an additional tax upon the gross receipts of such business at the rate of tax levied in Article V, Schedule E, G.S. 105-164.1 to 105-164.44, upon retail sales of merchandise. Reports shall be made to the Secretary of Revenue, in such form as he may prescribe, within the first 10 days of each month covering all such gross receipts for the previous month, and the additional tax herein levied shall be paid monthly at the time such reports are made. The annual license tax herein levied shall be treated as an advance payment of the tax upon gross receipts herein levied, and the annual license tax shall be applied as a credit upon or advance payment of the gross receipts tax.

Every person, firm, or corporation giving, offering, or managing any dance or athletic contest of any kind, except high school and elementary school athletic contests, for which an admission fee in excess of fifty cents (50¢) is charged, shall pay an annual license tax of five dollars (\$5.00) for each location where such charges are made, and, in addition, a tax upon the gross receipts

derived from admission charges in excess of fifty cents (50¢) at the rate of tax levied in Article V, Schedule E, G.S. 105-164.1 to 105-164.44, upon retail sales of merchandise. The additional tax upon gross receipts shall be levied and collected in accordance with such regulations as may be made by the Secretary of Revenue. No tax shall be levied on admission fees for high school and elementary school contests.

Dances and other amusements actually promoted and managed by civic organizations and private and public secondary schools, shall not be subject to the license tax imposed by this section and the first one thousand dollars (\$1,000) of gross receipts derived from such events shall be exempt from the gross receipts tax herein levied when the entire proceeds of such dances or other amusements are used exclusively for the school or civic and charitable purposes of such organizations and not to defray the expenses of the organization conducting such dance or amusement. The mere sponsorship of dance or other amusement by such a school, civic, or fraternal organization shall not be deemed to exempt such dance or other amusement as provided in this paragraph, but the exemption shall apply only when the dance or amusement is actually managed and conducted by the school, civic, or fraternal organization and the proceeds are used as hereinbefore required.

Dances and other amusements promoted and managed by a qualifying corporation that operates a center for the performing and visual arts are exempt from the license tax and the gross receipts tax imposed under this section if the dance or other amusement is held at the center. "Qualifying corporation" means a corporation as defined in G.S. 105-130.2(1) that is exempt from income tax under G.S. 105-130.11(a)(3). "Center for the performing and visual arts" means a facility, having a fixed location, that provides space for dramatic performances, studios, classrooms and similar accommodations to organized arts groups and individual artists. This exemption shall not apply to athletic events.

(1939, c. 158, s. 105; 1943, c. 400, s. 2; 1945, c. 708, s. 2; 1947, c. 501, s. 2; 1963, c. 1231; 1967, c. 865; 1973, c. 476, s. 193; 1977, c. 657, s. 1; 1981, c. 2; c. 83, s. 3; c. 977.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendments, it is not set out.

**Effect of Amendments.** — The first 1981 amendment, effective July 1, 1981, deleted the former fourth sentence of the third paragraph of subsection (a), which read: "The tax levied in this last portion of this section shall apply to all privately owned toll bridges, including all charges made for all vehicles, freight and

passenger, and the minimum charge of fifty cents (50¢) for admission shall not apply to bridge tolls."

The second 1981 amendment substituted "G.S. 105-164.1 to 105-164.44" for "G.S. 105-164 to 105-187" in the second and third paragraphs of subsection (a).

The third 1981 amendment added the fifth paragraph of subsection (a).

## § 105-38. Amusements — circuses, menageries, wild west, dog and/or pony shows, etc.

Every person, firm, or corporation engaged in the business of exhibiting performances, such as a circus, menagerie, wild west show, dog and/or pony show, or any other show, exhibition or performance similar thereto, not taxed in other sections of this Article, shall apply for and obtain a State license from the Secretary of Revenue for the privilege of engaging in such business, and pay for such license the following tax for each day or part of a day:

- (7) Every such person, firm, or corporation who shall give any such exhibitions or performances mentioned in this section within this State, before the statement provided for has been filed with the Secretary of Revenue, or before the State license tax has been paid, or which

shall, after the filing of such statement, give any such exhibitions or performances taxable at a higher rate than the exhibition or performance authorized by the Secretary of Revenue upon the statement filed, shall pay a State license tax of fifty percent (50%) greater than the tax hereinbefore prescribed, to be assessed and collected either by the Secretary of Revenue or by his division deputy.

Upon all performances taxable under this section there is levied, in addition to the license tax levied in this section, a tax upon the gross receipts of such business at the rate of tax levied in Schedule E, G.S. 105-164.1 to 105-164.44, upon retail sales of merchandise. The license tax herein levied shall be treated as an advance payment of the tax upon gross receipts herein levied, and the license tax shall be applied as a credit upon or advance payment of the gross receipts tax. The Secretary of Revenue may adopt such regulations as may be necessary to effectuate the provisions of this section and shall prescribe the form and character of reports to be made, and shall have such authority of supervision as may be necessary to effectuate the purpose of this Subchapter.

(1939, c. 158, s. 106; 1973, c. 476, s. 193; 1981, c. 83, s. 3.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amend-

ment substituted "G.S. 105-164.1 to 105-164.44" for "G.S. 105-164 to 105-187" in the second paragraph of subdivision (7).

## § 105-39. Amusements — carnival companies, etc.

(c) Subject to the exceptions provided in subsection (b), no person, firm, or corporation, nor any aggregation of same, giving such shows, exhibitions, or performances shall be relieved from the payment of the tax levied in this section, regardless of whether or not the State derives a benefit from the same. Nor shall any carnival operating or giving performances or exhibitions in connection with any fair in North Carolina be relieved from the payment of tax levied in this section. It is the intent and purpose of this section that every person, firm, or corporation, or aggregation of same which is engaged in the giving of such shows, exhibitions, performances, or amusements, whether the whole or a part of the proceeds are for charitable, benevolent, educational, or other purposes whatsoever, shall pay the State license taxes provided for in this section.

It is not the purpose of this Article to discourage agricultural fairs in the State, and to further this cause, no carnival company will be allowed to play a "still date" in any county where there is a regularly advertised agricultural fair, 30 days prior to the dates of said fair. An agricultural fair shall be construed as meaning one that has operated at least one year prior to March 24, 1939.

Upon all performances taxable under this section there is levied, in addition to the license tax levied in this section, a tax upon the gross receipts of such business at the rate of tax levied in Schedule E, G.S. 105-164.1 to 105-164.44, upon retail sales of merchandise. The license tax herein levied shall be treated as an advanced payment of the tax upon the gross receipts herein levied, and the license tax shall be applied as a credit upon or advance payment of the gross receipts tax. The Secretary of Revenue may adopt such regulations as may be necessary to effectuate the provisions of this section and shall prescribe the form and character of reports to be made, and shall have such authority or supervision as may be necessary to effectuate the purposes of this Subchapter.

Nothing herein contained shall prevent veterans' organizations and posts chartered by Congress or organized and operated on a statewide or nationwide basis from holding fairs or tobacco festivals on any dates which they may select,

provided said fairs or festivals have heretofore been held as annual events.

(1939, c. 158, s. 107; 1941, c. 50, s. 3; 1947, c. 501, s. 2; 1951, c. 743, s. 2; 1973, c. 476, s. 193; c. 1227; 1975, c. 142, ss. 1-3; c. 726; 1981, c. 83, s. 3.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

ment substituted "G.S. 105-164.1 to 105-164.44" for "G.S. 105-164 to 105-187" in the third paragraph of subsection (c).

**Effect of Amendments.** — The 1981 amend-

## § 105-41. Attorneys-at-law and other professionals.

(a) Every practicing attorney-at-law, practicing physician, veterinary, surgeon, osteopath, chiropractor, chiropodist, dentist, oculist, optician, optometrist, any person practicing any professional art of healing for a fee or reward, every practicing professional engineer as defined in Chapter 89C of the General Statutes, every practicing land surveyor as defined in Chapter 89C of the General Statutes, every architect and landscape architect, photographer, canvasser for any photographer, agent of a photographer in transmitting pictures or photographs to be copied, enlarged or colored (including all persons enumerated in this section employed by the State, county, municipality, a corporation, firm or individual), and every person, whether acting as an individual, as a member of a partnership, or as an officer and/or agent of a corporation, who is engaged in the business of selling or offering for sale, buying or offering to buy, negotiating the purchase, sale, or exchange of real estate, or who is engaged in the business of leasing or offering to lease, renting or offering to rent, or of collecting any rents as agent for another for compensation, or who is engaged in the business of soliciting and/or negotiating loans on real estate as agent for another for a commission, brokerage and/or other compensation, shall apply for and obtain from the Secretary of Revenue a statewide license for the privilege of engaging in such business or profession, or the doing of the act named, and shall pay for such license twenty-five dollars (\$25.00): Provided, that no professional man or woman shall be required to pay a privilege tax after he or she has arrived at the age of 75 years. Further provided, that it shall be unlawful for a nonresident of this State to engage in the real estate business in this State, as defined in this section, unless the State of residence of such person will permit a resident of this State to engage in such business. Any person who shall engage in the real estate business in this State in violation of the terms of this provision shall be guilty of a misdemeanor and shall be punished in the discretion of the court; and further provided, that the obtaining of a real estate dealer's license by such person shall not authorize such nonresident to engage in the real estate business in this State, and provided further that in all prosecutions under this section, a certificate under the hand and seal of the Secretary of Revenue that the accused filed no income tax returns with his department for the preceding taxable year shall be prima facie evidence that the accused is a nonresident and that his license is void.

(f) Repealed by Session Laws 1981, c. 17, effective July 1, 1981.

(g) License Revocable for Failure To Pay Tax. Whenever it shall be made to appear to any judge of the superior court that any person practicing any profession for which the payment of a license tax is required by this section has failed, or fails, to pay the professional tax levied in this section, and execution has been issued for the same by the Secretary of Revenue and returned by the proper officer "no property to be found," or returned for other cause without payment of the tax, it shall be the duty of the judge presiding in the superior court of the county in which such person resides, upon presentation therefor, to cause the clerk of said court to issue a rule requiring such person to show cause by the next session of court why such person should not be deprived of license to practice such profession for failure to pay such professional tax. Such rule shall be served by the sheriff upon said person 20 days before the next

session of the court, and if at the return term of court such person fails to show sufficient cause, the said judge may enter a judgment suspending the professional license of such person until all such tax as may be due shall have been paid, and such order of suspension shall be binding upon all courts, boards and commissions having authority of law in this State with respect to the granting or continuing of license to practice any such profession.

(1939, c. 158, s. 109; 1941, c. 50, s. 3; 1943, c. 400, s. 2; 1949, c. 683; 1953, c. 1306; 1957, c. 1064; 1973, c. 476, s. 193; 1981, c. 17; c. 83, ss. 4, 5.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendments, it is not set out.

**Effect of Amendments.** — The first 1981 amendment, effective July 1, 1981, deleted subsection (f), which read: "Only one-half of the tax levied in this section shall be collected from those persons whose gross receipts from the business or profession for the preceding year did

not exceed one thousand dollars (\$1,000)."

The second 1981 amendment substituted "Chapter 89C" for "Chapter 89" in two places near the beginning of the first sentence of subsection (a), and substituted "next session" for "next term" near the end of the first sentence of subsection (g) and near the beginning of the second sentence of subsection (g).

## § 105-42. Private detectives and investigators.

(a) Every person engaged in business as a "private detective" or "private investigator" shall apply for and obtain from the Secretary of Revenue a statewide license for the privilege of engaging in such business, and shall pay for such license a tax of twenty-five dollars (\$25.00). However, no officer or employee of this State, or of the United States, or of any political subdivision of either, while such officer or employee is engaged in the performance of official duties within the course and scope of his governmental employment, shall be subject to the tax imposed by this section.

(b) "Private detective" or "private investigator" means any person who engages in the business of or accepts employment to furnish, agrees to make, or makes an investigation for the purpose of obtaining information with reference to:

- (1) Crime or wrong done or threatened against the United States or any state or territory of the United States;
- (2) The identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of any person;
- (3) The location, disposition, or recovery of lost or stolen property;
- (4) The cause or responsibility for fires, libels, losses, accidents, damages, or injuries to persons or to properties, provided that scientific research laboratories and consultants shall not be included in this definition;
- (5) Securing evidence to be used before any court, board, officer, or investigation committee; or
- (6) Protection of individuals from serious bodily harm or death.

However, the employee of a security department of a private business which conducts investigations exclusively on matters internal to the business affairs of the business shall not be required to be licensed as a private detective or investigator under this section.

(c) So long as private detectives and private investigators are required to be licensed pursuant to the provisions of Chapter 74C of the General Statutes, or any successor thereto, no license shall be issued pursuant to this section until the applicant exhibits to the Secretary of Revenue an original or certified copy of the license required by Chapter 74C, or any successor thereto.

(d) No county, city or town shall levy any license tax on the business taxed under this section. (1939, c. 158, s. 110; 1971, c. 814, s. 14; 1973, c. 476, s. 193; c. 794; 1975, c. 19, s. 27; 1981, c. 83, s. 6.)

**Effect of Amendments.** — The 1981 amendment, effective July 1, 1981, rewrote this section.

**§ 105-44:** Repealed by Session Laws 1981 (Regular Session, 1982), c. 1228, effective July 1, 1983.

**§ 105-48.1:** Repealed by Session Laws 1981, c. 7, effective July 1, 1981.

## **§ 105-49. Bicycle dealers.**

**Cross References.** — As to an optional license tax on persons engaged in the retail variety sales business, see § 105-102.4.

## **§ 105-51. Automatic machines.**

(a) Every person, firm, or corporation engaged in the business of selling, delivering, or renting any of the following types of automatic machines shall apply for and procure from the Secretary of Revenue a State license for each place where such business is transacted in this State, and shall pay for such license a tax of ten dollars (\$10.00):

- (1) Office machines including, but not limited to, cash registers, typewriters, word processing equipment, addressograph machines, adding or bookkeeping machines, calculators, billing machines, check writing machines, copying machines, dictating equipment, and data processing equipment; and
- (2) Home appliances including, but not limited to, washing machines, clothes dryers, refrigerators, freezers, vacuum cleaners, air conditioning units (other than permanently installed units using internal ductwork), and sewing machines; and
- (3) Burglar alarms, smoke alarms, and other warning devices. Counties, cities and towns shall not levy a license tax on the business taxed under this section.

(b) The tax imposed by this section does not apply to persons who are engaged in the business of selling, delivering, or renting burglar alarms and other warning devices and are licensed under G.S. 105-51.1. (1939, c. 158, s. 119; 1973, c. 476, s. 193; 1979, c. 16, s. 2; 1983, c. 300, s. 2.)

**Cross References.** — As to an optional license tax on persons engaged in the retail variety sales business, see § 105-102.4.

**Effect of Amendments.** — The 1983 amend-

ment, effective July 1, 1983, designated the present first paragraph, with its subdivisions (1) through (3), as subsection (a), and added subsection (b).

## **§ 105-51.1. Alarm systems.**

(a) Every person, firm, or corporation engaged in an alarm system business licensed under Chapter 74C of the General Statutes shall apply for and obtain from the Secretary of Revenue a State license and shall pay a tax of twenty-five dollars (\$25.00) for the privilege of engaging in this business.

(b) Counties, cities, and towns may not levy a license tax on the business taxed under this section. (1983, c. 300, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 300, s. 3, makes this section effective July 1, 1983.

Effective January 1, 1984, persons, etc., engaged in an alarm system business will be

licensed under Chapter 74D rather than Chapter 74C, as referred to in this section.

### § 105-53. Peddlers.

(f) The board of county commissioners of any county in this State, upon proper application, may exempt from the annual license tax levied in this section disabled soldiers of the first and second World Wars, who have been bona fide residents of this State for 12 or more months, continuously, and the blind who have been bona fide residents of this State for 12 or more months continuously, widows with dependent children; and when so exempted, the board of county commissioners shall furnish such person or persons with a certificate of exemption, and such certificate shall entitle the holder thereof to peddle within the limits of such county without payment of any license tax to the State.

(1939, c. 158, s. 121; 1941, c. 50, s. 3; 1943, c. 400, s. 2; 1945, c. 708, s. 2; 1951, c. 643, s. 2; 1955, c. 1315; 1973, c. 476, s. 193; 1979, c. 74; 1981, c. 16.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amendment, effective July 1, 1981, deleted "Confeder-

ate soldiers, disabled veterans of the Spanish-American War" preceding "disabled soldiers of the first and second World Wars" near the beginning of subsection (f).

### § 105-54. Contractors and construction companies.

(a) Every person, firm, or corporation who, for a fixed price, commission, fee, or wage, offers or bids to construct within the State of North Carolina any building, highway, street, sidewalk, bridge, culvert, sewer or water system, drainage or dredging system, railway, reservoir or dam, hydraulic or power plant, transmission line, tower, dock, wharf, excavation, grading or other improvement or structure, or any part thereof, the cost of which exceeds the sum of ten thousand dollars (\$10,000), shall apply for and obtain from the Secretary of Revenue an annual statewide license, and shall pay for such license a tax of one hundred dollars (\$100.00) at the time of or prior to offering or submitting any bid on any of the above enumerated projects.

(1939, c. 158, s. 122; 1951, c. 643, s. 2; 1973, c. 476, s. 193; 1981, c. 18.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amend-

ment, effective July 1, 1981, deleted "electric or steam" preceding "railway" near the middle of subsection (a).

**§ 105-56:** Repealed by Session Laws 1981, c. 5, effective July 1, 1981.

**§ 105-59:** Repealed by Session Laws 1981 (Regular Session, 1982), c. 1282, s. 44, effective April 1, 1983.

### § 105-61. Hotels, motels, tourist courts and tourist homes.

**Cross References.** — As to prohibition against use of hotels, motels, tourist courts, or

tourist homes for precious metal dealing, see § 66-165.

§ 105-65.1. Merchandising dispensers and weighing machines.

(a) Every person, firm, or corporation engaged in the business of operating, maintaining, or placing on location anywhere within the State of North Carolina merchandising dispensers in which are kept any article or merchandise to be purchased, or weighing machines, shall be deemed a distributor or operator and shall apply for and procure from the Secretary of Revenue a statewide license to be known as an annual distributor's or operator's license, and shall pay for such license the following tax:

Distributors or operators of five or more drink dispensers other than open cup drink dispensers . . . . .	\$100.00
Distributors or operators of five or more open cup drink dispensers . . . . .	50.00
Distributors or operators of five or more cigarette dispensers or dispensers of other tobacco products . . . . .	50.00
Distributors or operators of five or more food or other merchandising dispensers selling products for five cents (5¢) or more . . . . .	50.00
Distributors or operators of five or more food or other merchandising dispensers selling products for less than five cents (5¢) . . . . .	25.00
Distributors or operators of five or more weighing machines . . . . .	50.00

A person, firm, or corporation operating and maintaining soft drink dispensers or any other dispensers as set forth above in places of business operated by him or it, and not elsewhere, shall not be considered a distributor or operator of such dispensers for the purpose of this section.

Any person, firm, or corporation operating, maintaining, or placing on location fewer than five such machines or dispensers shall not be considered a distributor or operator for the purpose of this section. Any person, firm, or corporation operating, maintaining, or placing on location five or more soft drink dispensers shall not be considered a distributor or operator for the purpose of this section when all of said dispensers operated, maintained, or placed on location by such person, firm, or corporation are operated, maintained, or placed in a single building, all parts of which are accessible through the same outside entrance, and which building is occupied by a single commercial, manufacturing, or industrial business. Every machine or dispenser placed on location by a licensed operator or distributor as herein defined shall have fixed thereto identification showing the name and address of the owner, operator, or distributor. The operator of any machine or dispenser not so identified shall be liable for additional license tax as levied by G.S. 105-65.2.

(b)(1) In addition to the license tax imposed under subsection (a), a distributor or operator of soft drink dispensers, except open cup drink dispensers, shall annually pay to the Secretary of Revenue a soft drink dispenser tax in an amount based on the number of dispensers operated, maintained or placed on location by the distributor or operator on July 1 of the license year. The amount of tax due is as follows:

Number of Dispensers	Amount of Tax
5-50	7.00 per dispenser
51-100	535.00
101-150	892.50
151-200	1,250.00
200 and up	1,250.00 plus \$357.50 for each additional 50 dispensers or fraction thereof

A distributor or operator who was not in business on July 1 of the license year shall pay a tax based on the number of dispensers he reasonably expects to operate, maintain or place on location during the ensuing license year. If the number of dispensers operated, maintained or placed on location during that year exceeds the distributor's or operator's estimate, the distributor or operator shall, within 20 days of the close of the license year, report the excess to the Secretary and pay any additional tax due according to the above table.

- (2) In addition to the above annual distributor's or operator's license, every distributor or operator distributing, maintaining, or operating five or more cigarette dispensers, or five or more dispensers of other tobacco products, or five or more open-cup drink dispensers, or five or more food or other merchandising dispensers, or five or more weighing machines shall pay a tax upon the gross receipts obtained from such machines and dispensers at the rate of six tenths of one percent (6/10 of 1%) of gross receipts from cigarette sales, and one tenth of one percent (1/10 of 1%) of gross receipts from all other sales; but the tax paid for the operator's license shall be treated as an advance payment of the gross receipts tax and shall be applied as a credit upon the gross receipts tax, but only for the same year for which the tax was paid. All persons, firms, or corporations liable for the gross receipts tax levied hereunder shall file quarterly reports with the Secretary of Revenue no later than the fifteenth day of each of the months of January, April, July and October of each year for the three months' period ended on the last day of the month immediately preceding the month in which the report is due. All taxes due for said period shall be paid to the Secretary of Revenue at the time the report is required to be filed.
- (3), (4) Repealed by Session Laws 1979, c. 150, s. 3, effective July 1, 1979. (1939, c. 158, s. 130; 1941, c. 50, s. 3; 1943, c. 105; c. 400, s. 2; 1945, c. 708, s. 2; 1949, c. 1220, s. 1; 1953, c. 1142; 1955, cc. 1271, 1344; 1957, c. 1340, s. 2; 1963, c. 1169, s. 10; 1965, c. 1078, s. 1; 1967, c. 1118, s. 2; 1973, c. 476, s. 193; c. 1200, s. 2; 1979, c. 150, s. 3; 1981, c. 83, s. 7; 1983, c. 379, ss. 1, 2.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amendment substituted "G.S. 105-65.2" for "subsection (b)(3)" at the end of the last paragraph of subsection (a).

The 1983 amendment, effective May 23, 1983, substituted "section" for "subsection" in the second and third paragraphs of subsection (a) and rewrote subdivision (b)(1).

## § 105-65.2. Sundries license tax.

**Cross References.** — As to an optional license tax on persons engaged in the retail variety sales business, see § 105-102.4.

## § 105-66. (Effective until July 1, 1984) Bagatelle tables, merry-go-rounds, etc.

(d) Any person obtaining a license under G.S. 14-309.7 is not required to obtain a State license under this section for the same activity, but is subject to subsection (c) of this section as if a State license was required. (1939, c. 158, s. 131; 1973, c. 476, s. 193; 1983, c. 896, s. 4.1.)

**Section Set Out Twice.** — The section above is effective until July 1, 1984. For this section as amended effective July 1, 1984, see the following section, also numbered 105-66.

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** — Session Laws 1983, c. 896, ss. 5.1 and 6, provide: "Sec. 5.1. Should the Supreme Court of North Carolina or federal court having jurisdiction over North Carolina find and determine in any manner, whether on the merits or by denial of petition for discretionary review, that the General Assembly may not constitutionally allow "exempt organiza-

tions" as defined herein to conduct bingo or raffles, while denying that privilege to all other persons, then this act and G.S. 14-292.1 are repealed in their entirety, and no person may conduct bingo or raffles under any circumstances not permitted by the gambling laws of North Carolina.

"Sec. 6. Prosecutions for offenses occurring before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1983 amendment, effective Oct. 1, 1983, added subsection (d).

## § 105-66. (Effective July 1, 1984) Bagatelle tables, merry-go-rounds, etc.

(b) The tax imposed under this section does not apply to machines and other devices licensed under G.S. 105-64, 105-65, or 105-66.1.

(d) Any person obtaining a license under G.S. 14-309.7 is not required to obtain a State license under this section for the same activity, but is subject to subsection (c) of this section as if a State license was required. (1939, c. 158, s. 131; 1973, c. 476, s. 193; 1983, c. 713, s. 98; c. 896, s. 4.1.)

**Section Set Out Twice.** — The section above is effective July 1, 1984. For this section as in effect until July 1, 1984, see the preceding section, also numbered 105-66.

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** — Session Laws 1983, c. 896, ss. 5.1 and 6, provide: "Sec. 5.1. Should the Supreme Court of North Carolina or a federal court having jurisdiction over North Carolina find and determine in any manner, whether on the merits or by denial of petition for discretionary review, that the General Assembly may not constitutionally allow "exempt organizations" as defined herein to conduct bingo or raffles, while denying that privilege to all other

persons, then this act and G.S. 14-292.1 are repealed in their entirety, and no person may conduct bingo or raffles under any circumstances not permitted by the gambling laws of North Carolina.

"Sec. 6. Prosecutions for offenses occurring before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The first 1983 amendment, effective July 1, 1984, rewrote subsection (b), which read "The tax under this section shall not apply to machines and other devices licensed under G.S. 105-64 and 105-65."

The second 1983 amendment, effective Oct. 1, 1983, added subsection (d).

## § 105-66.1. (Effective July 1, 1984) Electronic video games.

(a) Every person, firm, or corporation engaged in the business of owning or operating machines that play electronic video games when a coin or other thing of value is deposited in the machine shall obtain from the Secretary of Revenue a statewide license for each machine owned or operated and shall pay a tax of fifteen dollars (\$15.00) for each license. An application for a license shall include the serial number of the machine operated. The licensee shall attach the license to the machine in a conspicuous place. No person may allow an unlicensed video game machine in a place of business occupied by that person. Licenses issued under this section are not transferable from one machine to another. The Secretary may seize any machine not licensed in accordance with this section and may hold the machine until it is duly licensed. All machines licensed under this section shall have a counter that records the number of games played or the amount of money deposited in the machine, or both.

(b) As used in this section, a person, firm, or corporation is "engaged in the business of owning an electronic video game machine" if he owns the machine and locates it in his own place of business; and a person, firm, or corporation is "engaged in the business of operating an electronic video game machine" if he locates, exhibits, displays, or permits to be exhibited or displayed an electronic video game machine in a place of business other than his own.

(c) Counties, cities, and towns may levy a tax, not to exceed five dollars (\$5.00) per machine, on the business taxed under this section. (1983, c. 713, s. 99.)

**Editor's Note.** — Session Laws 1983, c. 713, s. 109 makes this section effective July 1, 1984.

**§ 105-68:** Repealed by Session Laws 1981 (Regular Session, 1982), c. 1229, effective July 1, 1983.

**§ 105-75:** Repealed by Session Laws 1979, 2nd Session, c. 1304, s. 1, effective July 1, 1981.

**Cross References.** — For present section covering the subject matter of the repealed section, see § 105-75.1.

### **§ 105-75.1. Municipal license tax on barbershops and beauty salons.**

Cities and towns may levy a license tax on every person, firm, or corporation engaged in the business of conducting a barbershop, beauty salon, or other shop of like kind for the privilege of conducting such business at a rate not to exceed the following:

For each barber, manicurist, cosmetologist, beautician, or other operator employed in such barbershop or beauty shop or parlor — \$2.50. (1979, 2nd Sess., c. 1304, s. 2.)

**Editor's Note.** — Session Laws 1979, 2nd Sess., c. 1304, s. 3, makes this section effective July 1, 1981.

### **§ 105-80. Dealers in pistols, etc.**

**Cross References.** — As to an optional license tax on persons engaged in the retail variety sales business, see § 105-102.4.

### **§ 105-82. Pianos, organs, victrolas, records, radios, accessories.**

**Cross References.** — As to an optional license tax on persons engaged in the retail variety sales business, see § 105-102.4.

### § 105-83. Installment paper dealers.

(a) Every person, firm, or corporation, foreign or domestic, engaged in the business of dealing in, buying, and/or discounting installment paper, notes, bonds, contracts, evidences of debt and/or other securities, where at the time of or in connection with the execution of said instruments, a lien is reserved or taken upon personal property located in this State to secure the payment of such obligations, shall apply for and obtain from the Secretary of Revenue a State license for the privilege of engaging in such business or for the purchasing of such obligations in this State, and shall pay for such license an annual tax of one hundred dollars (\$100.00).

(b) In addition to the tax levied in subsection (a) of this section, such person, firm, or corporation shall submit to the Revenue Secretary quarterly no later than the twentieth day of January, April, July, and October of each year, upon forms prescribed by the said Secretary, a full, accurate, and complete statement, verified by the officer, agent, or person making such statement, of the total face value of the installment paper, notes, bonds, contracts, evidences of debt, and/or other securities described in this section dealt in, bought and/or discounted within the preceding three calendar months and, at the same time, shall pay a tax of two hundred and seventy-five thousandths of one percent (.275%) of the face value of such obligations dealt in, bought and/or discounted for such period.

(1939, c. 158, s. 148; 1957, c. 1340, s. 2; 1973, c. 476, s. 193; 1981, c. 83, ss. 8, 9.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amendment, effective July 1, 1981, inserted "at the time of or in connection with the execution of

said instruments" near the middle of subsection (a), substituted "no later than the twentieth day" for "on the first day" near the beginning of subsection (b), and substituted "preceding three calendar months" for "preceding three months" near the end of subsection (b).

### § 105-85. Laundries.

#### CASE NOTES

**Sales Tax Unaffected by 1975 Amendment.** — The General Assembly did not intend by the 1975 amendment to this section, exempting apartment owners from the privilege license tax on laundries, to exclude the

payment of sales tax by apartment owners on the receipts from coin-operated washers or dryers. In re Proposed Assmt. of Additional Sales & Use Tax, 46 N.C. App. 631, 265 S.E.2d 461 (1980).

§ 105-87: Repealed by Session Laws 1981, c. 6, effective July 1, 1981.

### § 105-89. Automobiles, wholesale supply dealers and service stations.

**Cross References.** — As to an optional license tax on persons engaged in the retail variety sales business, see § 105-102.4.

§ 105-92: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1227, effective July 1, 1983.

§ 105-96: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1231, effective July 1, 1983.

§ 105-102: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1230, effective July 1, 1983.

§ 105-102.2: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1213, effective July 1, 1983.

### § 105-102.3. Banks.

There is hereby imposed upon every bank or banking association, including each national banking association, that is operating in this State as a commercial bank, an industrial bank, a savings bank, a trust company, or any combination of such facilities or services, and whether such bank or banking association, hereinafter to be referred to as a bank or banks, be organized, under the laws of the United States or the laws of North Carolina, in the corporate form or in some other form of business organization, an annual privilege tax in the amount of thirty dollars (\$30.00) for each one million dollars (\$1,000,000) or fractional part thereof of total assets held as hereinafter provided. The assets upon which the tax is levied shall be determined by averaging the total assets shown in the four quarterly call reports of condition (consolidating domestic subsidiaries) for the preceding calendar year as required by bank regulatory authorities; provided, however, where a new bank commences operations within the State there shall be levied and paid an annual privilege tax of one hundred dollars (\$100.00) until such bank shall have made four quarterly call reports of condition (consolidating domestic subsidiaries) for a single calendar year; provided further, however, where a bank operates an international banking facility, as defined in G.S. 105-130.5(b)(13), the assets upon which the tax is levied shall be reduced by the average amount for the taxable year of all assets of the international banking facility which are employed outside the United States, as computed pursuant to G.S. 105-130.5(b)(13)c. The tax imposed hereunder shall be for the privilege of carrying on the businesses herein defined on a statewide basis regardless of the number of places or locations of business within the State. Counties, cities and towns shall not levy a license or privilege tax on the businesses taxed under this section, nor on the business of an international banking facility as defined in subsection (b)(13) of G.S. 105-130.5. (1973, c. 1053, s. 7; 1981, c. 855, s. 2.)

**Effect of Amendments.** — The 1981 amendment deleted "organized and" preceding "operating in this State" near the beginning of the first sentence, added the second proviso at

the end of the second sentence, and added "nor on the business of an international banking facility as defined in subsection (b)(13) of G.S. 105-130.5" at the end of the last sentence.

### § 105-102.4. Optional license tax on persons engaged in retail variety sales business.

(a) Any person, firm or corporation required to procure a license imposed under one or more of the statutes listed in subsection (b) for the same location may, upon application to the Secretary of Revenue and payment of a tax of one hundred dollars (\$100.00), obtain a "retail variety store privilege license" for

the privilege of engaging, at that location, in one or more of the businesses taxed in the listed sections.

(b) A retail variety store privilege license replaces the licenses imposed in the following sections and relieves the licensee of liability for the taxes imposed in these sections: G.S. 105-49, 105-51, 105-65.2, 105-80(b), 105-82 and 105-89(a).

(c) Counties, cities and towns may not levy a license tax under this section. This section shall not affect the authority of cities and towns to levy taxes under G.S. 160A-211 or the authority of counties, cities and towns to levy taxes under G.S. 105-49, 105-51, 105-65.2, 105-80(b), 105-82 and 105-89(a) if the indicated statute authorizes these entities to do so. (1983, c. 38, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 38, s. 2, makes this section effective July 1, 1983.

## ARTICLE 2A.

### *Schedule B-A. Cigarette Tax.*

#### § 105-113.18. Reports.

The following reports are required to be filed with the Secretary:

- (4) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1209, s. 1. (1969, c. 1075, s. 2; 1973, c. 476, s. 193; 1981 (Reg. Sess., 1982), c. 1209, s. 1.)

**Only Part of Section Set Out.** — As subdivisions (1), (2), and (3) were not changed by the amendment, they are not set out.

**Effect of Amendments.** — The 1981 (Reg.

Sess., 1982) amendment repealed subdivision (4), relating to reports to be filed by distributors of coin-operated machines under § 105-250.1 (also repealed by the amendatory act).

#### § 105-113.32. Unstamped cigarettes subject to confiscation.

**Editor's Note.** — In this section as it appears in the replacement volume, the reference to § 195-113.31 should be to § 105-113.31.

## ARTICLE 2B.

### *Schedule B-B. Soft Drink Tax.*

#### § 105-113.61. Criminal acts.

(a) It shall be unlawful for any person willfully to:

- (1) Remove, wash, restore, alter or otherwise prepare any adhesive stamp or crown with intent to use it or cause it to be used after it has already been used;
- (2) Knowingly or willfully buy, sell, offer for sale or give away any such washed, restored or altered stamp or crown to any person;
- (3) Knowingly use or have in his possession any washed, restored or altered stamps or crowns which have been removed from the articles to which they have been previously affixed;
- (4) For the purpose of indicating the payment of any tax under this Article, reuse any stamp or crown that has theretofore been used for the purpose of denoting payment of the tax provided in this Article.

(b) It shall be unlawful for any person to prepare, buy, sell, offer for sale or have in his possession any counterfeit, or false stamps or crowns, or any stamps or crowns printed, fabricated or manufactured contrary to the provisions of this Article. Violation of subsection (b) of this section is hereby made a Class I felony. (1969, c. 1075, s. 3; 1979, 2nd Sess., c. 1316, s. 29.)

**Effect of Amendments.** — The 1979, 2nd Sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, substituted "Class I felony" for "felony punishable by a fine of not more than five thousand dollars (\$5,000) or imprisonment in the State prison for not more than five years,

or both, in the discretion of the court" in subsection (b).

The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

## ARTICLE 2C.

### *Schedule B-C. Alcoholic Beverages Tax.*

#### § 105-113.68. Definitions.

(a) As used in this Article:

- (1) "Alcoholic beverage" means any beverage containing at least one half of one percent (0.5%) alcohol by volume, including malt beverages, unfortified wine, fortified wine, spirituous liquor, and mixed beverages.
- (2) "Fortified wine" means any wine made by fermentation from grapes, fruits, berries, rice, or honey, to which nothing has been added other than pure brandy made from the same type of grape, fruit, berry, rice, or honey that is contained in the base wine, and which has an alcoholic content of not more than twenty-four percent (24%) alcohol by volume.
- (3) "License" means a written or printed certificate issued pursuant to this Article by the Secretary of Revenue or by a city or county, which allows a person to engage in some phase of the alcoholic beverage industry.
- (4) "Malt beverage" means beer, lager, malt liquor, ale, porter, and any other brewed or fermented beverage containing at least one half of one percent (0.5%) and not more than six percent (6%) alcohol by volume.
- (5) "Person" means an individual, firm, partnership, association, corporation, other organization or group, or other combination of individuals acting as a unit.
- (6) "Sale" means any transfer, trade, exchange, or barter, in any manner or by any means, for consideration.
- (7) "Spirituous liquor" or "liquor" means distilled spirits or ethyl alcohol, including spirits of wine, whiskey, rum, brandy, gin and all other distilled spirits and mixtures of cordials, liqueur, and premixed cocktails, in closed containers for beverage use regardless of their dilution.
- (8) "Unfortified wine" means wine that has an alcoholic content produced only by natural fermentation or by the addition of pure cane, beet, or dextrose sugar, and that has an alcoholic content of not less than six percent (6%) and not more than seventeen percent (17%) alcohol by volume.

(b) All alcoholic beverages shall be taxed as provided in this Article whether or not meeting all criteria of the definitions in subsection (a).

(c) All references in this Article to permits are to the ABC permits provided for and defined in Articles 9, 10 and 11 of Chapter 18B. (1971, c. 872, s. 2; 1973, c. 476, s. 193; 1975, c. 411, s. 1; 1981, c. 747, s. 2.)

**Editor's Note. —**

Session Laws 1981, c. 747, ss. 1-32, extensively amended this Article so as to bring it into conformity with the revision of the laws governing alcoholic beverages, contained in Chapter 18B as enacted by Session Laws 1981, c. 412.

Session Laws 1981, c. 747, s. 67, provides in part: "Sections 1-34 of this act become effective January 1, 1982. State, city and county revenue licenses issued under Article 2C of Chapter 105 in effect on that date shall remain valid until they expire or until replaced by the equivalent license issued under this act. Each applicant for a new or replacement ABC permit under

Article 11 of Chapter 18B shall pay the fee required by G.S. 18B-902(d). No fee may be charged for replacement after January 1, 1982, of a State, city or county revenue license that would otherwise be valid until April 30, 1982."

**Effect of Amendments. —** The 1981 amendment, effective Jan. 1, 1982, rewrote the former introductory language in subdivisions (1) to (12) as subsection (a), designated the former last paragraph of the section as subsection (b) and substituted "alcoholic beverages" for "intoxicating liquor" and "definitions in subsection (a)" for "above definitions" in that provision and added subsection (c).

## § 105-113.69. Requirements, effect of revenue license.

(a) A license required by this Article is a license for the same activity that is authorized by the equivalent ABC permit. No license may be issued under this Article until the applicant has received from the Alcoholic Beverage Control Commission the applicable ABC permit for that activity. The qualifications for a revenue license are the same as for the equivalent ABC permit. Each person receiving an ABC permit must apply for and pay the fee for the equivalent license or licenses under this Article. Upon proper application and payment of the prescribed fee, issuance of a revenue license is mandatory if the applicant has received and remains presently qualified for the equivalent ABC permit.

(b) Unless otherwise stated, all revenue licenses are annual licenses for the period from May 1 to April 30.

(c) Neither the State nor any local government may require any revenue license for activities related to the manufacture or sale of alcoholic beverages other than the licenses stated in this Article.

(d) Failure to secure a license required by this Article is a misdemeanor. (1949, c. 974, s. 6; 1951, c. 378, s. 4; 1963, c. 426, s. 12; 1971, c. 872, s. 2; 1981, c. 747, s. 3.)

**Effect of Amendments. —** The 1981 amendment, effective Jan. 1, 1982, rewrote this section in conformity with the revision of the laws

governing alcoholic beverages contained in Chapter 18B. See the Editor's Note under § 105-113.68.

## § 105-113.70. State brewery and unfortified winery licenses.

(a) Each person holding a brewery permit must secure from the Secretary of Revenue a State brewery license. The annual fee for this license is five hundred dollars (\$500.00).

(b) The holder of a State brewery license may sell, deliver and ship malt beverages only to wholesalers licensed under this Article, except that malt beverages may be sold to nonresident wholesalers when the purchase is not for resale in this State.

(c) Each person holding an unfortified winery permit must secure from the Secretary of Revenue a State unfortified winery license. The annual fee for this license is one hundred dollars (\$100.00).

(d) The holder of a State unfortified winery license may sell, deliver and ship unfortified wine only to wholesalers licensed under this Article, except that wine may be sold to nonresident wholesalers when the purchase is not for

resale in this State. The holder of a State unfortified winery license may also ship his wine to individual purchasers inside and outside this State.

(e) No State license is required for an individual who makes native wines and malt beverages for his own use and the use of his family and guests as provided in G.S. 18B-306. Native wines are wines made principally from honey, grapes, or other fruit or grain grown in this State, or from wine kits containing honey, grapes, or other fruit or grain concentrates, and which have only that alcoholic content produced by natural fermentation. (1939, c. 158, s. 504; 1945, c. 903, s. 4; 1967, c. 162, s. 1; c. 867, s. 1; 1969, cc. 732, 1057; 1971, c. 872, s. 2; 1973, c. 476, s. 193; c. 511, s. 7; 1975, c. 411, s. 10; 1979, c. 502, s. 1; 1981, c. 747, s. 4.)

**Effect of Amendments.** — The 1981 amendment, effective Jan. 1, 1982, rewrote this section in conformity with the revision of the laws

governing alcoholic beverages contained in Chapter 18B. See the Editor's Note under § 105-113.68.

### § 105-113.71. State bottler license.

Each person holding a bottler permit must secure from the Secretary of Revenue a State bottler license. The annual fee for this license is two hundred fifty dollars (\$250.00). The holder of a bottler license may sell, ship and deliver malt beverages, unfortified wine and fortified wine only to wholesalers licensed under this Article. (1939, c. 158, s. 505; 1941, c. 339, s. 4; 1945, c. 903, s. 5; 1971, c. 872, s. 2; 1981, c. 747, s. 5.)

### § 105-113.72. State fortified winery and distillery licenses.

(a) Each person holding a fortified winery permit must secure from the Secretary of Revenue a State fortified winery license. The annual fee for this license is one hundred dollars (\$100.00).

(b) The holder of a State fortified winery license may sell, deliver and ship fortified wine only to wholesalers licensed under this Article, except that wine may be sold to nonresident wholesalers when the purchase is not for resale in this State. The holder of a State fortified winery license may also ship his wine to individual purchasers inside and outside this State.

(c) Each person holding a distillery permit must secure from the Secretary of Revenue a State distillery license. The annual fee for this license is one hundred dollars (\$100.00).

(d) Each person holding a fuel alcohol permit must secure from the Secretary of Revenue a State fuel alcohol license. The annual fee for this license is ten dollars (\$10.00). (1967, c. 614; 1971, c. 872, s. 2; 1975, c. 411, s. 9; 1979, c. 502, s. 2; c. 699, s. 5; 1979, 2nd Sess., c. 1329, s. 2; 1981, c. 747, s. 6.)

**Effect of Amendments.** — The 1979, 2nd Sess., amendment, effective October 1, 1980, and applicable to all persons holding or obtaining federal permits on or after that date, added subsection (c).

The 1981 amendment, effective Jan. 1, 1982, rewrote this section in conformity with the revision of the laws governing alcoholic beverages contained in Chapter 18B. See the Editor's Note under § 105-113.68.

### § 105-113.73. Malt beverage and wine wholesaler licenses.

(a) Each person holding a malt beverage wholesaler permit must secure from the Secretary of Revenue a State malt beverages wholesaler license. The annual fee for this license is one hundred fifty dollars (\$150.00).

(b) Each person holding a wine wholesaler permit must secure from the Secretary of Revenue a State wine wholesaler license. The annual fee for this license is one hundred fifty dollars (\$150.00).

(c) The total annual fee for a person who secures both a State malt beverage wholesaler and State wine wholesaler license for the same business for the same year is two hundred fifty dollars (\$250.00).

(d) The holder of a wholesaler license may sell, deliver, and ship his products only to wholesalers and retailers licensed under this Article, except that sales may also be made to his employees as provided in G.S. 18B-1107(3) and 18B-1109(a)(3). A malt beverage wholesaler may not sell to wholesalers and retailers less than one case or container at a time.

(e) A wholesaler who maintains more than one place of business or storage warehouse from which orders are received or beverages are distributed must secure a separate State license for each of those places.

(f) A city may require city malt beverage and wine wholesaler licenses for businesses located in the city, but may not require a license for a business located outside the city to sell or deliver inside the city. The annual fee for a city license may not be more than twenty-five percent (25%) of the annual fee for the equivalent State license. (1939, c. 158, s. 506; 1941, c. 339, s. 4; 1945, c. 903, s. 6; 1971, c. 872, s. 2; 1973, c. 476, s. 193; 1981, c. 747, s. 7.)

**Effect of Amendments.** — The 1981 amendment, effective Jan. 1, 1982, rewrote this section in conformity with the revision of the laws

governing alcoholic beverages contained in Chapter 18B. See the Editor's Note under § 105-113.68.

**§ 105-113.74:** Repealed by Session Laws 1981, c. 747, s. 8, effective January 1, 1982.

### **§ 105-113.75. Sales on railroad trains.**

Each person operating a railroad train in this State on which malt beverages or unfortified wine are sold must secure from the Secretary of Revenue a State railroad sales license. The annual fee for this license is one hundred dollars (\$100.00) for each railroad system over which cars are operated in this State. Each person required to secure a license under this section shall report to the Secretary of Revenue by the fifteenth day of each calendar month the sales for the previous month and the payment of the tax on those sales at the rate levied in this Article. (1939, c. 158, s. 507; 1971, c. 872, s. 2; 1973, c. 476, s. 193; 1981, c. 747, s. 9.)

**Effect of Amendments.** — The 1981 amendment, effective Jan. 1, 1982, rewrote this section in conformity with the revision of the laws

governing alcoholic beverages contained in Chapter 18B. See the Editor's Note under § 105-113.68.

### **§ 105-113.76. State salesman license.**

Each person holding a salesman permit or a vendor representative permit must secure from the Secretary of Revenue a State salesman's license. A license may be issued only upon recommendation of the vendor whom the salesman or representative represents. The annual fee for this license is twelve dollars and fifty cents (\$12.50). A person who holds more than one vendor representative permit is required to obtain only one State salesman license. (1939, c. 158, s. 508; 1945, c. 903, s. 7; 1971, c. 872, s. 2; 1973, c. 476, s. 193; 1981, c. 747, s. 10.)

**Effect of Amendments.** — The 1981 amendment, effective Jan. 1, 1982, rewrote this section in conformity with the revision of the laws

governing alcoholic beverages contained in Chapter 18B. See the Editor's Note under § 105-113.68.

§§ 105-113.77, 105-113.78: Repealed by Session Laws 1981, c. 747, s. 11, effective January 1, 1982.

§ 105-113.79. City malt beverage and unfortified wine retail licenses.

(a) Each person holding any of the following ABC permits for an establishment located within a city must secure from the city a city license for that activity, with the annual fee for each license indicated next to the kind of license:

- (1) On-premises malt beverage . . . . . \$15.00;
- (2) Off-premises malt beverage . . . . . 5.00;
- (3) On-premises unfortified wine . . . . . 15.00;
- (4) Off-premises unfortified wine . . . . . 10.00.

(b) The annual license fee stated in subsection (a) is the fee for the first license issued to a person. The fee for each additional license issued to that person for the same year is ten percent (10%) of the base license fee, that increase to apply progressively for each additional license. (1939, c. 158, s. 510; 1943, c. 400, s. 6; 1945, c. 708, s. 6; 1971, c. 872, s. 2; 1981, c. 747, s. 12.)

**Effect of Amendments.**— The 1981 amendment, effective Jan. 1, 1982, rewrote this section in conformity with the revision of the laws governing alcoholic beverages contained in Chapter 18B. See the Editor's Note under § 105-113.68.

§ 105-113.80. Application for city malt beverage or wine license.

Each person seeking a city malt beverage or wine license must complete and submit an application on a form prescribed by the city. The information required to be provided in the application shall be the same as required by the Alcoholic Beverage Control Commission for the equivalent permit. (1939, c. 158, s. 511; 1945, c. 708, s. 6; 1947, c. 1098, s. 1; 1963, c. 426, s. 3; c. 1188; 1971, c. 872, s. 2; 1973, c. 758, s. 2; 1981, c. 747, s. 13.)

**Effect of Amendments.**— The 1981 amendment, effective Jan. 1, 1982, rewrote this section in conformity with the revision of the laws governing alcoholic beverages contained in Chapter 18B. See the Editor's Note under § 105-113.68.

§ 105-113.81. County malt beverage and unfortified wine licenses.

(a) Each person holding any of the following ABC permits must secure from the county in which the establishment is located a county license for that activity, with the annual fee for each license indicated next to the kind of license:

- (1) On-premises malt beverage . . . . . \$25.00;
- (2) Off-premises malt beverage . . . . . 5.00;
- (3) On-premises unfortified wine . . . . . 25.00;
- (4) Off-premises unfortified wine . . . . . 25.00.

(b) Each person seeking a county license under this section or under G.S. 105-113.85 must complete and submit an application on a form prescribed by the county. The information required to be provided in the application shall be the same as required by the Alcoholic Beverage Control Commission for the equivalent permit. If the establishment for which the license is sought is located within a city, the application to the county must show that the equiv-

alent city license has been issued. Issuance of the equivalent license by the city determines the right of the applicant to the county license upon compliance with the requirements of this Article. (1939, c. 158, s. 512; 1941, c. 339, s. 4; 1943, c. 400, s. 6; 1971, c. 872, s. 2; 1973, c. 476, s. 193; 1981, c. 747, s. 14.)

**Effect of Amendments.** — The 1981 amendment, effective Jan. 1, 1982, rewrote this section in conformity with the revision of the laws

governing alcoholic beverages contained in Chapter 18B. See the Editor's Note under § 105-113.68.

## § 105-113.82. Issuance of local licenses mandatory.

(a) Except as provided in subsection (b), issuance of the city and county licenses provided in G.S. 105-113.73(f), 105-113.79, 105-113.81, and 105-113.85 is mandatory when the applicant has complied with the requirements of Chapter 18B and this Article. The governing board of a city or county may, however, refuse to issue a license if it finds that the applicant in the preceding year has committed any act or permitted any activity that would be grounds for suspension or revocation of his permit under G.S. 18B-104. Before denying the license, the governing board must give the applicant an opportunity to appear at a hearing before the board and to offer evidence. The applicant must be given at least 10 days' notice of the hearing. At the conclusion of the hearing the board must make written findings of fact based on the evidence at the hearing. The applicant may appeal the denial of a license to the superior court for that county, if notice of appeal is given within 10 days of the denial.

(b) The governing bodies of the following counties and cities in their discretion may decline to issue on-premises unfortified wine licenses: the counties of Alamance, Alexander, Ashe, Avery, Chatham, Clay, Duplin, Granville, Greene, Haywood, Jackson, Macon, Madison, McDowell, Montgomery, Nash, Pender, Randolph, Robeson, Sampson, Transylvania, Vance, Watauga, Wilkes, Yadkin; any city within any of those counties; and the cities of Greensboro, Aulander, Pink Hill, and Zebulon. (1939, c. 158, s. 513; c. 405; 1945, c. 708, s. 6; cc. 934, 935, 1037; 1947, c. 932; 1971, c. 872, s. 2; 1975, c. 242, s. 1; 1981, c. 747, s. 15.)

**Effect of Amendments.** — The 1981 amendment, effective Jan. 1, 1982, rewrote this section in conformity with the revision of the laws

governing alcoholic beverages contained in Chapter 18B. See the Editor's Note under § 105-113.68.

## § 105-113.83. State unfortified wine retail licenses.

(a) Each person holding an on-premises unfortified wine permit must secure from the Secretary of Revenue a State on-premises unfortified wine license. The annual fee for this license is twenty-five dollars (\$25.00).

(b) Each person holding an off-premises unfortified wine permit must secure from the Secretary of Revenue a State off-premises unfortified wine license. The annual fee for this license is twenty dollars (\$20.00).

(c) The holder of a license under this section may purchase unfortified wine only from a wholesaler or importer maintaining a place of business in this State and licensed under this Article. (1939, c. 158, s. 516; 1941, c. 339, s. 4; 1971, c. 872, s. 2; 1973, c. 476, s. 193; 1975, c. 722, s. 2; 1979, c. 801, s. 28; 1981, c. 747, s. 16.)

**Effect of Amendments.** — The 1979 amendment, effective May 1, 1980, raised the tax for an "off-premises" license from five dollars to

twenty dollars in this section as it stood prior to the 1981 amendment.

The 1981 amendment, effective Jan. 1, 1982, rewrote this section in conformity with the revision of the laws governing alcoholic beverages

contained in Chapter 18B. See the Editor's Note under § 105-113.68.

### § 105-113.84. State malt beverage retail licenses.

(a) Each person holding either an on-premises or off-premises malt beverage permit must secure from the Secretary of Revenue a State retail malt beverage license. The annual fee for this license is twenty dollars (\$20.00).

(b) The holder of a license under this section may purchase malt beverages only from a wholesaler or importer maintaining a place of business in this State and licensed under this Article. (1939, c. 158, s. 515; 1967, c. 162, s. 2; 1971, c. 872, s. 2; 1973, c. 476, s. 193; 1975, c. 654, s. 3; 1979, c. 801, s. 29; 1981, c. 747, s. 17.)

**Effect of Amendments.** — The 1979 amendment, effective May 1, 1980, rewrote the fee provisions of this section as it stood prior to the 1981 amendment.

The 1981 amendment, effective Jan. 1, 1982,

rewrote this section in conformity with the revision of the laws governing alcoholic beverages contained in Chapter 18B. See the Editor's Note under § 105-113.68.

### § 105-113.85. Fortified wine retail licenses.

(a) Each person holding an on-premises fortified wine permit must secure from the Secretary of Revenue a State on-premises fortified wine license. The person also must secure from the county in which the establishment is located a county on-premises fortified wine license and, if the establishment is located within a city, must secure from the city a city on-premises fortified wine license. The annual fee for the license is twenty-five dollars (\$25.00) for the State license, twenty-five dollars (\$25.00) for the county license, and fifteen dollars (\$15.00) for the city license, except as provided in subsection (c).

(b) Each person holding an off-premises fortified wine permit must secure from the Secretary of Revenue a State off-premises fortified wine license. The person also must secure from the county in which the establishment is located a county off-premises fortified wine license and, if the establishment is located within a city, must secure from the city a city off-premises fortified wine license. The annual fee for the license is twenty dollars (\$20.00) for the State license, twenty-five dollars (\$25.00) for the county license, and ten dollars (\$10.00) for the city license, except as provided in subsection (c).

(c) A person receiving State and local licenses under this section who also receives for the same business for the same year unfortified wine licenses for the same type of sales is required to pay only the fee for the unfortified wine licenses and may not be charged additional fees for the fortified wine licenses.

(d) The holder of a license under this section may purchase fortified wine only from a wholesaler or importer maintaining a place of business in this State and licensed under this Article. (1941, c. 339, s. 6; 1945, c. 903, s. 11; 1963, c. 460, s. 2; 1971, c. 872, s. 2; 1973, c. 476, s. 193; 1979, c. 683, ss. 8, 15; 1981, c. 747, s. 18.)

**Effect of Amendments.** — The 1981 amendment, effective Jan. 1, 1982, rewrote this section in conformity with the revision of the laws

governing alcoholic beverages contained in Chapter 18B. See the Editor's Note under § 105-113.68.

**§ 105-113.86. Additional tax.**

(a) (1) In addition to the license taxes herein levied, a tax is hereby levied upon the sale of malt beverages of seven dollars and fifty cents (\$7.50) per barrel of 31 gallons, or the equivalent of such tax on barrels of not less than seven and three-fourths gallons, and on barrels, bottles, or other containers of less than seven and three-fourths gallons, a tax of twenty-six and six hundred eighty-eight one-thousandths cents (26.688¢) per gallon.

(2) In addition to all other taxes levied in this Chapter, there is hereby levied an additional tax or surtax upon the sale of malt beverages of seven dollars and fifty cents (\$7.50) per barrel of 31 gallons, or the equivalent of such tax on barrels of not less than seven and three-fourths gallons, and on barrels, bottles, or other containers of less than seven and three-fourths gallons, a tax of twenty-six and six hundred eighty-eight one-thousandths of a cent (26.688¢) per gallon.

(j) The Secretary of Revenue shall promulgate rules and regulations to relieve resident manufacturers, wholesale distributors, and importers from the liability of paying the excise tax levied and imposed on malt beverages that are intended to be sold and are thereafter sold to army, navy, air force and coast guard services of the United States and their organized personnel in this State; or which are intended to be shipped and are thereafter shipped out of this State by such resident manufacturers, wholesale distributors, or importers for resale outside of this State; or which are intended for use or consumption by or on ocean-going vessels that ply the high seas in interstate or foreign commerce in the transport of freight and/or passengers for hire exclusively, when delivered to an officer or agent of such vessel for use by or on such vessel. The Secretary of Revenue may require such resident manufacturers, wholesale distributors, and importers to submit with the monthly report required under subsection (c) invoices or equivalent proof of such sales on which the excise tax is not levied.

The Secretary of Revenue may require each manufacturer or bottler manufacturing beverages within or outside the State of North Carolina which are intended to be sold and are thereafter sold to the army, navy, air force, coast guard services or any other military establishment in North Carolina to identify such beverages by placing on the label, crown, can end, or kegs the phrase "For Military Use Only," any and all laws, regulations, and requirements to the contrary notwithstanding. Provided that all other malt beverages intended for sale in North Carolina shall bear no special identification other than proprietary crowns, lids, or stamps.

(l) Any person who shall fail, neglect, refuse to comply with or violate any provisions of this section, for which no specific penalty is provided, or who shall refuse to permit the Secretary of Revenue or his agents to examine his books, papers, invoices, and other records or his store of alcoholic beverages in and upon any premises where the same are manufactured, bottled, stored, sold, offered for sale, or held for sale, shall be guilty of a misdemeanor.

(p) From the taxes collected annually under subdivision (a)(1) an amount equivalent to forty-seven and one-half percent (47½%) thereof, and from the taxes collected annually under subsection (o) an amount equivalent to sixty-two percent (62%) thereof, and from the taxes collected annually under G.S. 105-113.95 an amount equivalent to twenty-two percent (22%) thereof shall be allocated and distributed, upon the basis herein provided, to counties and municipalities wherein such beverages may be licensed to be sold at retail under the provisions of this Article. The amount distributable to each county and municipality entitled to the same under the provisions of this subsection shall be determined upon the basis of population therein according to the most recent annual estimates of population as certified to the Secretary of Revenue by the State Budget Officer. Where such beverages may be licensed to be sold

at retail in both county and municipality, allocation of such amounts shall be made to both the county and the municipality on the basis of population. In any county in which ABC stores have been established by petition, any revenue distributed under this subsection shall be distributed as though the whole county had approved the retail sale of those beverages. Where such beverages may be licensed to be sold at retail in a municipality in a county wherein the sale of such beverages is otherwise prohibited, allocation of such amounts shall be made to the municipality on the basis of population; provided, however, that where the sale of such beverages is prohibited within defined areas within a county or municipality, the amounts otherwise distributable to such county or municipality on the basis of population shall be reduced in the same ratio that such areas bear to the total area of the county or municipality, and the amount of such reduction shall be retained by the State: Provided, further, that if said area within a county is a municipality for which the population is shown by the most recent annual estimate of population as certified to the Secretary of Revenue by the State Budget Officer, reduction of such amounts shall be based on such population rather than on area. The Secretary of Revenue shall determine the amounts distributable to each county and municipality, for the period July 1, 1947, to September 30, 1947, inclusive, and shall distribute such amounts within 60 days thereafter; and the Secretary of Revenue annually thereafter shall determine the amounts distributable to each county and municipality for each 12-month period ending September 30 and shall distribute such amounts within 60 days thereafter.

The taxes levied in this section are in addition to the taxes levied in Schedule E of the Revenue Act.

(q) to (u) Repealed by Session Laws 1981, c. 747, s. 20, effective January 1, 1982.

(1939, c. 158, s. 517; c. 370, s. 1; 1941, c. 50, s. 7; c. 339, s. 4; 1943, c. 400, s. 6; cc. 564, 565; 1945, c. 708, s. 6; 1947, c. 1084, ss. 7-9; 1951, c. 1162, s. 1; 1955, c. 1313, s. 6; c. 1370; 1957, c. 1340, s. 11; 1963, c. 460, s. 3; c. 992, s. 2; 1967, c. 162, s. 3; c. 759, ss. 1-20; 1969, c. 1075, s. 1; cc. 1239, 1268; 1971, c. 872, s. 2; 1973, c. 476, s. 193; c. 500, s. 2; c. 511, ss. 3, 5; c. 537, s. 2; 1975, c. 53, s. 1; c. 275, s. 3; 1977, c. 657, s. 3; c. 1114, s. 5; 1979, c. 18, s. 1; c. 801, s. 30; 1979, 2nd Sess., c. 1137, s. 51; 1981, c. 669; c. 747, ss. 19, 20; 1983, c. 650; c. 713, ss. 107, 108.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendments, it is not set out.

**Cross References.** — As to withholding of tax owed under this section to county failing to pay full share of public assistance costs, see § 108A-93.

**Effect of Amendments.** — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "State Budget Officer" for "Secretary of the North Carolina Department of Administration" at the end of the second sentence and for "Secretary of Administration" in the proviso to the present fifth sentence in subsection (p).

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

The first 1981 amendment, effective Jan. 1, 1982, added the second sentence of the first paragraph of subsection (j), added "The Secretary of Revenue may require" at the beginning of the first sentence of the second paragraph of subsection (j), and substituted "to identify" for "shall identify" near the middle of the first sen-

tence of the second paragraph of subsection (j).

The second 1981 amendment, effective Jan. 1, 1982, substituted "alcoholic beverages" for "intoxicating liquors" in subsection (l) and deleted subsections (q) through (u), which contained obsolete provisions relating to the years 1967 and 1968. See the Editor's Note under § 105-113.68.

The first 1983 amendment, effective July 1, 1983, inserted the present fourth sentence of subsection (p).

The second 1983 amendment, effective Aug. 1, 1983, deleted the second sentence of subdivision (a)(2), which read "Notwithstanding any provisions of subsection (p) of this section, none of the revenues collected pursuant to the tax imposed by this subsection shall be allocated or distributed to any county or municipality, but all of said revenue derived from the increase in tax rates imposed by this subsection shall be paid into the general fund of the State," and, in subsection (p), substituted "subdivision (a)(1)" for "subsection (a)" in the first sentence.

**§ 105-113.88. By whom excise taxes payable.**

The excise tax levied in G.S. 105-113.86 upon the sale of malt beverages shall be paid to the Secretary of Revenue by the wholesale distributor or importer of such beverages, and the excise tax levied in G.S. 105-113.86 or 105-113.95 upon the sale of fortified and unfortified wine shall be paid to the Secretary of Revenue by the wholesale distributor or importer of such beverages; provided that the excise tax levied in G.S. 105-113.86 shall be paid and collected on the same beverages only once. The Secretary of Revenue shall require each wholesale distributor or importer to furnish bond in an indemnity company licensed to do business under the insurance laws of this State in such sums as the Secretary of Revenue shall find adequate to cover the tax liability of each such wholesale distributor or importer, proportioned to the volume of business of each such wholesale distributor or importer, but in no event to be less than five thousand dollars (\$5,000) or more than fifty thousand dollars (\$50,000), or to deposit federal, State, county, or municipal bonds in required amounts; such county and municipal bonds to be approved by the Secretary of Revenue. The Secretary of Revenue may grant such extension of time for compliance with this condition as may be found reasonable. For the purposes of this Article, where the term "wholesale distributor or importer" is used with reference to wholesale distributors or importers of fortified and unfortified wine, such term shall include resident manufacturers of fortified and unfortified wine who make retail sales thereof. (1939, c. 158, s. 518; 1941, c. 339, s. 4; 1967, c. 759, s. 21; 1971, c. 872, s. 2; 1973, c. 476, s. 193; 1979, c. 502, s. 3; 1981, c. 747, s. 21.)

**Effect of Amendments.** — The 1981 amendment, effective Jan. 1, 1982, substituted "five thousand dollars (\$5,000)" for "one thousand dollars (\$1,000)" in the second sentence and

deleted, at the end of the last sentence, "pursuant to G.S. 18A-36.1, and G.S. 105-113.70(b) or 105-113.72." See the Editor's Note under § 105-113.68.

**§ 105-113.89. State nonresident vendor license.**

(a) Each person holding a nonresident malt beverage or wine vendor permit must secure from the Secretary of Revenue a State nonresident vendor license. The annual fee for this license is one hundred fifty dollars (\$150.00), unless the vendor sells less than 500 cases of alcoholic beverages in North Carolina during the year, in which case the annual fee is twenty-five dollars (\$25.00). A vendor who pays the lower annual fee must pay the one hundred twenty-five dollar (\$125.00) difference between that and the higher fee once his sales reach 500 cases.

(b) The holder of a nonresident vendor license may sell, deliver and ship his product in this State only to wholesalers, importers, and bottlers maintaining places of business in this State and licensed under this Article. The holder of the nonresident vendor license shall include the number of his license on each invoice for alcoholic beverage sold, delivered or shipped to wholesalers, importers, or bottlers in this State.

(c) The Secretary of Revenue may require the holder of a license under this section to execute and deposit with the Secretary a bond in a sum not to exceed two thousand dollars (\$2,000) conditioned upon the faithful compliance with the provisions of this Article, and particularly upon his making no sales of alcoholic beverages to any person in this State other than licensed wholesalers, importers, and bottlers. The Secretary may waive this bond entirely for a vendor who sells less than 500 cases of alcoholic beverages in North Carolina during the year. (1939, c. 158, s. 518<sup>1/2</sup>; 1945, c. 903, s. 9; 1971, c. 872, s. 2; 1973, c. 476, s. 193; 1981, c. 747, s. 22.)

**Effect of Amendments.** — The 1981 amendment, effective Jan. 1, 1982, rewrote this section in conformity with the revision of the laws governing alcoholic beverages contained in Chapter 18B. See the Editor's Note under § 105-113.68.

### § 105-113.90. Resident wholesalers shall not purchase beverages for resale from unlicensed nonresidents.

It shall be unlawful for any resident wholesaler, importer or bottler to purchase any malt beverages, or unfortified wine, or fortified wine for resale within this State from any nonresident who has not procured the license required in the preceding section [G.S. 105-113.89]. (1945, c. 708, s. 6; 1971, c. 872, s. 2; 1981, c. 747, s. 23.)

**Effect of Amendments.** — The 1981 amendment, effective Jan. 1, 1982, substituted "wholesaler, importer," for "wholesale distributor." See the Editor's Note under § 105-113.68.

### § 105-113.91. State malt beverage and wine importers licenses.

Each person holding a malt beverages or wine importer permit must secure from the Secretary of Revenue a State importer's license. The annual fee for this license is one hundred fifty dollars (\$150.00). (1957, c. 1244; 1967, c. 759, s. 22; 1971, c. 872, s. 2; 1973, c. 476, s. 193; 1981, c. 747, s. 24.)

**Effect of Amendments.** — The 1981 amendment, effective Jan. 1, 1982, rewrote this section in conformity with the revision of the laws governing alcoholic beverages contained in Chapter 18B. See the Editor's Note under § 105-113.68.

### § 105-113.92. Repealed by Session Laws 1981, c. 747, s. 25, effective January 1, 1982.

### § 105-113.93. Tax on spirituous liquors.

In lieu of the taxes levied in the "North Carolina Sales and Use Tax Act" on the sale of spirituous liquors, there is hereby levied a tax of twenty-two and one-half percent ( $22\frac{1}{2}\%$ ) on the retail price of spirituous liquors and every kind that are sold in this State, including liquors sold in county or municipal A.B.C. stores, but not including spirituous liquors sold in mixed beverages as defined in G.S. 18B-101(10).

The taxes levied in this section shall be payable monthly, at the same time and in the same manner as the taxes levied in the "North Carolina Sales and Use Tax Act," and the liability for such tax shall be subject to all the rules, regulations and penalties provided in said act, and in other sections of Subchapter I, Chapter 105 of the General Statutes, for the payment or collection of taxes. (1939, c. 158, s. 519 $\frac{1}{2}$ ; 1941, c. 339, s. 4; 1951, c. 1162, s. 2; 1955, c. 1313, s. 6; 1961, c. 826, s. 1; 1971, c. 872, s. 2; 1973, c. 1288, s. 2; 1975, c. 53, s. 2; 1979, c. 286, s. 6; 1981, c. 747, s. 26.)

**Effect of Amendments.** — The 1981 amendment, effective Jan. 1, 1982, substituted "G.S. 18B-101(10)" for "G.S. 18A-2(6)" at the end of the first paragraph. See the Editor's Note under § 105-113.68.

**Legal Periodicals.** — For article, "A History of Liquor-by-the-Drink Legislation in North Carolina," see 1 Campbell L. Rev. 61 (1979).

## § 105-113.96. Refund for tax paid on sacramental wine.

(a) Any person who purchases fortified or unfortified wine for the purposes stated in G.S. 18B-103(8) may secure a refund from the Secretary of Revenue for the amount of the excise tax levied on that wine under this Article. The Secretary of Revenue shall make refunds annually.

(b) An applicant for a refund authorized by this section shall file a written request with the Secretary for the refund due for the prior calendar year on or before April 15. The Secretary may by rule prescribe what information and records must be supplied for the applicant to qualify for the refund.

(c) An application for a refund filed later than required in subsection (b) shall be accepted by the Secretary, but shall be subject to the following late penalties: an application filed by May 15, twenty-five percent (25%); an application filed after May 15 but no later than October 15, fifty percent (50%). No refund may be made if the application is filed after October 15. (1945, c. 708, s. 6; 1971, c. 872, s. 2; 1981, c. 747, s. 27; 1983, c. 792.)

**Effect of Amendments.** — The 1981 amendment, effective Jan. 1, 1982, inserted "and fortified" and substituted "does not apply to wine received for use for sacramental purposes under G.S. 18B-103(8)" for "shall not apply to sacramental wines received by ordained ministers of the gospel under the provisions of G.S. 18A-4." See the Editor's Note under § 105-113.68.

The 1983 amendment, effective Jan. 1, 1984, and applicable to taxes paid on and after that date, rewrote this section, which formerly read "The tax levied in this Article upon the sale of unfortified and fortified wine does not apply to wine received for use for sacramental purposes under G.S. 18B-103(8)." The act also amended the section catchline.

## § 105-113.98. Books, records, reports.

Every person licensed under any of the provisions of this Article shall keep accurate records of purchase and sale of all beverages taxable under this Article, such records to be kept separate from all purchases and sales of merchandise not taxable under this Article, including a separate file and record of all invoices. The Secretary of Revenue or any authorized agent shall at any time during business hours have access to such records. The Secretary of Revenue may also require regular or special reports to be made by every such person at such times and in such form as the Secretary may require. (1939, c. 158, s. 520; 1945, c. 903, s. 1; 1971, c. 872, s. 2; 1973, c. 476, s. 193; 1981, c. 747, s. 28.)

**Effect of Amendments.** — The 1981 amendment, effective Jan. 1, 1982, inserted "not" following "merchandise" near the end of the

first sentence. See the Editor's Note under § 105-113.68.

## § 105-113.99. License shall be posted; not transferable.

Each form of license required by this Article shall be kept posted in a conspicuous place at each place where the business taxable under this Article is carried on, and a separate license shall be required for each place of business. A license may not be transferred from one person to another or from one location to another. (1939, c. 158, s. 522; 1971, c. 872, s. 2; 1981, c. 747, s. 29.)

**Effect of Amendments.** — The 1981 amendment, effective Jan. 1, 1982, rewrote the second sentence, which formerly read: "Licenses shall not be transferred to any other person, nor to

any other location, except as expressly provided in this Article." See the Editor's Note under § 105-113.68.

## § 105-113.102. Rules and regulations.

The Secretary of Revenue shall, from time to time, initiate and prepare such regulations, not inconsistent with this Chapter and Chapter 18B or other provisions of law, as may be useful and necessary to implement the provisions of this Article, such regulations to become effective when approved by the Tax Review Board. All regulations and amendments thereto shall be published and made available by the Secretary of Revenue.

The Secretary of Revenue may, from time to time, make and prescribe such administrative rules, not inconsistent with law and the regulations approved by the Tax Review Board, as may be useful for the administration of his Department and the discharge of his responsibilities.

References to rules and regulations of the Secretary of Revenue in this Chapter and in any subsequent amendments or additions thereto (unless expressly provided to the contrary therein) shall be construed to mean those rules and regulations promulgated under the provisions of this section. (1955, c. 1350, s. 3; 1971, c. 872, s. 2; 1973, c. 476, s. 193; 1981, c. 747, s. 30.)

**Effect of Amendments.** — The 1981 amendment, effective Jan. 1, 1982, substituted "Chapter 18B" for "Chapter 18A" in the first sentence

of the first paragraph. See the Editor's Note under § 105-113.68.

## § 105-113.103. Revocation of license upon revocation of permit.

Whenever the Alcoholic Beverage Control Commission shall certify to the Secretary of Revenue that any permit issued by said Commission has been canceled or revoked, the Secretary of Revenue shall thereupon immediately revoke any license that has been issued under this Article to the person whose permit has been revoked by said Commission; such revocation by the Secretary shall not entitle the person whose license was revoked to any refund of taxes or license fees paid for or under said license. (1945, c. 903, s. 12; 1971, c. 872, s. 2; 1981, c. 747, s. 31.)

**Effect of Amendments.** — The 1981 amendment, effective Jan. 1, 1982, substituted "Alcoholic Beverage Control Commission" for "State Board of Alcoholic Control" near the beginning

of the section and substituted "Commission" for "Board" in two places. See the Editor's Note under § 105-113.68.

## § 105-113.104. Violation made misdemeanor; revocation of permits; forfeiture of license.

Except as otherwise expressly provided, whosoever violates any of the provisions of this Article, or any of the rules and regulations promulgated pursuant thereto, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine or by imprisonment, or by both fine and imprisonment, in the discretion of the court. The Secretary of Revenue may suspend or revoke any State license issued under this Article for up to three years for a violation of any provision of this Article or of Chapter 18B. The Secretary also may suspend or revoke any State license for up to three years upon notification that the person holding the license has been convicted of a violation of this Article or Chapter 18B. (1939, c. 158, s. 525; 1971, c. 872, s. 2; 1981, c. 747, s. 32.)

**Effect of Amendments.** — The 1981 amendment, effective Jan. 1, 1982, rewrote the second

sentence, which formerly provided for revocation of a permit and license by the court upon

conviction of violation of this Article, and the third sentence, which formerly provided for forfeiture of a license upon conviction of sale of

unauthorized liquors. See the Editor's Note under § 105-113.68.

## ARTICLE 3.

### *Schedule C. Franchise Tax.*

#### § 105-114. Nature of taxes; definitions.

The taxes levied in this Article upon persons and partnerships are for the privilege of engaging in business or doing the act named. The taxes levied in this Article upon corporations are privilege or excise taxes levied upon:

- (1) Corporations organized under the laws of this State for the existence of the corporate rights and privileges granted by their charters, and the enjoyment, under the protection of the laws of this State, of the powers, rights, privileges and immunities derived from the State by the form of such existence; and
- (2) Corporations not organized under the laws of this State for doing business in this State and for the benefit and protection which such corporations receive from the government and laws of this State in doing business in this State.

As used in this Article, the term "Code" means the Internal Revenue Code as enacted as of April 1, 1983, and includes any provisions enacted as of that date which become effective after that date.

The term "corporation" as used in this Article shall, unless the context clearly requires another interpretation, mean and include not only corporations but also associations or joint-stock companies and every other form of organization for pecuniary gain, having capital stock represented by shares, whether with or without par value, and having privileges not possessed by individuals or partnerships; and whether organized under, or without, statutory authority. The term "corporation" as used in this Article shall also mean and include any electric membership corporation organized under Chapter 117, and any electric membership corporation, whether or not organized under the laws of this State, doing business within the State.

When the term "doing business" is used in this Article, it shall mean and include each and every act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organizations whether the form of existence be corporate, associate, joint-stock company or common-law trust.

If the corporation is organized under the laws of this State, the payment of the taxes levied by this Article shall be a condition precedent to the right to continue in such form of organization; and if the corporation is not organized under the laws of this State, payment of said taxes shall be a condition precedent to the right to continue to engage in doing business in this State. The taxes levied in this Article or schedule shall be for the fiscal year of the State in which said taxes become due; except, that the taxes levied in G.S. 105-122 and 105-123 shall be for the income year of the corporation in which such taxes become due. For purposes of this Article, the words "income year" shall mean an income year as defined in G.S. 105-130.2(5). (1939, c. 158, s. 201; 1943, c. 400, s. 3; 1945, c. 708, s. 3; 1965, c. 287, s. 16; 1967, c. 286; 1969, c. 541, s. 6; 1973, c. 1287, s. 3; 1983, c. 713, s. 66.)

**Effect of Amendments.** — The 1983 amendment, effective for taxable years beginning on

or after Jan. 1, 1983, inserted the present second paragraph.

**§ 105-116. Franchise or privilege tax on electric light, power, gas, water, sewerage, and other similar public service companies not otherwise taxed.**

**CASE NOTES**

**Applied** in *State ex rel. Utilities Comm'n v. Public Staff — North Carolina Util. Comm'n*, 58 N.C. App. 480, 293 S.E.2d 880 (1982).

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

(b) Every such 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 shall be allowed other than for definite and accrued legal liabilities, except as herein provided; taxes accrued, dividends declared and reserves for depreciation of tangible assets as permitted for income tax purposes shall be treated as deductible liabilities. There shall also be treated as a deductible liability 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 streams, lakes, or rivers, upon condition that the corporation claiming such deductible liability shall furnish to the Secretary a certificate from the Department of Natural Resources and Community Development certifying that said Environmental Management Commission 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 such plant or equipment complies with the requirements of said Environmental Management Commission 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 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. 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 Human Resources certifying that the Department of Human 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 Human Resources, and the recycling or resource recovering is the primary purpose of the facility or equipment. 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 con-

structed or installed on or after January 1, 1955. Treasury stock shall not be considered in computing the capital stock, surplus and undivided profits as the basis for franchise tax, but shall be excluded proportionately from said capital stock, surplus and undivided profits as the case may be upon the basis and to the extent of the cost thereof. 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 or endorsed or guaranteed by 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. The term "indebtedness" as used in this paragraph shall include all loans, credits, goods, supplies or other capital of whatsoever nature furnished by a parent, subsidiary, or affiliated corporation. The terms "parent," "subsidiary," and "affiliate" as used in this paragraph shall have the meaning specified in G.S. 105-130.6. 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 paragraph to include in its tax base the amount of debt by reason of being a parent, subsidiary, or affiliate of the said creditor corporation, may deduct from the debt thus included a proportionate part determined on the basis of the ratio of such borrowed capital as above specified of the creditor corporation to the total assets of the said creditor corporation. Further, in case the creditor corporation as above specified is also taxable under the provisions of this section, such creditor corporation shall be 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 such debt has been included in the tax base of said parent, subsidiary or affiliated debtor corporation reporting for taxation under the provisions of this section.

(h) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1211, s. 5. (1939, c. 158, s. 210; 1941, c. 50, s. 4; 1943, c. 400, s. 3; 1945, c. 708, s. 3; 1947, c. 501, s. 3; 1951, c. 643, s. 3; 1953, c. 1302, s. 3; 1955, c. 1100, s. 2½; c. 1350, s. 17; 1957, c. 1340, s. 3; 1959, c. 1259, s. 3; 1963, c. 1169, s. 1; 1967, c. 286; c. 892, ss. 10, 11; c. 1110, s. 2; 1973, c. 476, s. 193; c. 695, s. 17; c. 1262, s. 23; c. 1287, s. 3; 1975, c. 764, s. 2; 1977, c. 771, s. 4; 1981, c. 704, s. 18; c. 855, s. 3; 1981 (Reg. Sess., 1982), c. 1211, s. 5.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendments, it is not set out.

**Effect of Amendments.** — The first 1981 amendment inserted "or for the purpose of reducing the volume of hazardous waste generated" near the beginning of the third sentence of subsection (b).

Session Laws 1981, c. 704, ss. 1 and 2, provide:

"Section 1. Short title. This act may be referred to as the Waste Management Act of 1981.

"Sec. 2. Purpose. The purpose of this act is to provide for a comprehensive system for

management of hazardous and low-level radioactive waste in North Carolina as reflected in the 1981 Report of the Governor's Task Force on Waste Management."

Session Laws 1981, c. 704, s. 26, provides that the act shall be liberally construed to carry out the policies set forth in the act.

Session Laws 1981, c. 704, s. 27, contains a severability clause.

The second 1981 amendment added the last two sentences of the first paragraph of subsection (b).

The 1981 (Reg. Sess., 1982) amendment deleted subsection (h), relating to taxes levied and returns due in the year 1968.

**§ 105-125. Corporations not mentioned.**

None of the taxes levied in this Article shall apply to charitable, religious, fraternal, benevolent, scientific or educational corporations, not operating for a profit; nor to insurance companies; nor to mutual ditch or irrigation associations, mutual or cooperative telephone associations or companies, mutual canning associations, cooperative breeding associations, or like organizations or associations of a purely local character deriving receipts solely from assessments, dues, or fees collected from members for the sole purpose of meeting expenses; nor to cooperative marketing associations operating solely for the purpose of marketing the products of members or other farmers, which operations may include activities which are directly related to such marketing activities, and turning back to them the proceeds of sales, less the necessary operating expenses of the association, including interest and dividends on capital stock on the basis of the quantity of product furnished by them; nor to production credit associations organized under the act of Congress known as the Farm Credit Act of 1933; nor to business leagues, boards of trade, clubs organized and operated exclusively for pleasure, recreation and other nonprofitable purposes, civic leagues operated exclusively for the promotion of social welfare, or chambers of commerce and merchants' associations not organized for profit, and no part of the net earnings of which inures to the benefit of any private stockholder, individual or other corporations; nor to corporations or organizations, such as condominium associations, homeowner associations or cooperative housing corporations not organized for profit, the membership of which is limited to the owners or occupants of residential units in the condominium, housing development, or cooperative housing corporation, and operated exclusively for the management, operation, preservation, maintenance or landscaping of the common areas and facilities owned by such corporation or organization or its members situated contiguous to such houses, apartments or other dwellings or for the management, operation, preservation, maintenance and repair of such houses, apartments or other dwellings owned by the corporation or organization or its members, but only if no part of the net earnings of such corporation or organization inures (other than through the performance of related services for the members of such corporation or organization) to the benefit of any member of such corporation or organization or other person. In addition, absent a specific provision to the contrary, the taxes levied in this Article do not apply to any organization that is exempt from federal income tax under the Internal Revenue Code referred to G.S. 105-130.3.

Provided, that each such corporation must, upon request by the Secretary of Revenue, establish in writing its claim for exemption from said provisions. The provisions of G.S. 105-122 and 105-123 shall apply to electric light, power, gas, water, Pullman, sleeping and dining car, express, telegraph, telephone, motor bus, and truck corporations to the extent and only to the extent that the franchise taxes levied in G.S. 105-122 and 105-123 exceed the franchise taxes levied in other sections of this Article or schedule; except that the provisions of G.S. 105-122 and 105-123 shall not apply to businesses taxed under G.S. 105-120.1. The exemptions in this section shall apply only to those corporations specially mentioned, and no other.

Provided, that any corporation doing business in North Carolina which in the opinion of the Secretary of Revenue of North Carolina, qualifies as a "regulated investment company" under section 851 of the Code or as a "real estate investment trust" under the provisions of section 856 of the Code and which files with the North Carolina Department of Revenue its election to be treated as a "regulated investment company" or as a "real estate investment trust," shall in determining its basis for franchise tax be allowed to deduct the aggregate market value of its investments in the stocks, bonds, debentures, or other securities or evidences of debt of other corporations, partnerships, indi-

viduals, municipalities, governmental agencies or governments. (1939, c. 158, s. 213; 1951, c. 937, s. 3; 1955, c. 1313, s. 1; 1957, c. 1340, s. 3; 1963, c. 601, s. 3; c. 1169, s. 1; 1967, c. 1110, s. 2; 1971, c. 820, s. 3; c. 833, s. 1; 1973, c. 476, s. 193; c. 1053, s. 2; c. 1287, s. 3; 1975, c. 591, s. 1; 1983, c. 28, s. 2; c. 713, s. 67.)

**Effect of Amendments.** — The first 1983 amendment, effective for taxable years beginning on or after Jan. 1, 1983, added the last sentence of the first paragraph.

The second 1983 amendment, effective for taxable years beginning on or after Jan. 1,

1983, substituted "section 851 of the Code" for "the provisions of United States Code Annotated Title 26, section 851" and substituted "section 856 of the Code" for "United States Code Annotated Title 26, section 856" in the third paragraph.

## ARTICLE 4.

### *Schedule D. Income Tax.*

#### DIVISION I. CORPORATION INCOME TAX.

### § 105-130.2. Definitions.

For the purpose of this Division, and unless otherwise required by the context:

- (1) "Code" means the Internal Revenue Code as enacted as of April 1, 1983, and includes any provisions enacted as of that date which become effective after that date.
- (1a) The word "corporation" includes joint-stock companies or associations and insurance companies.
- (3) The words "fiscal year" mean an income year, ending on the last day of any month other than December. A corporation which pursuant to the provisions of the Code has elected to compute its income tax liability to the United States on the basis of an annual period varying from 52 to 53 weeks shall compute its taxable income for the purposes of this division on the basis of the same period used by such corporation in accordance with the Code in computing its tax liability to the United States for such income year.

(1939, c. 158, s. 302; 1941, c. 50, s. 5; 1955, c. 1331, s. 2; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; 1983, c. 713, ss. 68, 82.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amendment, effective for taxable years beginning on or after Jan. 1, 1983, inserted subdivision (1),

defining "Code," redesignated former subdivision (1), defining "corporation," as subdivision (1a), and substituted "Code" for "Federal Internal Revenue Code of 1954" in two places in subdivision (3).

### § 105-130.3. Corporations.

Every corporation doing business in this State shall pay annually an income tax equivalent to six percent (6%) of its net income or the portion thereof allocated and apportioned to this State. The net income or net loss of such corporation shall be the same as "taxable income" as defined in the Code subject to the adjustments provided in G.S. 105-130.5.

If the entire business of the corporation is done within this State or if the corporation is not taxable in another state within the meaning of subsection (b)

of G.S. 105-130.4, the tax shall be measured by the entire net income of the corporation for the income year.

If the business of the corporation is taxable both within and without this State, its entire net income or net loss shall be allocated and apportioned in accordance with the provisions of G.S. 105-130.4. (1939, c. 158, s. 311; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 752, s. 3; 1953, c. 1302, s. 4; 1955, c. 1350, s. 18; 1957, c. 1340, s. 4; 1959, c. 1259, s. 4; 1963, c. 1169, s. 2; c. 1186; 1967, c. 1110, s. 3; 1973, c. 1287, s. 4; 1975, c. 275, s. 4; 1977, c. 657, s. 4; 1979, c. 179, s. 2; 1981, c. 15; 1983, c. 713, s. 69.)

**Effect of Amendments.** — The 1981 amendment, effective for taxable years beginning on and after Jan. 1, 1981, substituted "January 1, 1981" for "January 1, 1979" near the end of the second sentence of the first paragraph.

The 1983 amendment, effective for taxable years beginning on or after Jan. 1, 1983, substituted "Code" for "Internal Revenue Code in

effect on January 1, 1981" in the second sentence of the first paragraph.

**Legal Periodicals.** — For article, "Foreign Corporations in North Carolina: The 'Doing Business' Standards of Qualification, Taxation, and Jurisdiction," see 16 Wake Forest L. Rev. 711 (1980).

## § 105-130.4. Allocation and apportionment of income for corporations.

(b) A corporation having income from business activity which is taxable both within and without this State shall allocate and apportion its net income or net loss as provided in this section. For purposes of allocation and apportionment, a corporation is taxable in another state if (i) the corporation's business activity in that state subjects it to a net income tax or a tax measured by net income, or (ii) that state has jurisdiction based on the corporation's business activity in that state to subject the corporation to a tax measured by net income regardless whether that state exercises its jurisdiction. For purposes of this section, "business activity" includes any activity by a corporation that would establish a taxable nexus pursuant to 15 United States Code section 381.

(1939, c. 158, s. 311; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 752, s. 3; 1953, c. 1302, s. 4; 1955, c. 1350, s. 18; 1957, c. 1340, s. 4; 1959, c. 1259, s. 4; 1963, c. 1169, s. 2; c. 1186; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; c. 1287, s. 4; 1981 (Reg. Sess., 1982), c. 1212.)

**Only Part of Section Set Out.** — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

Reg. Sess., 1982) amendment rewrote the second sentence and added the third sentence in subsection (b).

**Effect of Amendments.** — The 1981 (Reg.

## § 105-130.5. Adjustments to federal taxable income in determining State net income.

(a) The following additions to federal taxable income shall be made in determining State net income:

- (1) Taxes based on or measured by net income by whatever name called and excess profits taxes;
- (2) Interest paid in connection with income exempt from taxation under this Division;
- (3) The contributions deduction allowed by the Code;
- (4) Interest income earned on bonds and other obligations of other states or their political subdivisions, less allowable amortization on any bond acquired on or after January 1, 1963;

- (5) The amount by which gains have been offset by the capital loss carryover allowed under the Code. All gains recognized on the sale or other disposition of assets must be included in determining State net income or loss in the year of disposition;
  - (6) The net operating loss deduction allowed by the Code; and
  - (7) Special deductions allowable under sections 241 to 247, inclusive, of the Code.
  - (8) Depreciation or amortization claimed under the Code in connection with facilities for the handicapped as such facilities are defined in subdivision (10) of subsection (b) of this section, provided the cost of such facilities has been previously deducted for State income tax purposes.
  - (9) Payments to or charges by a parent, subsidiary or affiliated corporation in excess of fair compensation in all intercompany transactions of any kind whatsoever pursuant to the Revenue Laws of this State.
  - (10) The amount of property taxes allowed under Division IV of this Article during the taxable year as a credit against the taxpayer's income tax.
  - (11) The amount by which the percentage depletion allowance allowed by sections 613 and 613A of the Code for mines, oil and gas wells, and other natural deposits exceeds the cost depletion allowance for these items under the Code, except as otherwise provided herein. This subdivision does not apply to depletion deductions for clay, gravel, phosphate rock, lime, shells, stone, sand, feldspar, gemstones, mica, talc, lithium compounds, tungsten, coal, peat, olivine, pyrophyllite, and other solid minerals or rare earths extracted from the soil or waters of this State. Corporations required to apportion income to North Carolina shall first add to federal taxable income the amount of all percentage depletion in excess of cost depletion that was subtracted from the corporation's gross income in computing its federal income taxes and shall then subtract from the taxable income apportioned to North Carolina the amount by which the percentage depletion allowance allowed by sections 613 and 613A of the Code for solid minerals or rare earths extracted from the soil or waters of this State exceeds the cost depletion allowance for these items.
- (b) The following deductions from federal taxable income shall be made in determining State net income:
- (1) Interest upon the obligations of the United States or its possessions, to the extent included in federal taxable income: Provided, interest upon the obligations of the United States shall not be an allowable deduction unless interest upon obligations of the State of North Carolina or any of its political subdivisions is exempt from income taxes imposed by the United States;
  - (2) Payments received from a parent, subsidiary or affiliated corporation in excess of fair compensation in intercompany transactions which in the determination of the net income or net loss of such corporation were not allowed as a deduction under the Revenue Laws of this State;
  - (3) The deductible portion of dividends from stock issued by any corporation as provided under G.S. 105-130.7;
  - (4) Losses in the nature of net economic losses sustained by the corporation in any or all of the five preceding years pursuant to the provisions of G.S. 105-130.8. Provided, a corporation required to allocate and apportion its net income under the provisions of G.S. 105-130.4 shall deduct its allocable net economic loss only from total income allocable to this State pursuant to the provisions of G.S. 105-130.8;
  - (5) Contributions or gifts made by any corporation within the income year to the extent provided under G.S. 105-130.9;

- (6) Amortization in excess of depreciation allowed under the Code on the cost of any sewage or waste treatment plant, and facilities or equipment used for purposes of recycling or resource recovery of or from solid waste, or for purposes of reducing the volume of hazardous waste generated as provided in G.S. 105-130.10.
- (7) Depreciation of emergency facilities acquired prior to January 1, 1955. Any corporation shall be permitted to depreciate any emergency facility, as such is defined in section 168 of the Code, over its useful life, provided such facility was acquired prior to January 1, 1955, and no amortization has been claimed on such facility for State income tax purposes; and
- (8) The amount of losses realized on the sale or other disposition of assets not allowed under section 1211 (a) of the Code. All losses recognized on the sale or other disposition of assets must be included in determining State net income or loss in the year of disposition.
- (9) With respect to a shareholder of a regulated investment company, the portion of undistributed capital gains of such regulated investment company included in such shareholder's federal taxable income and on which the federal tax paid by the regulated investment company is allowed as a credit or refund to the shareholder under section 852 of the Code.
- (10) The entire amount of the cost of renovation to an existing building or facility owned by a taxpayer in order to permit physically handicapped persons to enter and leave such building or facility or to have effective use of the accommodations and facilities therein. The deduction shall be taken in the year the renovation is completed, and shall be made in lieu of any depreciation or amortization of the cost of such renovation. "Building or facility" shall mean only a building or facility, or such part thereof as is intended to be used, and is actually used, by the general public. If such building or facility is owned by more than one owner, the cost of renovation shall be apportioned among or between the owners as their interests may appear. The minimum renovation required in order to entitle a taxpayer to claim the deduction herein provided shall include one or more of the following: the provision of ground level or ramped entrances, free movement between public use areas, and washroom and toilet facilities accessible to and usable by physically handicapped persons.
- (11) The amount by which a deduction for an ordinary and necessary business expense was required to be reduced under the Code for federal tax purposes or the amount of such a deduction that was not allowed under the Code because the corporation claimed a federal tax credit against its federal income tax liability for the income year in lieu of a deduction.
- (12) Reasonable expenses, in excess of deductions allowed under the Code, paid for reforestation and cultivation of commercially grown trees; provided, that this deduction shall be allowed only to those corporations in which the real owners of all the shares of such corporation are natural persons actively engaged in the commercial growing of trees, or the spouse, siblings, or parents of such persons. Provided further, that in no case shall a corporation be allowed a deduction for the same reforestation or cultivation expenditure more than once.
- (13) The eligible income of an international banking facility to the extent included in determining federal taxable income, determined as follows:
  - a. "International banking facility" shall have the same meaning as is set forth in the laws of the United States or regulations of the board of governors of the federal reserve system.

b. The eligible income of an international banking facility for the taxable year shall be an amount obtained by multiplying State taxable income as determined under G.S. 105-130.3 (determined without regard to eligible income of an international banking facility and allocation and apportionment, if applicable) for such year by a fraction, the denominator of which shall be the gross receipts for such year derived by the bank from all sources, and the numerator of which shall be the adjusted gross receipts for such year derived by the international banking facility from:

1. Making, arranging for, placing or servicing loans to foreign persons substantially all the proceeds of which are for use outside the United States;
2. Making or placing deposits with foreign persons which are banks or foreign branches of banks (including foreign subsidiaries or foreign branches of the taxpayer) or with other international banking facilities; or
3. Entering into foreign exchange trading or hedging transactions related to any of the transactions described in this paragraph.

c. The adjusted gross receipts shall be determined by multiplying the gross receipts of the international banking facility by a fraction the numerator of which is the average amount for the taxable year of all assets of the international banking facility which are employed outside the United States and the denominator of which is the average amount for the taxable year of all assets of the international banking facility.

d. For the purposes of this subsection the term "foreign person" means:

1. An individual who is not a resident of the United States;
2. A foreign corporation, a foreign partnership or a foreign trust, as defined in section 7701 of the Code, other than a domestic branch thereof;
3. A foreign branch of a domestic corporation (including the taxpayer);
4. A foreign government or an international organization or an agency of either, or
5. An international banking facility.

For purposes of this paragraph, the terms "foreign" and "domestic" shall have the same meaning as set forth in section 7701 of the Code.

(14) The amount by which the basis of a depreciable asset is required to be reduced under the Code for federal tax purposes because of a tax credit allowed against the corporation's federal income tax liability. This deduction may be claimed only in the year in which the Code requires that the asset's basis be reduced. In computing gain or loss on the asset's disposition, this deduction shall be considered as depreciation.

(d) No gain or loss shall be recognized to a corporation from the sale or exchange by it of property within the 12-month period beginning on the date of the adoption by said corporation of a plan of complete liquidation if such gain or loss would not be recognized to such corporation under section 337 of the Code.

(e) Notwithstanding any other provision of this section, any recapture of depreciation required under the Code must be included in a corporation's State net income to the extent required for federal income tax purposes. (1967, c. 1110, s. 3; 1969, cc. 1113, 1124; 1971, c. 820, s. 1; c. 1206, s. 1; 1973, c. 1287, s. 4; 1975, c. 764, s. 4; 1977, 2nd Sess., c. 1200, s. 1; 1979, c. 179, s. 2; c. 801, s. 32; 1981, c. 704, s. 20; c. 855, s. 1; 1983, c. 61, c. 713, ss. 70-73, 82, 83.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendments, it is not set out.

**Effect of Amendments.** — The first 1981 amendment substituted "and facilities or equipment used for purposes of recycling or resource recovery of or from solid waste, or for purposes of reducing the volume of hazardous waste generated" for "and recycling and resource recovering facilities or equipment" near the end of subdivision (6) of subsection (b).

As to short title and purpose of Session Laws 1981, c. 704, see note to § 105-122.

Session Laws 1981, c. 704, s. 26, provides that the act shall be liberally construed to carry out the policies set forth in the act.

Session Laws 1981, c. 704, s. 27, contains a severability clause.

The second 1981 amendment added subdivision (13) of subsection (b).

The first 1983 amendment, effective for

taxable years beginning on or after Jan. 1, 1983; added subdivision (b)(14).

The second 1983 amendment, effective for taxable years beginning on or after Jan. 1, 1983, substituted "under the Code" for "for federal income tax purposes" in subdivisions (a)(8), (b)(6), and (b)(12); added subdivision (a)(11); rewrote subdivision (b)(11); in subdivision (b)(14), inserted "under the Code" in the first sentence and substituted "the Code" for "federal law" in the second sentence; at the end of subsection (d) substituted "under section 337 of the Code" for "for federal income tax purposes under the provisions of section 337 of the Federal Internal Revenue Code of 1954, including amendments, if any"; substituted "Code" for references to the Internal Revenue Code in subdivisions (a)(3), (a)(5), (a)(6), (a)(7), (b)(7), (b)(8), (b)(9), (b)(13)d 2, (b)(13)d 5 and in subsection (e).

## § 105-130.9. Contributions.

Contributions shall be allowed as a deduction to the extent and in the manner provided as follows:

- (1) Charitable contributions as defined in section 170(c) of the Code, exclusive of contributions allowed in subdivision (2) of this section, shall be allowed as a deduction to the extent provided herein. The amount allowed as a deduction hereunder shall be limited to an amount not in excess of five percent (5%) of the corporation's net income as computed without the benefit of this subdivision or subdivision (2) of this section. Provided, that a carryover of contributions shall not be allowed and that contributions made to North Carolina donees by corporations allocating a part of their total net income outside this State shall not be allowed under this subdivision, but shall be allowed under subdivision (3) of this section.
- (4) That portion of a contribution that is claimed as a tax credit pursuant to G.S. 105-130.34 shall not be eligible for a deduction pursuant to this section. (1939, c. 158, s. 322; 1941, c. 50, s. 5; 1943, c. 400, s. 4; c. 668; 1945, c. 708, s. 4; c. 752, s. 3; 1947, c. 501, s. 4; c. 894; 1949, c. 392, s. 3; 1951, c. 643, s. 4; c. 937, s. 4; 1953, c. 1031, s. 1; c. 1302, s. 4; 1955, c. 1100, s. 1; c. 1331, s. 1; cc. 1332, 1342; c. 1343; s. 1; 1957, c. 1340, ss. 4, 8; 1959, c. 1259, s. 4; 1961, c. 201, s. 1; c. 1148; 1963, c. 1169, s. 2; 1965, c. 1048; 1967, c. 1110, s. 3; 1969, c. 1175, s. 1; 1973, c. 1287, s. 4; 1983, c. 713, s. 82; c. 793, s. 2.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The first 1983 amendment, effective for taxable years beginning on or after Jan. 1, 1983, substituted

"Code" for "Internal Revenue Code" in the first sentence of subdivision (1).

The second 1983 amendment, effective for taxable years beginning on and after Jan. 1, 1983, added subdivision (4).

### § 105-130.10. Amortization of air-cleaning devices, waste treatment facilities and recycling facilities.

In lieu of any depreciation allowance, at the option of the corporation, a deduction shall be allowed for the amortization, based on a period of 60 months, of the cost of:

- (1) Any air-cleaning device, 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, industrial waste, or other polluting materials or substances into the outdoor atmosphere or streams, lakes, rivers, or coastal waters. The deduction provided herein shall apply also to the facilities or equipment of private or public utilities built and installed primarily for the purpose of providing sewer service to residential and outlying areas. The deduction provided for in this subdivision shall be allowed by the Secretary of Revenue only upon the condition that the corporation claiming such allowance shall furnish to the Secretary a certificate from the Department of Natural Resources and Community Development certifying that the Environmental Management Commission has found as a fact that the air-cleaning device, waste treatment plant or other pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that such construction, plant or equipment complies with the requirements of said Environmental Management Commission with respect to such devices, construction, 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, 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.
- (2) 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. The deduction provided for in this subdivision shall be allowed by the Secretary of Revenue only upon the condition that the corporation claiming such allowance shall furnish to the Secretary a certificate from the Department of Human Resources certifying that the Department of Human 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 Human Resources, and that recycling or resource recovering is the primary purpose of the facility or equipment.

The deduction herein provided for shall also be allowed as to plants or equipment constructed or installed after January 1, 1955, but only with respect to the undepreciated value of such plants or equipment. (1939, c. 158, s. 322; 1941, c. 50, s. 5; 1943, c. 400, s. 4; c. 668; 1945, c. 708, s. 4; c. 752, s. 3; 1947, c. 501, s. 4; c. 894; 1949, c. 392, s. 3; 1951, c. 643, s. 4; c. 937, s. 4; 1953, c. 1031, s. 1; c. 1302, s. 4; 1955, c. 1100, s. 1; c. 1331, s. 1; cc. 1332, 1342; c. 1343, s. 1; 1957, c. 1340, ss. 4, 8; 1959, c. 1259, s. 4; 1961, c. 201, s. 1; c. 1148; 1963, c. 1169, s. 2; 1965, c. 1048; 1967, c. 1110, s. 3; 1969, c. 817; 1973, c. 476, s. 193; c. 1262, s. 23; 1975, c. 764, s. 3; 1977, c. 771, s. 4; 1981, c. 704, s. 19.)

**Effect of Amendments.** — The 1981 amendment added "or for the purpose of reducing the volume of hazardous waste generated" at the end of the first sentence of subdivision (2).

As to short title and purpose of Session Laws 1981, c. 704, see note to § 105-122.

Session Laws 1981, c. 704, s. 26, provides that the act shall be liberally construed to carry out the policies set forth in the act.

Session Laws 1981, c. 704, s. 27, contains a severability clause.

## § 105-130.11. Conditional and other exemptions.

(a) Except as provided in subsections (b) and (c), the following organizations and any organization that is exempt from federal income tax under the Internal Revenue Code referred to in G.S. 105-130.3 are exempt from the tax imposed under this Division.

- (1) Fraternal beneficiary societies, orders or associations
  - a. Operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and
  - b. Providing for the payment of life, sick, accident, or other benefits to the members of such society, order or association, or their dependents;
- (2) Every building and loan associations [association], and savings and loan associations subject to tax under Article 8D of this Chapter; and any cooperative banks without capital stock organized and operated for mutual purposes and without profit, and electric and telephone membership corporations organized under Chapter 117 of the General Statutes;
- (3) Cemetery corporations and corporations organized for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual;
- (4) Business leagues, chambers of commerce, merchants' associations, or boards of trade not organized for profit, and no part of the net earnings of which inures to the benefit of any private stockholder or individual;
- (5) Civic leagues or organizations not organized for profit, but operated exclusively for the promotion of social welfare;
- (6) Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private stockholder or member;
- (7) Farmers' or other mutual hail, cyclone, or fire insurance companies, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations of a purely local character the income of which consists solely of assessments, dues and fees collected from members for the sole purpose of meeting expenses;
- (8) Farmers', fruit growers', or like organizations organized and operated as sales agents for the purpose of marketing the products of members and turning back to them the proceeds of sales, less the necessary selling expenses, on the basis of the quantity of product furnished by them;
- (9) 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.

Nothing in this subdivision shall be construed to exempt any cooperative, mutual association or other organization from an income tax on net income which has not been refunded to patrons on a patronage basis and distributed either in cash, stock, certificates, or in some other manner that discloses to each patron the amount of his

patronage refund. Provided, in arriving at net income for purposes of this subdivision, no deduction shall be allowed for dividends paid on capital stock. Patronage refunds made after the close of the taxable year and on or before the fifteenth day of the ninth month following the close of such year shall be considered as made on the last day of such taxable year to the extent the allocations are attributable to income derived before the close of such year; provided, that no stabilization or marketing organization which handles agricultural products for sale for producers on a pool basis shall be deemed to have realized any net income or profit in the disposition of a pool or any part of a pool until all of the products in that pool shall have been sold and the pool shall have been closed; provided, further, that a pool shall not be deemed closed until the expiration of at least 90 days after the sale of the last remaining product in that pool. Such cooperatives and other organizations shall file an annual information return with the Secretary of Revenue on forms to be furnished by the Secretary and shall include therein the names and addresses of all persons, patrons and/or shareholders, whose patronage refunds amount to ten dollars (\$10.00) or more; and

- (10) Insurance companies paying the tax on gross premiums as specified in G.S. 105-228.5.
- (11) Corporations or organizations, such as condominium associations, homeowner associations, or cooperative housing corporations not organized for profit, the membership of which is limited to the owners or occupants of residential units in the condominium, housing development or cooperative housing corporation, and operated exclusively for the management, operation, preservation, maintenance or landscaping of the common areas and facilities owned by such corporation or organization or its members situated contiguous to such houses, apartments or other dwellings or for the management, operation, preservation, maintenance and repair of such houses, apartments or other dwellings owned by the corporation or organization or its members, but only if no part of the net earnings of such corporation or organization inures (other than through the performance of related services for the members of such corporation or organization) to the benefit of any member of such corporation or organization or other person.

(b) Organizations described in subdivision (1), (3), (4), (5), (6), (7), (8) or (9) of subsection (a) of this section shall be subject to the tax provided for in G.S. 105-130.3 to the following extent:

Gross income derived by any organization from any trade or business the conduct of which is not substantially related (aside from the need of the organization for income) to the exercise or performance of those functions constituting the basis for its exemption in subsection (a) of this section, less all deductions allowed by this Division directly connected with carrying on such trade or business and less one thousand dollars (\$1,000); provided, this paragraph does not apply to interest, royalties, dividends or rents unless this income is determined to be "unrelated business taxable income" under the Internal Revenue Code referred to in G.S. 105-130.3; provided further, this paragraph shall not apply to any trade or business (i) in which substantially all the work in carrying on such trade or business is performed for the organization without compensation; or (ii) which is the selling of merchandise, substantially all of which is given to it; (iii) which is carried on by an organization described in G.S. 105-130.11(a)(3) primarily for the convenience of its members, students, patients or employees. Provided further, this paragraph shall not apply to net income derived from research (i) performed by a college, university or hospital; or (ii) performed for the United States, its instrumen-

talities or any state or political subdivision thereof; or (iii) performed by an organization operated primarily for the purpose of carrying on fundamental research, the results of which are freely available to the general public.

(1939, c. 158, s. 314; 1945, c. 708, s. 4; c. 752, s. 3; 1949, c. 392, s. 3; 1951, c. 937, s. 1; 1955, c. 1313, s. 1; 1957, c. 1340, s. 4; 1959, c. 1259, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; c. 1053, s. 4; 1975, c. 19, s. 28; c. 591, s. 2; 1981, c. 450, s. 2; 1983, c. 28, s. 1; c. 31.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amendment, effective Jan. 1, 1982, substituted "subject to tax" for "subject to capital stock tax and/or excise tax" near the beginning of subdivision (2) of subsection (a).

Session Laws 1981, c. 450, s. 3, provides: "The share and deposit tax levied under Article 8D of G.S. Chapter 105 prior to the effective date of this act shall not be collected for taxable years beginning on or after that date. This act shall apply for income tax purposes to taxable years beginning on or after January 1, 1982, and shall apply for franchise tax purposes as of December 31, 1982."

The first 1983 amendment, effective for

taxable years beginning on or after Jan. 1, 1983, rewrote the introductory paragraph of subsection (a), so as to include reference to any organization that is exempt from federal income tax under the Internal Revenue Code referred to in § 105-130.3.

The second 1983 amendment, effective for taxable years beginning on or after Jan. 1, 1983, substituted "this paragraph does not apply to interest, royalties, dividends or rents unless this income is determined to be 'unrelated business taxable income' under the Internal Revenue Code referred to in G.S. 105-130.3" for "this paragraph shall not apply to interest, royalties, dividends or rents" in the first proviso of the first sentence of the second paragraph of subsection (b).

## § 105-130.12. Regulated investment companies and real estate investment trusts.

Any organization or trust which, in the opinion of the Secretary of Revenue of North Carolina, qualifies as either a "regulated investment company" under section 851 of the Code or as a "real estate investment trust" under section 856 of the Code and which files with the North Carolina Department of Revenue its election to be treated as a "regulated investment company," or as a "real estate investment trust" shall be taxed under this Division upon only that part of its net income which is not distributed or declared for distribution to shareholders during the income year or by the time required by law for the filing of the return for the income year including the period of any extension of time granted for filing such return. (1963, c. 1169, s. 2; 1967, c. 110, s. 3; 1971, c. 820, s. 2; 1973, c. 476, s. 193; 1983, c. 713, s. 74.)

**Effect of Amendments.** — The 1983 amendment, effective for taxable years beginning on or after Jan. 1, 1983, substituted "section 851 of the Code" for "the provisions of United States

Code Annotated Title 26, § 851" and substituted "section 856 of the Code" for "the provisions of United States Code Annotated Title 26, § 856."

## § 105-130.13. Special corporations.

A corporation electing to be taxed under subchapter S of chapter 1 of the Code shall compute its State taxable income in the same manner as corporations not electing to be taxed under subchapter S of chapter 1 of the Code. (1967, c. 1110, s. 3; 1983, c. 713, s. 82.)

**Effect of Amendments.** — The 1983 amendment, effective for taxable years beginning on

or after Jan. 1, 1983, substituted "Code" for "Internal Revenue Code" in two places.

## § 105-130.15. Basis of return of net income.

### (b) Change of Income Year. —

- (1) A corporation may change the income year upon which it reports for income tax purposes without prior approval by the Secretary of Revenue if such change in income year has been approved by or is acceptable to the Federal Commissioner of Internal Revenue and is used for filing income tax returns under the provisions of the Code.

If a corporation desires to make a change in its income year other than as provided above, it may make such change in its income year with the approval of the Secretary of Revenue, provided such approval is requested at least 30 days prior to the end of its new income year.

A corporation which has changed its income year without requesting the approval of the Secretary of Revenue as provided in the first paragraph of this subdivision shall submit to the Secretary of Revenue notification of any change in the income year after the change has been approved by the Federal Commissioner of Internal Revenue or his agent where application for permission to change is required by the Federal Commissioner of Internal Revenue with such notification stating that such approval has been received. Where application for change of the income year is not required by the Federal Commissioner of Internal Revenue, notification of the change of income year shall be submitted to the Secretary of Revenue with the short period return.

- (2) A return for a period of less than 12 months (referred to in this subsection as "short period") shall be made when the corporation changes its income year. In such a case, the return shall be made for the short period beginning on the day after the close of the former taxable year and ending at the close of the day before the day designated as the first day of the new taxable year, except that a corporation changing to, or from, a taxable year varying from 52 to 53 weeks shall not be required to file a short period return if such change results in a short period of 359 days or more, or less than seven days. Short period income tax returns shall be filed within the same period following the end of such short period as is required for full year returns under the provisions of G.S. 105-130.17.

(1939, c. 158, s. 318; 1943, c. 400, s. 4; 1945, c. 708, s. 4; 1949, c. 392, s. 3; 1955, c. 1313, s. 1; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; 1983, c. 713, s. 82.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amend-

ment, effective for taxable years beginning on or after Jan. 1, 1983, substituted "Code" for "Internal Revenue Code of 1954" at the end of the first paragraph of subdivision (b)(1).

## § 105-130.17. Time and place of filing returns.

(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.

(1939, c. 158, s. 329; 1943, c. 400, s. 4; 1951, c. 643, s. 4; 1953, c. 1302, s. 4; 1955, c. 17, s. 1; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; c. 1287, s. 4; 1981, c. 56.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amendment, effective for taxable years beginning on or after Jan. 1, 1981, added subsection (d1).

### § 105-130.22. Tax credit for construction of dwelling units for handicapped persons.

There shall be allowed to corporate owners of multifamily rental units located in North Carolina as a credit against the tax imposed by this Division, an amount equal to five hundred fifty dollars (\$550.00) for each dwelling unit constructed by such corporate owner which conforms to the requirements of section (11x) of the North Carolina Building Code for the taxable year within which the construction of such dwelling unit is completed; provided, that credit will be allowed under this section only for the number of such dwelling units completed during the taxable year which were required to be built in compliance with section (11x) of the North Carolina Building Code; provided further, that if the credit allowed by this section exceeds the tax imposed by this Division reduced by all other credits allowed by the provisions of this Division, such excess shall be allowed against the tax imposed by this Division for the next succeeding year; and provided further, that in order to secure the credit allowed by this section the corporation shall file with its income tax return for the taxable year with respect to which such credit is to be claimed, a copy of the occupancy permit on the face of which there shall be recorded by the building inspector the number of units completed during the taxable year which conform to section (11x) of the North Carolina Building Code. When he has recorded the number of such units on the face of the occupancy permit, the building inspector shall promptly make and forward a copy of the permit to the Special Office for the Handicapped, Department of Insurance. (1973, c. 910, s. 1; 1979, c. 803, ss. 1, 2; 1981, c. 682, s. 16.)

**Effect of Amendments.** — The 1981 amendment, effective July 1, 1981, substituted "(11x)" for "(IIX)" in three places.

### § 105-130.23. Credit against corporate income tax for solar hot water, heating and cooling.

(a) Any corporation which causes to be constructed or installed solar hot water, heating or cooling equipment in buildings to include residential buildings used or sold by the corporation for commercial or business purposes in North Carolina shall be allowed as a credit against the taxes imposed by this Division, an amount equal to twenty-five percent (25%) of the installation and equipment cost of the solar hot water, heating or cooling equipment; provided, that credit allowed under this section shall not exceed one thousand dollars (\$1,000) per system or per year for any single building or each family dwelling unit of a multi-dwelling building which is individually metered for electric power or natural gas or with separate furnace for oil heat paid for by the occupant; provided further, that to obtain the credit the taxpayer must own or control the use of the building at the time of the installation, except that in the case of a building constructed or modified for sale in which a solar system is constructed or installed, the credit shall be allowed to the owner who first occupies the building for use after the construction or installation of the system or the owner-lessor who first leases the building for use after the construction or installation of the system; provided, further, that the credit shall not be allowed to the extent that any of the cost of the system was provided by federal, State, or local grants; and provided further, that if the credit allowed by this

section exceeds the taxes imposed by this Division reduced by all other credits allowed by the provisions of this Division, such excess shall be allowed against the taxes imposed by this Division for the next three succeeding years.

(b) For the purpose of this section, the term "solar hot water, heating and cooling equipment" means any hot water, heating, cooling, or heating and cooling equipment which meets the definitive performance criteria established by the U.S. Secretary of the Treasury or any other performance criteria approved and published by the Secretary of Revenue, or passive solar systems that meet the eligibility criteria approved and published by the Secretary of Revenue. (1977, c. 792, s. 4; 1979, c. 892, s. 1; 1981, c. 921, ss. 3, 4.)

**Effect of Amendments.** — The 1981 amendment, effective for taxable years beginning on and after Jan. 1, 1981, substituted "causes to be constructed or installed" for "constructs or installs" near the beginning of subsection (a), inserted "per system or per year" following "\$1,000" in the first proviso of subsection (a),

substituted the second and third provisos of subsection (a) for the former second proviso, relating to similar subject matter, and added "or passive solar systems that meet the eligibility criteria approved and published by the Secretary of Revenue" at the end of subsection (b).

### § 105-130.26. Credit against corporate income tax for conversion of industrial boiler to wood fuel.

Any corporation which modifies or replaces an oil or gas-fired boiler or kiln and the associated fuel and residue handling equipment used in the manufacturing process of a manufacturing business located in this State with one which is capable of burning wood shall be allowed as a credit against the tax imposed by this Division, an amount equal to fifteen percent (15%) of the installation and equipment cost of such conversion; provided, that in order to secure the credit allowed by this section, the taxpayer must own or control the business in which such boiler or kiln is used at time of such conversion and payment in part or in whole for such installation and equipment must be made by the taxpayer during the tax year for which the credit is claimed; and the amount of credit allowed for any one income year shall be limited to fifteen percent (15%) of such costs paid during the year; and the credit allowed by this section shall not exceed the amount of the tax imposed by this Division for the taxable year reduced by the sum of all credits allowable under this Division, except for payments of tax made by or on behalf of the taxpayer. If a credit is granted under this section to a taxpayer engaged in the business of poultry production and that credit exceeds the tax imposed under this Division, the excess may be carried forward and applied to the tax imposed under this Division for the succeeding five years. (1979, c. 801, s. 35; 1979, 2nd Sess., c. 1318, s. 1; 1983, c. 929, s. 1.)

**Effect of Amendments.** — The 1979, 2nd Sess., amendment inserted "and the associated fuel and residue handling equipment" near the beginning of the section.

The 1983 amendment, effective July 22, 1983, and applicable to credits allowed in taxable years beginning on or after Jan 1, 1982, added the last sentence.

### § 105-130.27. Credit against corporate income tax for construction of a fuel ethanol distillery.

(a) Any corporation which constructs in North Carolina a distillery to make ethanol from agricultural or forestry products for use as a motor fuel shall be allowed a credit against the tax imposed by this Division equal to twenty percent (20%) of the installation and equipment costs of construction, and an additional ten percent (10%) of those costs if the distillery is powered primarily

by use of an alternative fuel source. In order to secure the credit allowed by this section, the taxpayer must own or control the distillery at the time of construction, and payment for the installation and equipment must be made by the taxpayer during the tax year for which the credit is claimed. The amount of the credit allowed for any one income year shall be limited to twenty percent (20%) of the costs paid during the year, or thirty percent (30%) of those costs if the distillery is powered primarily by use of an alternative fuel source. Invoices or receipts shall be furnished to substantiate a claim or a credit under this section if requested by the Secretary of Revenue. The credit allowed by this section shall not exceed the amount of the tax imposed by this Division for the taxable year reduced by the sum of all credits allowable under this Division, except for payments of tax made by or on behalf of the taxpayer.

(b) For purposes of this section, "alternative fuel source" includes agricultural and forestry products, waste petroleum products, and peat, but does not include other petroleum products, coal, or natural gas.

(c) The amount of credit allowed under this section may be carried over for the next succeeding five years. (1979, 2nd Sess., c. 1265, s. 1.)

**Editor's Note.** — Session Laws 1979, 2nd Sess., c. 1265, s. 3, makes this section effective with respect to taxable years beginning on and after July 1, 1980.

### **§ 105-130.27A. Credit against corporate income tax for construction of a peat facility.**

(a) Any corporation which constructs in North Carolina a facility which uses peat as the feedstock for the production of a commercially manufactured energy source to replace petroleum, natural gas or other nonrenewable energy sources shall be allowed a credit against the tax imposed by this Division equal to twenty percent (20%) of the installation and equipment costs of construction; provided, that the credit shall not be allowed to the extent that any of the cost of the system was provided by federal, State, or local grants. In order to secure the credit allowed by this section, the taxpayer must own or control such facility at the time of construction, and the credit allowed by this section shall not exceed the amount of the tax imposed by this Division for the taxable year reduced by the sum of all credits allowable under this Division, except for payments of tax made by or on behalf of the taxpayer.

(b) The amount of unused credit allowed under this section may be carried over for the next succeeding five years. (1981 (Reg. Sess., 1982), c. 1204, s. 1.)

**Editor's Note.** — Session Laws 1981 (Reg. Sess., 1982), c. 1204, s. 3, provides: "This act shall become effective with respect to taxable years beginning on and after January 1, 1982."

### **§ 105-130.28. Credit against corporate income tax for construction of a photovoltaic equipment facility.**

(a) Any corporation that constructs in North Carolina a facility for the production of photovoltaic equipment shall be allowed a credit against the tax imposed by this Division equal to twenty percent (20%) of the installation and equipment costs of construction. This credit shall not be allowed to the extent that any of the costs of the system were provided by federal, State, or local grants. To secure the credit allowed by this section, the taxpayer must own or control the facility at the time of construction. The credit allowed by this section may not exceed the amount of the tax imposed by this Division for the taxable year reduced by the sum of all credits allowable under this Division, except payments of tax made by or on behalf of the taxpayer.

(b) As used in this section, "photovoltaic equipment" means those products designed, manufactured, and produced to convert sunlight directly into electricity without a need for additional generating or conversion equipment.

(c) The amount of credit allowed under this section may be carried over for the next succeeding five years. (1981, c. 921, s. 1.)

**Editor's Note.** — Session Laws 1981, c. 921, s. 7, makes this section effective for taxable years beginning on and after Jan. 1, 1981.

### **§ 105-130.29. Credit against corporate income tax for construction of an olivine brick facility.**

(a) Any corporation that constructs in North Carolina a facility for the production of olivine bricks for thermal storage shall be allowed a credit against the tax imposed by this Division equal to twenty percent (20%) of the installation and equipment costs of construction. This credit shall not be allowed to the extent that any of the costs of the system were provided by federal, State, or local grants. To secure the credit allowed by this section, the taxpayer must own or control the facility at the time of construction. The credit allowed by this section may not exceed the amount of the tax imposed by this Division for the taxable year reduced by the sum of all credits allowable under this Division, except payments of tax made by or on behalf of the taxpayer.

(b) The amount of credit allowed under this section may be carried over for the next succeeding five years. (1981, c. 921, s. 1.)

**Editor's Note.** — Session Laws 1981, c. 921, s. 7, makes this section effective for taxable years beginning on and after Jan. 1, 1981.

### **§ 105-130.30. Credit against corporate income tax for construction of a methane gas facility.**

(a) Any corporation that constructs in North Carolina a facility for the production of methane gas from renewable biomass resources shall be allowed a credit against the tax imposed by this Division equal to ten percent (10%) of the installation and equipment costs of construction. The credit allowed under this section may not exceed two thousand five hundred dollars (\$2,500) for any single installation. This credit shall not be allowed to the extent that any of the costs of the system were provided by federal, State, or local grants. To secure the credit allowed by this section, the taxpayer must own or control the facility at the time of construction. The credit allowed by this section may not exceed the amount of the tax imposed by this Division for the taxable year reduced by the sum of all credits allowable under this Division, except payments of tax made by or on behalf of the taxpayer.

(b) As used in this section, "renewable biomass resources" means organic matter produced by terrestrial and aquatic plants and animals such as standing vegetation, aquatic crops, forestry and agricultural residues and animal wastes that can be used for the production of energy. (1981, c. 921, s. 1.)

**Editor's Note.** — Session Laws 1981, c. 921, s. 7, makes this section effective for taxable years beginning on and after Jan. 1, 1981.

### **§ 105-130.31. Credit against corporate income tax for installation of a wind energy device.**

(a) Any corporation that constructs or installs a wind energy device for the production of electricity at a site located in this State shall be allowed a credit against the tax imposed by this Division equal to ten percent (10%) of the installation and equipment costs of the wind energy device. The credit allowed under this section may not exceed one thousand dollars (\$1,000) for any single installation. This credit shall not be allowed to the extent that any of the costs of the system were provided by federal, State, or local grants. To secure the credit allowed by this section, the taxpayer must own or control the site at the time the wind energy device is installed. The credit allowed by this section may not exceed the amount of the tax imposed by this Division for the taxable year reduced by the sum of all credits allowable under this Division, except payments of tax made by or on behalf of the taxpayer.

(b) As used in this section, "wind energy device" means equipment (and parts solely related to the functioning of the equipment) that, when installed on a site, transmits or uses wind energy to generate electricity. (1981, c. 921, s. 1.)

**Editor's Note.** — Session Laws 1981, c. 921, s. 7, makes this section effective for taxable years beginning on and after Jan. 1, 1981.

### **§ 105-130.32. Credit against corporate income tax for installation of solar equipment for the production of industrial heat.**

(a) Any corporation that constructs or installs solar equipment for the production of heat in the manufacturing process of a manufacturing business located in this State shall be allowed a credit against the tax imposed by this Division equal to twenty percent (20%) of the installation and equipment costs of the solar equipment. The credit allowed under this section may not exceed eight thousand dollars (\$8,000) for any single installation. This credit shall not be allowed to the extent that any of the costs of the system were provided by federal, State, or local grants. To secure the credit allowed by this section, the taxpayer must own or control the business at the time the solar equipment is installed. The credit allowed by this section may not exceed the amount of the tax imposed by this Division for the taxable year reduced by the sum of all credits allowable under this Division, except payments of tax made by or on behalf of the taxpayer.

(b) As used in this section, "solar equipment" means equipment and materials designed to collect, store, transport, or control energy derived directly from the sun. (1981, c. 921, s. 1.)

**Editor's Note.** — Session Laws 1981, c. 921, s. 7, makes this section effective for taxable years beginning on and after Jan. 1, 1981.

### **§ 105-130.33. Credit against corporate income tax for installation of a hydroelectric generator.**

(a) Any corporation that constructs or installs a hydroelectric generator with a capacity of at least three kilowatts (3KW) at an existing dam or free flowing stream located in this State shall be allowed a credit against the tax

imposed by this Division equal to ten percent (10%) of the installation and equipment costs of the hydroelectric generator. The credit allowed under this section may not exceed five thousand dollars (\$5,000) for any single installation. This credit shall not be allowed to the extent that any of the costs of the system were provided by federal, State, or local grants. To secure the credit allowed by this section, the taxpayer must own or control the site at the time the hydroelectric generator is installed. The credit allowed by this section may not exceed the amount of the tax imposed by this Division for the taxable year reduced by the sum of all credits allowable under this Division, except payments of tax made by or on behalf of the taxpayer.

(b) The term "installation costs" includes spillway and other site construction and modifications necessary to accommodate the hydroelectric generator.

(c) As used in this section, "hydroelectric generator" means a machine that produces electricity by water power or by the friction of water or steam. (1981, c. 921, s. 1.)

**Editor's Note.** — Session Laws 1981, c. 921, s. 7, makes this section effective for taxable years beginning on and after Jan. 1, 1981.

## § 105-130.34. Credit for certain real property donations.

(a) Any corporation that makes a qualified donation of interest in real property located in North Carolina during the taxable year that is useful for public beach access or use, public access to public waters or trails, fish and wildlife conservation, or other similar land conservation purposes, shall be allowed a credit against the taxes imposed by this Division equal to twenty-five percent (25%) of the fair market value of the donated property interest. To be eligible for this credit, the interest in real property must be donated to and accepted by either the State, local government or a body that is both organized to receive and administer lands for conservation purposes and is qualified to receive charitable contributions pursuant to G.S. 105-130.9; provided, however, that lands required to be dedicated pursuant to local governmental regulation or ordinance and dedications made to increase building density levels permitted under such regulations or ordinances shall not be eligible for this credit. The credit allowed under this section may not exceed five thousand dollars (\$5,000). To support the credit allowed by this section, the taxpayer shall file with its income tax return for the taxable year in which the credit is claimed, a certification by the Department of Natural Resources and Community Development that the property donated is suitable for one or more of the valid public benefits set forth in this subsection.

(b) The credit allowed by this section may not exceed the amount of tax imposed by this Division for the taxable year reduced by the sum of all credits allowed under this Division, except payments of tax made by or on behalf of the taxpayer.

(c) Any unused portion of this credit may be carried forward for the next succeeding five years.

(d) The fair market value, or any portion thereof, of a qualifying donation that is not eligible for a credit pursuant to this section may be considered as a charitable contribution pursuant to G.S. 105-130.9. That portion of the donation allowed as a credit pursuant to this section shall not be eligible as a charitable contribution. (1983, c. 793, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 793, s. 5, makes this section effective for taxable years beginning on and after Jan. 1, 1983.

### § 105-130.35. Contribution of corporate income tax refunds to Wildlife Fund for management of nongame and endangered species.

Any taxpayer that is entitled to a refund of taxes paid as provided by this Article may elect to contribute all or any part of such refund to the Wildlife Fund for the support of wildlife management and protection programs primarily for nongame wildlife species and wildlife species which are or may hereafter be designated as endangered or threatened. The Secretary of Revenue shall provide appropriate language and space on the corporation income tax form in which to make such election and shall note the same in his instructions as a contribution qualifying as a deduction under G.S. 105-130.9(2). Any such election shall become irrevocable upon filing the taxpayer's income tax return for the taxable year. All of such contributions shall be transmitted to the State Treasurer for credit to the Wildlife Fund which shall be made available to the Wildlife Resources Commission for the support of management and protection programs primarily for nongame wildlife and endangered and threatened species and to match federal funds which may become available for such purposes. (1983, c. 865, s. 2.)

**Editor's Note.** — Session Laws 1983, c. 865, ss. 3 and 4 provided:

"Sec. 3. At least seventy-five percent (75%) of the total amount of the funds derived during any year from the contributions made pursuant to this act must be used for nongame, endangered and threatened species, and urban wildlife programs, and the remainder may be used by the Wildlife Resources Commission for other wildlife management programs."

"Sec. 4. Notwithstanding G.S. 105-163.16(e)

and G.S. 105-130.35, the Department of Revenue may deduct and retain from the funds so contributed an amount equal to the cost of implementing this act, but not to exceed forty-five thousand dollars (\$45,000) per fiscal year. Any such retainage is subject to the approval of the Director of the Budget."

Session Laws 1983, c. 865, s. 5, makes this section effective as to all taxpayers whose taxable years begin on or after Jan. 1, 1983.

## DIVISION II. INDIVIDUAL INCOME TAX.

### § 105-135. Definitions.

For the purpose of this Division, and unless otherwise required by the context:

- (5) The words "fiscal year" means an income year, ending on the last day of any month other than December. A taxpayer who pursuant to the provisions of § 441(f) of the Code has elected to compute his income tax liability to the United States on the basis of an annual period varying from 52 to 53 weeks, for any income year ending after August 16, 1954, shall compute his taxable income for the purposes of this Division on the basis of the same period used by such taxpayer in accordance with the Code in computing his tax liability to the United States for such income year.
- (13) The word "resident" applies only to individuals and includes, for the purpose of determining liability for the tax imposed with reference to the income of any income year, all individuals who, at any time during such income year, are domiciled in this State, or who, whether regarding their domicile as in this State or not, reside within this State for other than a temporary or transitory purpose. In the absence of convincing proof to the contrary, an individual who is present within the State for more than six months during such income year shall be deemed to be a resident of the State; but absence from the

State for more than six months shall raise no presumption that the individual is not a resident of the State.

If an individual was a resident of this State for only part of the income year, having moved into or removed from the State during such year, such individual shall, as to income received by him during the period of his residence, report for taxation all income required to be so reported by residents and shall, as to income received by him during the remainder of such year, report for taxation all income required to be so reported by nonresidents: Provided, that in the case of an individual removing from the State during such year, he shall not be regarded as having become a nonresident until he shall have both established a definite domicile elsewhere and abandoned any domicile he may have acquired in this State.

The fact that an individual is a nonresident of the State at the time the tax becomes due and payable shall not affect his liability for the tax.

No presumption as to domicile shall exist from the fact of marriage.

- (15) The word "Code" means the Internal Revenue Code as enacted as of April 1, 1983, and includes any provisions enacted as of that date which become effective after that date. (1939, c. 158, s. 302; 1941, c. 50, s. 5; 1955, c. 1331, s. 2; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1969, c. 1075, s. 4; 1973, c. 476, s. 193; 1977, c. 657, s. 5; c. 900, s. 5; 1979, c. 801, s. 36; 1983, c. 195; c. 713, ss. 75, 82.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The first 1983 amendment, effective April 20, 1983, added the last paragraph of subdivision (13).

The second 1983 amendment, effective for taxable years on or after Jan. 1, 1983, substituted "Code" for "Federal Internal Revenue Code of 1954" in two places in subdivision (5) and rewrote subdivision (15).

## § 105-141. "Gross income" defined.

(a) Except as otherwise provided in subsection (b) of this section, "gross income" for purposes of this Division shall mean all income in whatever form and from whatever source derived, including (but not limited to) the following items:

- (1) Compensation for services, including fees, commissions and similar items;
- (2) Gross income derived from business;
- (3) Gains derived from dealings in property;
- (4) Interest;
- (5) Rents;
- (6) Royalty;
- (7) Dividends;
- (8) Alimony and separate maintenance payments, subject to the provisions of G.S. 105-141.2;
- (9) Annuities, subject to the provisions of G.S. 105-141.1;
- (10) Income from life insurance and endowment contracts;
- (11) Pensions;
- (12) Income from discharge of indebtedness;
- (13) Distributive share of partnership income subject to the provisions of G.S. 105-142(c);
- (14) Income in respect of a decedent, subject to the provisions of G.S. 105-142.1;
- (15) Income from an interest in an estate or trust;

- (16) Payments made by or on behalf of an employer by reason of death of an employee to the widow or heirs of the employee, subject to certain exclusions as provided in subsection (b) of this section;
  - (17) Recovery of bad debts and similar items previously charged off;
  - (18) Amounts received as reimbursement for losses of such nature as those allowable under subdivision (9)a and (9)b of G.S. 105-147 in excess of the adjusted basis of property, subject to the limitations in G.S. 105-144.1;
  - (19) Prizes and awards, subject to the exceptions provided in subsection (b) of this section relating to scholarship and fellowship grants; and
  - (20) Subject to the provisions of G.S. 105-141(b)(4), amounts received or made available from:
    - a. Individual retirement accounts described in section 408(a) of the Code;
    - b. Individual retirement annuities described in section 408(b) of the Code; and
    - c. Retirement bonds described in section 409 of the Code to the extent such amounts are includible in the recipient's gross income under the internal revenue laws of the United States.
  - (21) Reimbursement for moving expenses from one residence to another which is attributable to employment or self-employment must be included in gross income as a compensation for services when the income from the new principal place of employment is reportable for taxation to North Carolina under the provisions of this Division; provided, however, that when only a portion of the income earned at the new principal place of employment is reportable for taxation to North Carolina under the provisions of this Division, the moving expense reimbursement shall be apportioned for taxation by this State under rules and regulations prescribed by the Secretary of Revenue.
  - (22) The amount of property taxes allowed under Division IV of this Article during the taxable year as a credit against the taxpayer's income tax.
- (b) The words "gross income" do not include the following items, which shall be exempt from taxation under this Division, but shall be reported in such form and manner as may be prescribed by the Secretary of Revenue:
- (1) The proceeds of life insurance policies and contracts paid upon the death of the insured to beneficiaries or to the estate of the insured.
  - (2) The amount received by the insured as a return of premium or premiums paid by him under life insurance endowment contracts, either during the term or at the maturity of the term mentioned in the contracts or upon surrender of the contract.
  - (3) The value of property acquired by gift, bequest, devise or descent except as provided in G.S. 105-142.1 (but the income from such property shall be included in gross income).
  - (4) Interest upon the obligations of the United States or its possessions, or of the State of North Carolina, or of a political subdivision thereof, or of nonprofit educational institutions organized or chartered under the laws of the State of North Carolina: Provided, interest upon the obligations of the United States shall not be excluded from gross income unless interest upon obligations of the State of North Carolina or any of its political subdivisions is excluded from income taxes imposed by the United States.
  - (5) Any amounts received as compensation for personal injuries or sickness (i) through accident or health insurance, (ii) through health or accident plans financed by profit-sharing trusts or pension trusts, (iii) under workmen's compensation acts or similar acts (which have been judicially declared to provide benefits in the nature of workmen's

compensation benefits, by whatever name called), and (iv) for damages (whether by suit or agreement); and any amounts received through self-funded reimbursement plans adopted by an employer for the benefit of his employees, reimbursing them for expenses incurred for their medical care or for the medical care of their spouses or their dependents; provided, that any amounts received from sources mentioned in this subdivision as reimbursement for medical care expenses incurred and claimed as a deduction in a prior year or in prior years shall be excluded only to the extent that such amounts exceed the deduction claimed under subdivision (11) of G.S. 105-147, except that nothing in this subdivision shall be construed as preventing a taxpayer from filing an amended return for a taxable year in which a medical deduction was claimed and allowed for the purpose of reducing the amount of the medical expense deduction claimed in such year by any reimbursement for such medical expenses received in a later year when a change in the prior year is not barred by the provisions of this Division.

- (6) The rental value of a home and the appurtenances thereof furnished to a minister of the gospel as a part of his compensation, or the rental allowance paid to him as a part of his compensation to the extent used by him to rent or provide a home including the appurtenances thereof; also the rental value of any homes and quarters and the appurtenances thereof furnished the officers and employees of orphanages whose duties require them to live on the premises and in buildings owned by such institutions as a part of their compensation.
- (7) The amounts received in lump sum or monthly payments of benefits under the Social Security Act.
- (8) The amounts received in lump sum or monthly payment benefits from retirement or pension systems of other states by former teachers or State employees of such states: Provided, this exclusion shall apply only to individuals receiving benefits from states which grant similar exclusions or exemptions for individual income tax purposes to retired members of the North Carolina Retirement System for Teachers and State Employees or which levy no income tax on individuals.
- (9) The gross income of an employee shall not include:
  - a. The value of meals or lodging furnished for the convenience of the employer to the extent that the value of such meals or lodging is excluded from gross income under the provisions of section 119 of the Code;
  - b. Amounts expended by his employer for premiums on group life, accident, health, or hospitalization insurance plans for the benefit of the employee; and
  - c. Amounts paid or incurred by an employer for dependent care assistance provided to the employee to the extent these amounts are excluded from gross income under Section 129 of the Code.
- (10) The amounts received as a scholarship at an educational institution (as defined in G.S. 105-135) or as a fellowship grant, including the value of contributed services and accommodations; and the amounts received to cover expenses for travel, research, clerical help, or equipment which are incident to such scholarship or fellowship grant to the extent that such amounts are exempt for federal income tax purposes under the provisions of section 117 of the Code.
- (11) Amounts received by the estate, widow or heirs of an employee paid by or on behalf of one or more employers and paid by reason of death of any one employee to the extent of five thousand dollars (\$5,000) with respect to the death of any one employee regardless of the number of employers making such payments, except that such exclusion

shall not apply to amounts with respect to which the employee possessed, immediately before his death, a nonforfeitable right to receive the amounts while living, except that even though an employee possessed a nonforfeitable right immediately before his death to receive the amounts while living, the exclusion provided in this subdivision will still apply in those cases in which the total distributions are payable within one taxable year of the distributee to such a distributee by a pension, profit-sharing, stock bonus or annuity trust qualifying under the provisions of subsection (f)(1)a of G.S. 105-161, or plan qualifying under the provisions of section 401(a) of the Code.

- (12) Compensation received for active service as a member of the armed forces of the United States below the grade of commissioned officers; and so much of the compensation of a commissioned officer in such armed forces as does not exceed five hundred dollars (\$500.00), for any month during any part of which such member served in a combat zone, or was hospitalized as a result of wounds, disease, or injury incurred while serving in a combat zone, except that this subdivision shall not apply with respect to compensation received while such member was hospitalized for any month beginning more than two years after the date of the termination of combatant activities in such zone. With respect to service in the combat zone designated for purposes of the Vietnam conflict, this subdivision shall not apply with respect to compensation received while such member was hospitalized for any month beginning after January 2, 1977. For the purposes of this subdivision, the term "commissioned officer" does not include a warrant officer; the term "combat zone" means an area which the President of the United States by executive order designates as an area in which armed forces of the United States are or have been engaged in combat; service is performed in a combat zone only if performed on or after the date designated by the President by executive order as the date of the commencing of combatant activities in such zone; and the term "compensation" does not include pension and retirement pay.
- (13) The amounts received in lump sum or monthly payments of benefits from retirement and pension funds established for firemen or law-enforcement officers by or under the control of cities or counties located in North Carolina; provided, that such amounts shall be exempt from income tax only if they would have been exempt under the provisions of either G.S. 143-166 (relating to the Law-Enforcement Officers' Benefit and Retirement Fund) or G.S. 128-31 (relating to North Carolina Local Governmental Employees' Retirement Fund) if such cities or counties had elected to provide such benefits for firemen or law-enforcement officers under the provisions of such laws.
- (14) Any amount not to exceed three thousand dollars (\$3,000) received during any year under a federal employee retirement program to which the employee made contributions during his working years.
- (15) Amounts received by members of the armed forces as hostile-fire duty pay which is authorized by Public Law 88-132 enacted by the Congress of the United States on October 2, 1963.
- (16) All disability pay received from the United States government by reason of service in either the army, navy, marine corps, nurses' corps, air corps, air force, or any of the armed services of the United States.
- (17) a. A portion of amounts contributed for the purchase of an annuity contract for an employee by an employer described in section 501(c)(3) of the Code which is exempt from federal income tax under section 501(a) of such Code, or for an employee who performs services for an educational institution (as defined in G.S. 105-135(3)) by an employer which is a state, a political subdi-

vision of a state, or an agency or instrumentality of any one or more of the foregoing, if such annuity contract is not purchased under a plan which meets the requirements of G.S. 105-161(f)(1)a, and if the employee's rights under the annuity contract are nonforfeitable except for failure to pay future premiums. However, such portion of amounts contributed by such employer for such annuity contract on or after such rights become nonforfeitable shall be excluded from the gross income of the employee for the taxable year only to the extent that the aggregate of such amounts does not exceed the exclusion allowance (as herein defined) for such taxable year. In addition, the employee shall include in his gross income the amounts received under such annuity contract for the year received as provided in G.S. 105-141.1 (relating to annuities).

- b. For purposes of this subdivision, the "exclusion allowance" for an employee for the taxable year is an amount equal to the excess, if any, of (i) the amount determined by multiplying twenty percent (20%) of his includible compensation (as herein defined) by the number of years of service, over (ii) the aggregate of the amounts contributed by the employer for annuity contracts and excludible from gross income of the employee for any prior taxable year; provided, however, that in the case of an employee who makes an election under section 415(c)(4)(D) of the Code to have the provisions of section 415 apply, the exclusion allowance of the employee shall be computed under the provisions of section 415 of the Code.

For purposes of this subdivision, the term "includible compensation" means, in the case of any employee, the amount of compensation which is received from the employer described in the first paragraph of this subdivision, and which is includible in gross income for the most recent period (ending not later than the close of the taxable year) which under the following paragraph may be counted as one year of service. Such term does not include any amount contributed by the employer for any annuity contract to which this subdivision applies.

In determining the number of years of service for purposes of this subdivision there shall be included (i) one year for each full year during which the individual was a full-time employee of the organization purchasing the annuity for him, and (ii) a fraction of a year (determined as the Secretary of Revenue may prescribe) for each full year during which such individual was a part-time employee of such organization and for each part of a year during which such individual was a full-time or part-time employee of such organization. In no case shall the number of years of service be less than one.

If for any taxable year of the employee this subdivision applies to two or more annuity contracts purchased by the employer, such contracts shall be treated as one contract.

For purposes of this subdivision and G.S. 105-141.1(e) (relating to specific rules for computing employees' contributions to annuity contract), if rights of the employee under an annuity contract described in the first paragraph of this subdivision change from forfeitable to nonforfeitable rights, then the amount (determined without regard to this subsection) includible in gross income by reason of such change shall be treated as an amount contributed by the employer for such annuity contract as of the time such rights become nonforfeitable.

- c. For purposes of this Division, amounts paid by an employer described in paragraph a of this subdivision to a custodial account

which satisfies the requirements of section 401(f)(2) of the Code shall be treated as amounts contributed by him for an annuity contract for his employee if the amounts are paid to provide a retirement benefit for that employee and are to be invested in regulated investment company stocks to be held in that custodial account. For purposes of this Division, a custodial account which satisfies the requirements of section 401(f)(2) of the Code shall be treated in the same manner as an exempt trust qualifying under the provisions of G.S. 105-161(f)(1)a solely for purposes of taxing the income earned or received by such account.

- d. An amount distributed from an annuity contract described in this subdivision or a custodial account described in this subdivision which qualifies for rollover treatment as provided in the Code shall likewise qualify for rollover hereunder and shall be excluded from gross income to the extent such amount is excluded from gross income as provided in the Internal Revenue Code of 1954 as amended unless such exclusion is contrary to the context and intent of State law.
- (18) Any amount not to exceed three thousand dollars (\$3,000) received by a taxpayer during any year as retired or retainer pay as a result of service in any of the armed forces of the United States.
- (19) Amounts earned during the income year by a pension, profit-sharing, stock bonus, or annuity plan established by an employer for the benefit of his employees or for himself and his employees, provided that such plan shall have been determined by the Internal Revenue Service to be a qualified plan for federal income tax purposes under the provisions of section 401(a) of the Code; and amounts earned during the income year by an individual retirement account described in section 408(a) of the Code, or an individual retirement annuity described in section 408(b) of the Code, provided that such individual retirement account or individual retirement annuity is exempt from federal income taxation under section 408(e) of the Code.
- (20) The amount of any reduction after December 31, 1973, in the retired or retainer pay of a member or former member of the uniformed services of the United States who has made an election under Chapter 73 of Title 10 of the United States Code to receive a reduced amount of retired or retainer pay.

In the case of any individual referred to in the preceding paragraph, all amounts received after December 31, 1973, as retired or retainer pay shall be excluded from gross income until there has been so excluded an amount equal to the consideration for the contract. The preceding sentence shall apply only to the extent that the amounts received would, but for such sentence, be includible in gross income.

For the purpose of this subdivision and subsection (i) of G.S. 105-141.1, the term "consideration for the contract" means, in respect of any individual, the sum of: (i) the total amount of the reductions before January 1, 1974, in his retired or retainer pay by reason of an election under Chapter 73 of Title 10 of the United States Code, and, (ii) any amounts deposited at any time by him pursuant to section 1438 of such Title 10.

- (21) No amount shall be included in gross income by reason of the discharge of all or part of the indebtedness of an individual under a student loan if such discharge was pursuant to a provision of such loan under which all or part of the indebtedness of an individual would be discharged if the individual worked for a certain period of time in certain geographical areas or for certain classes of employers.

For the purposes of this subdivision, the term "student loan" has the same meaning as found in section 2117(b) of the 1976 Tax Reform Act.

- (22) In the case of a North Carolina resident any amounts excludable from gross income as income earned by individuals living abroad under the provisions of section 911 of the Code and as exemptions for certain allowances received by civilian officers or employees of the government of the United States under the provisions of section 912 of the Code.
- (23) Educational expenses incurred by the employer for educational assistance to the employee to the extent excluded from federal gross income under the provisions of section 127 of the Code. No deduction or credit shall be allowed under any other section of this Division for any amount excluded from income by reason of this section.
- (24) In the case of an individual whose principal residence is damaged or destroyed by fire, storm, or other casualty, or who is denied access to his principal residence by governmental authorities because of the occurrence or threat of occurrence of such a casualty, gross income does not include amounts received by such individual under an insurance contract which are paid to compensate or reimburse such individual for living expenses incurred for himself and members of his household resulting from the loss of use or occupancy of such residence. The exclusion provided in this subdivision shall apply to amounts received by the taxpayer for living expenses incurred during any period only to the extent the amounts received do not exceed the amounts by which:
  - a. The actual living expenses incurred during such period for himself and members of his household resulting from the loss of use or occupancy of their residence, exceeds
  - b. The normal living expenses which would have been incurred for himself and members of his household during such period.
- (25) Any amount, not exceeding one thousand five hundred dollars (\$1,500), paid to an individual as compensation for the performance of duties as a member of the North Carolina organized militia, the national guard as defined in G.S. 127A-3.
- (26) a. General Rule. — At the election of the taxpayer, gross income does not include gain from the sale or exchange of property if with respect to a sale or exchange of a residence on or after July 27, 1978,
  - 1. The taxpayer has attained the age of 55 before the date of such sale or exchange, and
  - 2. During the five-year period ending on the date of the sale or exchange, such property has been owned and used by the taxpayer as his principal residence for periods aggregating three years or more.
- b. Limitation. —
  - 1. The amount of the gain excluded from gross income under sub-subdivision a shall not exceed one hundred twenty-five thousand dollars (\$125,000) (not to exceed sixty-two thousand five hundred dollars (\$62,500) to each spouse with respect to property held by a husband and wife as tenants by the entirety or held as joint tenants with right of survivorship).
  - 2. Sub-subdivision a shall not apply to any sale or exchange by the taxpayer if an election by the taxpayer or his spouse under sub-subdivision a with respect to any other sale or exchange is in effect.

- c. Election. — An election under sub-subdivision a may be made or revoked at any time before the expiration of the period for making a claim for credit or refund of the tax imposed by this Article for the taxable year in which the sale or exchange occurred, and shall be made or revoked in such manner as the Secretary of Revenue shall prescribe. In the case of a taxpayer who is married, an election under sub-subdivision a or a revocation thereof may be made only if his spouse joins in such election or revocation.
- d. Special Rules. —
1. For purposes of this subdivision, if
    - I. Property is held by a husband and wife as tenants by the entirety or held as joint tenants with right of survivorship,
    - II. Such husband and wife make a joint return under section 6013 of the Code for the taxable year of the sale or exchange, and
    - III. One spouse satisfies the age, holding, and use requirements of sub-subdivision a with respect to such property, then both husband and wife shall be treated as satisfying the age, holding, and use requirements of sub-subdivision a with respect to such property.
  2. For purposes of this subdivision, if property is held by a husband and wife as tenants by the entirety or held as joint tenants with right of survivorship, they shall be treated as one person for purpose of determining a gain under this subdivision. After such gain has been determined, one half the gain shall be attributed as income to each spouse. In order to enjoy the benefits of the election with respect to entirety property or property held as joint tenants with right of survivorship, the husband and wife shall file a combined return.
  3. For purposes of this subdivision, in the case of an unmarried individual whose spouse is deceased on the date of the sale or exchange of property, if
    - I. The deceased spouse (during the five-year period ending on the date of the sale or exchange) satisfied the holding and use requirements of sub-subdivision a 2 with respect to the property, and
    - II. No election by the deceased spouse under sub-subdivision a is in effect with respect to a prior sale or exchange, then such individual shall be treated as satisfying the holding and use requirements of sub-subdivision a with respect to the property.
  4. For purposes of this subdivision, if the taxpayer holds stock as a tenant-stockholder (as defined in section 216 of the Code) in a cooperative corporation (as defined in that section), then
    - I. The holding requirements of sub-subdivision a shall be applied to the holding of the stock, and
    - II. The use requirements of sub-subdivision a shall be applied to the house or apartment which the taxpayer was entitled to occupy as such stockholder.
  5. For purposes of this subdivision, the destruction, theft, seizure, requisition, or condemnation of property shall be treated as the sale of the property.
  6. In the case of property only a portion of which, during the five-year period ending on the date of the sale or exchange, has been owned and used by the taxpayer as his principal

residence for periods aggregating three years or more, this subdivision shall apply with respect to so much of the gain from the sale or exchange of such property as is determined, under regulations prescribed by the Secretary of Revenue, to be attributable to the portion of the property so owned and used by the taxpayer.

7. In the case of any sale or exchange, for purposes of this subdivision:
    - I. The determination of whether an individual is married shall be made as of the date of the sale or exchange, and
    - II. An individual legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married.
  8. In applying G.S. 105-144.1 (relating to involuntary conversions) and 105-144.2 (relating to sale or exchange of residence), the amount realized from the sale or exchange of property shall be treated as being the amount determined without regard to this subdivision, reduced by the amount of gain not included in gross income pursuant to an election under this subdivision.
  9. If the basis of property sold or exchanged is determined (in whole or in part) under subsection (b) of G.S. 105-144.1 (relating to the basis of property acquired through involuntary conversion), then the holding and use by the taxpayer of the converted property shall be treated as holding and use by the taxpayer of the property sold or exchanged.
- (27) The portion of payments received from governmental programs listed under section 126 of the Code which are excludable from gross income for federal income tax purposes. No deduction or credit allowable under any other provision of this Division shall be allowed for any expenditure made with the use of such payments or for any property acquired with such payments (to the extent that the basis is allocable to the use of such payments). No adjustment to basis shall be made for property acquired through the use of such payments, to the extent that such adjustment would reflect the amount of such payment.
- (28) Repealed by Session Laws 1983, c. 713, s. 85, effective January 1, 1983.
- (29) Money and other benefits, other than salary or wages, received by a driver or passenger while in a ridesharing arrangement as defined by G.S. 136-44.21. (1939, c. 158, s. 317; 1941, c. 50, s. 5; c. 283; 1943, c. 400, s. 4; 1945, c. 708, s. 4; c. 752, s. 3; 1951, c. 643, s. 4; 1957, c. 1224; c. 1340, s. 4; 1961, c. 893; 1963, c. 1169, s. 2; 1965, c. 833; c. 1003, s. 1; 1967, c. 716, s. 1; cc. 871, 1025; c. 1110, s. 3; cc. 1151, 1221; 1969, cc. 178, 1272; 1971, cc. 792, 996; 1973, c. 287; c. 476, s. 193; c. 1287, s. 5; 1975, c. 275, s. 4; c. 559, ss. 3, 4, 6; 1977, c. 657, s. 5; c. 900, ss. 4, 6; 1977, 2nd Sess., c. 1200, s. 2; c. 1221; 1979, c. 179, s. 2; c. 801, ss. 37-39; 1979, 2nd Sess., c. 1109; c. 1301, s. 1; 1981, c. 606, s. 4; 1981 (Reg. Sess., 1982), c. 1205, s. 1; c. 1217; 1983, c. 713, ss. 76, 82, 85; c. 895.)

**Local Modification.** — New Hanover County School Employees' Retirement Fund: 1979, 2nd Sess., c. 1307.

**Cross References.** — As to income from property held in tenancy by the entirety, see § 39-13.6.

**Editor's Note.** —

Subdivision (26) of subsection (b) of this section was originally made effective with respect to taxable years beginning on and after Jan. 1, 1979. Session Laws 1979, 2nd Sess., c. 1301, amended Session Laws 1979, c. 801, s. 102, so as

to make the subdivision effective with respect to taxable years beginning on and after July 27, 1978, and Session Laws 1981, c. 80, amended the 1979 and 1979, 2nd Sess., acts so as to make subdivision (26) effective with respect to taxable years ending on and after July 27, 1978.

References to "workmen's compensation" are now deemed references to "workers' compensation." See § 97-1.1.

**Effect of Amendments.** — The first 1979, 2nd Sess., amendment, applicable to taxable years beginning on or after January 1, 1980, added subdivision (28) to subsection (b).

The second 1979, 2nd Sess., amendment substituted "July 27, 1978," for "January 1, 1979," at the end of the introductory language in paragraph a of subdivision (26) of subsection (b).

The 1981 amendment added subdivision (29) to subsection (b).

The first 1981 (Reg. Sess., 1982) amendment, effective for taxable years beginning on and after Jan. 1, 1982, substituted "living abroad" for "in certain camps" near the beginning of subdivision (22) of subsection (b).

The second 1981 (Reg. Sess., 1982) amendment, applicable to residences sold or exchanged after July 20, 1981, substituted "one hundred twenty-five thousand dollars (\$125,000)" for "one hundred thousand dollars (\$100,000)" and "sixty-two thousand five hun-

dred dollars (\$62,500)" for "fifty thousand dollars (\$50,000)" in subdivision (26)b1 of subsection (b).

The first 1983 amendment, effective for taxable years beginning on or after Jan. 1, 1983, deleted subdivision (b)(28), which read: "Interest received, not to exceed two hundred dollars (\$200.00), from savings deposits or certificates evidencing savings deposits in banks, credit unions, and savings and loan associations located within the State of North Carolina"; substituted "Code" for references to the Internal Revenue Code in subdivisions (a)(20), (b)(9)a, (b)(10), (b)(11), (b)(17), (b)(19), (b)(22), (b)(23), (b)(26)d, and (b)(27), and substituted "1976 Tax Reform Act" for "Internal Revenue Code of 1954 as amended" in subdivision (b)(21).

The second 1983 amendment, effective for taxable years beginning on or after Jan. 1, 1983, in subdivision (b)(9), deleted "and" at the end of paragraph a., substituted "; and" for a period at the end of paragraph b. and added paragraph c.

**Legal Periodicals.** — For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

For comment on the tax effects of equitable distribution upon divorce, see 18 Wake Forest L. Rev. 555 (1982).

## CASE NOTES

**Damages for Wrongful Death Not Exempt.** — It is reversible error for the trial court to instruct the jury that damages awarded in a wrongful death action are exempt from

federal and State income taxes. Scallon v. Hooper, 58 N.C. App. 551, 293 S.E.2d 843, cert. denied, 306 N.C. 744, 295 S.E.2d 480 (1982).

## § 105-141.2. Gross income — alimony payments.

Gross income includes amounts received by a wife from her husband or by a husband from his wife as periodic payments under a decree of divorce or separate maintenance, under a written separation agreement, or under a decree requiring support and maintenance to the extent includable in gross income for federal income tax purposes under the provisions of § 71 of the Code. (1957, c. 1340, s. 4; 1967, c. 1110, s. 3; 1983, c. 713, s. 82.)

**Effect of Amendments.** — The 1983 amendment, effective for taxable years beginning on or after Jan. 1, 1983, substituted "Code" for

"Internal Revenue Code of 1954 as amended" at the end of this section.

## § 105-142. Basis of return of net income.

(b) Change of Income Year. —

- (1) A taxpayer may change the income year upon which he reports for income tax purposes without prior approval by the Secretary of Revenue if such change in income year has been approved by or is acceptable to the Federal Commissioner of Internal Revenue and is used for filing income tax returns under the provisions of the Code.

If a taxpayer desires to make a change in his income year other than as provided above he may make such change in his income year with the approval of the Secretary of Revenue, provided such approval is requested at least 30 days prior to the end of his new income year.

A taxpayer who has changed his income year without requesting the approval of the Secretary of Revenue as provided in the first paragraph of this subdivision shall submit to the Secretary of Revenue notification of any change in the income year after the change has been approved by the Federal Commissioner of Internal Revenue or his agent where application for permission to change is required by the Federal Commissioner of Internal Revenue with such notification stating that such approval has been received. Where application for change of the income year is not required by the Federal Commissioner of Internal Revenue, notification of the intention to change the income year shall be submitted to the Secretary of Revenue prior to the time for filing the short period return.

- (2) A return for a period of less than 12 months (referred to in this subsection as "short period") shall be made when the taxpayer changes his income year. In such a case, the return shall be made for the short period beginning on the day after the close of the former taxable year and ending at the close of the day before the day designated as the first day of the new taxable year, except that taxpayers changing to, or from, a taxable year varying from 52 to 53 weeks as provided in subdivision (5) of G.S. 105-135 shall not be required to file a short-period return if such change results in a short period of 359 days or more or of less than seven days. Short-period income tax returns shall be filed within the same period following the end of such short period as is required for full year returns under the provisions of G.S. 105-155.
- (3) In the case of a taxpayer who is an individual, if a return is made for a short period under the provisions of subdivision (2) of this subsection the exemptions allowed as a deduction under G.S. 105-149 shall be reduced to amounts which bear the same ratio to the full exemptions as the number of months in the short period bears to 12 and the net taxable income for the short period shall be placed on an annual basis by multiplying such income by 12 and by dividing the result by the number of months in the short period. The tax shall be the same part of the tax computed on the annual basis as the number of months in the short period is of 12 months.

(d) The amount actually distributed to any employee or the beneficiary of an employee by an employees' trust, which qualifies under subsection (f)(1)a of G.S. 105-161 as an exempt organization, or qualified plan which meets the requirements of section 401(a) of the Code shall be taxable to the employee or his beneficiary in the year in which distributed except to the extent such distribution is a rollover amount which is not includable in federal gross income under section 402(a) of the Code; provided, that if such employee has made contributions to such trust or such qualified plan, and the benefits are received as periodic payments, the amounts annually received shall be taxed as an annuity as provided in G.S. 105-141.1. The amount actually received by the employee or his beneficiary which consists of corporate shares or other securities shall be taken into account in determining the amount distributed at their fair market value, except that the net unrealized appreciation in the corporation shares or other securities of the employer corporation shall not be included in determining such amount distributed for purposes of this subsection.

The amount paid or distributed out of an individual retirement account described in section 408(a) of the Code, or individual retirement annuity de-

scribed in section 408(b) of the Code, shall be includable in the gross income of the payee or distributee to the extent such amounts are includable in the payee's or distributee's gross income for federal income tax purposes.

Subject to the provisions of G.S. 105-141(b)(4) the amount received from a retirement bond described in section 409 of the Code, shall be included in the gross income of the payee or distributee to the extent such amounts are includable in the payee's or distributee's gross income for federal income tax purposes.

In the case of a pension, profit-sharing, or stock bonus plan or trust established by an employer for the benefit of his employees which does not meet the requirements of G.S. 105-161(f)(1)a or section 401(a) of the Code, any contributions to such plan or trust made by an employer during a taxable year shall be reportable as income in such taxable year by employees in whose names such contributions are credited only to the extent that such employees shall have acquired a nonforfeitable right to such contributions in such taxable year.

(e) An individual, who patronizes or owns stock or has membership in a farmers' marketing or purchasing cooperative or mutual, organized under Subchapter 4 or Subchapter 5 of Chapter 54 of the General Statutes of North Carolina, shall include in his gross income for the year in which the allocation is made his distributive share of any savings, whether distributed in cash or credit, allocated by the cooperative or mutual association for each income year; provided, however, that such allocation or distribution shall not be includable in the gross income for the income year if it is excludable from gross income for federal income tax purposes under the provisions of section 1385 of the Code.

(f) Installment Method. —

(1) General Rule. — Except as otherwise provided in this subsection, income from an installment sale shall be taken into account for purposes of this division under the installment method.

(2) Installment Sale Defined. — For purposes of this subsection:

a. In General. The term "installment sale" means a disposition of property where at least one payment is to be received after the close of the taxable year in which the disposition occurs.

b. Exceptions. The term "installment sale" does not include:

1. Dealer Disposition of Personal Property. — A disposition of personal property on the installment plan by a person who regularly sells or otherwise disposes of personal property on the installment plan.

2. Inventories of Personal Property. — A disposition of personal property of a kind which is required to be included in the inventory of the taxpayer if on hand at the close of the taxable year.

(3) Installment Method Defined. — For purposes of this subsection, the term "installment method" means a method under which the income recognized for any taxable year from a disposition is that proportion of the payments received in that year which the gross profit (realized or to be realized when payment is completed) bears to the total contract price.

(4) Election Out. —

a. In General. Subdivision (1) shall not apply to any disposition if the taxpayer elects to have subdivision (1) not apply to such disposition.

b. Time and Manner for Making Election. Except as otherwise provided by the Secretary of Revenue, an election under paragraph "a" with respect to a disposition may be made only on or before the due date prescribed by law (including extension) for filing the

taxpayer's return of the tax imposed by this division for the taxable year in which the disposition occurs. Such an election shall be made in the manner prescribed by the Secretary.

- c. Election Revocable Only with Consent. An election under paragraph "a" with respect to any disposition may be revoked only with the consent of the Secretary.

(5) Definitions and Special Rules. — For purposes of this subsection:

- a. Marketable Securities. The term "marketable securities" means any security for which, as of the date of the disposition, there was a market on an established securities market or otherwise.

- b. Payment. Except as provided in paragraph "c" the term "payment" does not include the receipt of evidences of indebtedness of the person acquiring the property (whether or not payment of such indebtedness is guaranteed by another person).

- c. Purchaser Evidences of Indebtedness Payable on Demand or Readily Tradable. Receipt of a bond or other evidence of indebtedness which

- 1. Is payable on demand, or

- 2. Is issued by a corporation or a government or political subdivision thereof and is readily tradable, shall be treated as receipt of payment.

- d. Readily Tradable Defined. For purposes of paragraph "c," the term "readily tradable" means a bond or other evidence of indebtedness which is issued

- 1. With interest coupons attached or in registered form (other than one in registered form which the taxpayer establishes will not be readily tradable in an established securities market), or

- 2. In any other form designed to render such bond or other evidence of indebtedness readily tradable in an established securities market.

- e. Like-Kind Exchanges. In the case of any exchange described in G.S. 105-145(a):

- 1. The total contract price shall be reduced to take into account the amount of any property permitted to be received in such exchange without recognition of gain,

- 2. The gross profit from such exchange shall be reduced to take into account any amount not recognized by reason of G.S. 105-145(a), and

- 3. The term "payment" shall not include any property permitted to be received in such exchange without recognition of gain.

(6) Use of Installment Method by Shareholders in Section 337 of the Code Liquidations:

- a. Receipt of Obligations Not Treated as Receipt of Payment:

- 1. In General. If, in connection with a liquidation to which section 337 of the Code applies, in a transaction to which section 331 of the Code applies the shareholder receives (in exchange for the shareholder's stock) an installment obligation acquired in respect of a sale or exchange by the corporation during the 12-month period set forth in section 337(a) of the Code, then, for purposes of this subsection, the receipt of payments under such obligation (but not the receipt of such obligation) by the shareholder shall be treated as the receipt of payment for the stock.

- 2. Obligations Attributable to Sale of Inventory Must Result From Bulk Sale. Subparagraph 1 shall not apply to an installment obligation described in section 337(b)(1)(B) of the Code

unless such obligation is also described in section 337(b)(2)(B) of the Code.

3. Sales by Liquidating Subsidiary. For purposes of subparagraph 1, in any case to which section 337(c)(3) of the Code applies, an obligation acquired in respect of a sale or exchange by the selling corporation shall be treated as so acquired by the corporation distributing the obligation to the shareholder.

- b. Distributions Received in More Than One Taxable Year of Shareholder. If:

1. Paragraph "a" applies with respect to any installment obligation received by a shareholder from a corporation and
2. By reason of the liquidation such shareholder receives property in more than one taxable year,

then, on completion of the liquidation, basis previously allocated to property so received shall be reallocated for all such taxable years so that the shareholder's basis in the stock of the corporation is properly allocated among all property received by such shareholder in such liquidation.

(7) Rules:

- a. In General. The Secretary shall prescribe such rules as may be necessary or appropriate to carry out the provisions of this section.
- b. Selling Price Not Readily Ascertainable. The rules prescribed under paragraph a shall include rules providing for ratable basis recovery in transactions where the gross profit or the total contract price (or both) cannot be readily ascertained.

(8) Installment Method for Dealers in Personal Property. —

a. General Rule.

1. In General. Under rules prescribed by the Secretary, a person who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the gross profit, realized or to be realized when payment is completed, bears to the total contract price.
2. Total Contract Price. For purposes of paragraph 1, the total contract price of all sales of personal property on the installment plan includes such sales and is added on the books of account of the seller to the established cash selling price of such property. This paragraph shall not apply with respect to sales of personal property under a revolving credit type plan.

- b. Carrying Charges Not Included in Total Contract Price. If the carrying charges or interest with respect to sales of personal property, the income from which is returned under subdivision a 1, is not included in the total contract price, payments received with respect to such sales shall be treated as applying first against such carrying charges or interest.

(9) Gain or Loss on Disposition of Installment Obligation. —

- a. General Rule. If an installment obligation is satisfied at other than its face value or distributed, transmitted, sold, or otherwise disposed of, gain or loss shall result to the extent of the difference between the basis of the obligation and

1. The amount realized, in the case of satisfaction at other than face value or a sale or exchange, or
2. The fair market value of the obligation at the time of distribution, transmission, or disposition, in the case of the distribution, transmission, or disposition otherwise than by sale or

exchange. Any gain or loss so resulting shall be considered as resulting from the sale or exchange of the property in respect of which the installment obligation was received.

- b. **Basis of Obligation.** The basis of an installment obligation shall be the excess of the face value of the obligation over an amount equal to the income which would be returnable were the obligation satisfied in full.
- c. **Special Rule for Transmission at Death.** Except as provided in G.S. 105-142.1 (relating to recipients of income in respect of decedents), this subsection shall not apply to the transmission of installment obligations at death.

- (10) **Obligation Becomes Unenforceable.** — For purposes of this subsection, if any installment obligation is canceled or otherwise becomes unenforceable the obligation shall be treated as if it were disposed of in a transaction other than a sale or exchange. (1939, c. 158, s. 318; 1943, c. 400, s. 4; 1945, c. 708, s. 4; 1949, c. 392, s. 3; 1955, c. 1313, s. 1; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; c. 843; c. 1287, s. 5; 1975, c. 559, s. 5; 1979, c. 179, s. 2; 1981, c. 46, s. 1; 1981 (Reg. Sess., 1982), c. 1222, ss. 1-3; 1983, c. 713, s. 82.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendments, it is not set out.

**Effect of Amendments.** — The 1981 amendment rewrote subsection (f). Session Laws 1981, c. 46, s. 4, provides that the act shall become effective for dispositions made after Oct. 19, 1980, for taxable years ending after Oct. 19, 1980, except that subdivision (6) of subsection (f) shall apply in the case of distributions of installment obligations after March 31, 1980, subdivision (8) of subsection (f) shall apply to taxable years ending after Oct. 19, 1980, and subdivision (10) of subsection (f) shall apply to installment obligations becoming unenforceable after Oct. 19, 1980, and also provides that, in the case of any disposition made on or before Oct. 19, 1980, in any taxable year ending after that date, the provisions of G.S. 105-142(f)(2) as they existed before Oct. 19, 1980, shall be applied with respect to such disposition without regard to the first proviso of that subdivision and without regard to any requirement that more than one payment be received.

The 1981 (Reg. Sess., 1982) amendment, effective for taxable years beginning on and after Jan. 1, 1982, deleted "or made available" following "distributed" near the beginning and again near the middle of the first sentence of the first paragraph of subsection (d), deleted "in the year in which distributed or made available" immediately preceding the proviso in the first sentence of the first paragraph of subsection (d), substituted "by" for "or made available to" near the beginning of the second sentence in subsection (d) and deleted "or made available" following "distributed" near the middle and again near the end of that sentence and following "amount received" near the beginning of the third paragraph in subsection (d).

The 1983 amendment, effective for taxable years beginning on or after Jan. 1, 1983, substituted "Code" for references to the Internal Revenue Code in subdivision (b)(1), in subsections (d) and (e), and in subdivision (f)(6).

## § 105-142.1. Income in respect of decedents.

(f) **Other Rules Relating to Installment Obligations.** —

- (1) **In General.** — In the case of an installment obligation reportable by the decedent on the installment method under G.S. 105-142, for purposes of subsection (b) of this section;
  - a. The second sentence of subsection (b) of this section shall be applied by inserting "(other than the obligor)" after "or a transfer to a person."
  - b. Any cancellation of such an obligation shall be treated as a transfer, and
  - c. Any cancellation of such an obligation occurring at the death of the decedent shall be treated as a transfer by the estate of the decedent.

dent (or, if held by a person other than the decedent before the death of the decedent, by such person).

- (2) **Cancellation Includes Becoming Unenforceable.** — For purposes of paragraph (1) of this subsection, an installment obligation which becomes unenforceable shall be treated as if it were cancelled. (1957, c. 1340, s. 4; 1967, c. 1110, s. 3; 1973, c. 1287, s. 5; 1981, c. 46, s. 3.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amendment, applicable in the case of decedent's dying after Oct. 19, 1980, added subsection (f).

## § 105-144. Determination of gain or loss.

(b) Except as hereinafter provided in subsection (c) of this section, the final distribution to the taxpayer of the assets of a corporation shall be treated as a sale of the stock or securities of the corporation owned by him, and the gain or loss shall be computed accordingly. Cash dividends paid by a corporation prior to January 1, 1969, from earnings derived from the sale of substantially all its assets under the provisions of section 337 of the Code shall be subject to the provision of G.S. 105-147(7) to the extent the gain on such sale shall be taxable by the State of North Carolina. Provided, however, that the preceding sentence shall not apply to pending litigation in a court of competent jurisdiction. Provided also, that if an individual receives an installment obligation in liquidation under the provisions of section 337 of the Code, the gain realized shall be reported in accordance with G.S. 105-142(f).

(c) An election as to recognition of gain in certain liquidations of corporations shall be allowed subject to the following:

- (1) **General Rule.** — In the case of property distributed in complete liquidation of a corporation, if

a. The liquidation is made in pursuance of a plan of liquidation adopted on or after June 21, 1961; and

b. The distribution is in complete cancellation or redemption of all the stock, and the transfer of all the property under the liquidation occurs within some one calendar month,

then in the case of each qualified electing shareholder (as defined in subdivision (2)) gain on the shares owned by him at the time of the adoption of the plan of liquidation shall be recognized only to the extent provided in subdivision (4).

- (2) **Qualified Electing Shareholders.** — For purposes of this section, the term "qualified electing shareholder" means an individual who is a shareholder of any class of stock (whether or not entitled to vote on the adoption of such plan of liquidation) who is a shareholder at the time of the adoption of such plan, and whose written election to have the benefits of subdivision (1) has been made and filed in accordance with subdivision (3), but only if written elections have been so filed by shareholders (other than corporations) who at the time of the adoption of the plan of liquidation are owners of stock possessing at least eighty percent (80%) of the total combined voting power (exclusive of voting power possessed by stock owned by corporations) of all classes of stock entitled to vote on the adoption of such plan of liquidation.

- (3) **Making and Filing of Elections.** — The written elections referred to in subdivision (2) shall be deemed to have been made and filed if, and only if, such written elections were duly made and filed for federal income tax purposes in conformity with the provisions of section 333 of the Code and the regulations thereunder.

- (4) **Noncorporate Shareholders.** — In the case of a qualified electing shareholder other than a corporation:
- There shall be recognized, and treated as ordinary income, so much of the gain as is not in excess of his ratable share of the earnings and profits of the corporation accumulated after January 1, 1921, such earnings and profits to be determined as of the close of the month in which the transfer in liquidation occurred under subdivision (1), paragraph b, but without diminution by reason of distributions made during such month; but by including in the computation thereof all amounts accrued up to the date on which the transfer of all the property under the liquidation is completed; and
  - There shall be recognized and treated as gain so much of the remainder of the gain as is not in excess of the amount by which the value of that portion of the assets received by him which consists of money, or of stock or securities acquired by the corporation after December 31, 1962, exceeds his ratable share of such earnings and profits.
- (5) **Basis of Property Received in Liquidation.** — If property was acquired by an individual shareholder in the liquidation of a corporation in cancellation or redemption of stock, and with respect to such acquisition gain was realized, but as the result of an election made by a shareholder under this section the extent to which gain was recognized was determined under this section, then the basis shall be the same as the basis of the stock cancelled or redeemed in the liquidation, decreased in the amount of any money received by the shareholder, and increased in the amount of gain recognized to him. (1939, c. 158, s. 319; 1941, c. 50, s. 5; 1957, c. 1340, s. 4; 1961, c. 1093; 1963, c. 1169, s. 2; 1965, c. 580; 1967, c. 1110, s. 3; 1969, c. 1120; 1973, c. 1287, s. 5; 1981, c. 46, s. 2; 1983, c. 713, s. 82.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amendment, effective for dispositions made after Oct. 19, 1980, for taxable years ending after Oct. 19,

1980, added the last sentence of subsection (b).

The 1983 amendment, effective for taxable years beginning on or after Jan. 1, 1983, substituted "Code" for references to the Internal Revenue Code in subsection (b) and in subdivision (c)(3).

## § 105-144.1. Involuntary conversions; recognition of gain.

(g) In the administration of this section, the Secretary may, in his discretion, apply the federal rules and regulations, rulings, and federal court decisions pertinent to the administration and construction of section 1033 of the Code, but the Secretary shall not be bound by such rules and regulations, rulings and decisions. (1949, c. 1171; 1959, c. 1259, s. 4; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; c. 1287, s. 5; 1977, c. 486; 1983, c. 713, s. 82.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amend-

ment, effective for taxable years beginning on or after Jan. 1, 1983, substituted "Code" for "Federal Internal Revenue Code of 1954" in subsection (g).

## § 105-144.2. Sale of principal residence of taxpayer — nonrecognition of gain.

(a) If property (in this section called "old residence") used by the taxpayer as his principal residence is sold by him after December 31, 1956, and, within a period beginning two years before the date of such sale and ending two years after such date, property (in this section called "new residence") is purchased and used by the taxpayer as his principal residence, gain (if any) from such sale shall be recognized only to the extent that the taxpayer's adjusted sales price (as defined in subsection (b)) of the old residence exceeds the taxpayer's cost of purchasing the new residence.

(c) Rules for Application of Section. — For the purposes of this section:

- (1) An exchange by the taxpayer of his residence for other property shall be treated as a sale of such residence, and the acquisition of a residence on the exchange of property shall be treated as a purchase of such residence.
  - (2) A residence any part of which was constructed or reconstructed by the taxpayer shall be treated as purchased by the taxpayer. In determining the taxpayer's cost of purchasing a residence, there shall be included only so much of his cost as is attributable to the acquisition, construction, reconstruction, and improvements made which are properly chargeable to capital account, during the period specified in subsection (a).
  - (3) If a residence is purchased by the taxpayer before the date of his sale of the old residence, the purchased residence shall not be treated as his new residence if sold or otherwise disposed of by him before the date of the sale of the old residence.
  - (4) If the taxpayer, during the period described in subsection (a), purchases more than one residence which is used by him as his principal residence at some time within two years after the date of the sale of the old residence, only the last of such residences so used by him after the date of such sale shall constitute the new residence. If a principal residence is sold in a sale to which paragraph (2) of subsection (d) applies within two years after the sale of the old residence, for purposes of applying the preceding sentence with respect to the old residence, the principal residence so sold shall be treated as the last residence used during such two-year period.
  - (5) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1208, s. 3.
- (d) Limitation. —

- (1) Subsection (a) shall not apply with respect to the sale of the taxpayer's residence if within two years before the date of such sale the taxpayer sold at a gain other property used by him as his principal residence, and any part of such gain was not recognized by reason of subsection (a).
  - (2) Paragraph (1) of this subsection shall not apply with respect to the sale of the taxpayer's residence if
    - a. Such sale was in connection with the commencement of work by the taxpayer as an employee or as a self-employed individual at a new principal place of work, and
    - b. If the residence so sold is treated as the former residence for purposes of Section 217 of the Code (relating to moving expenses), the taxpayer would satisfy the conditions of subsection (c) of section 217 (as modified by the other subsections of such section).
- (f) Tenant-Stockholder in a Cooperative Housing Corporation. — For purposes of this section references to property used by the taxpayer as his principal residence, and references to the residence of a taxpayer, shall include

stock held by a tenant-stockholder in a cooperative housing corporation if —

(1) In the case of stock sold, the house or apartment which the taxpayer was entitled to occupy as such stockholder was used by him as his principal residence, and

(2) In the case of stock purchased, the taxpayer used as his principal residence the house or apartment which he was entitled to occupy as such stockholder.

(h) **Members of the Armed Forces.** — The running of any period of time specified in subsection (a) or (c) (other than the two years referred to in subsection (c)(4)) shall be suspended during any time that the taxpayer (or his spouse if the old residence and the new residence are each used by the taxpayer and his spouse as their principal residence) serves on extended active duty with the armed forces of the United States after the date of sale of the old residence except that any such period of time as so suspended shall not extend beyond the date four years after the date of sale of the old residence. For purposes of this subsection, the term "extended active duty" means any period of active duty pursuant to a call or order to such duty for a period in excess of 90 days or for an indefinite period.

(i) **Individual Whose Tax Home is Outside of United States.** — The running of any period of time specified in subsection (a) or (c) of this section (other than the two years referred to in paragraph (4) of subsection (c)) shall be suspended during the time the taxpayer (or his spouse if the old residence and new residence are each used by the taxpayer and his spouse as their principal residence) has a tax home (as defined in section 913 (j)(1)(B) of the Code) outside of the United States after the date of the sale of the old residence; except that any such period of time as so suspended shall not extend beyond the date four years after the date of the sale of the old residence.

(1957, c. 1340, s. 4; 1973, c. 1287, s. 5; 1975, c. 551, s. 1; 1977, c. 657, s. 5; 1979, c. 179, s. 2; 1981 (Reg. Sess., 1982), c. 1208, ss. 1-3; 1983, c. 713, s. 82.)

**Only Part of Section Set Out.** — As the rest of the section was not affected, it is not set out.

**Editor's Note.** — Subsection (f) of this section is set out to correct an error in the bound volume.

**Effect of Amendments.** — The 1981 (Reg. Sess., 1982) amendment substituted "two years" for "18 months" in two places in subsection (a), in one place in the first sentence and in one place in the second sentence of subdivision (c)(4), near the beginning of subdivision (d)(1), near the beginning of the first sentence of subsection (h) and near the beginning of subsection (i). The amendment also substituted "two-year period" for "18-month period" at the end of subdivision (c)(4) and deleted subdivision (c)(5),

relating to the case of a new residence, the construction of which was commenced by the taxpayer before the expiration of 18 months after the date of the sale of the old residence.

Session Laws 1981 (Reg. Sess., 1982), c. 1208, s. 4, provides: "This act is effective upon ratification [June 18, 1982] and applies to old residences sold or exchanged (i) after July 20, 1981, or (ii) on or before July 20, 1981, if the rollover period under G.S. 105-144.2 determined without regard to this act expires on or after July 20, 1981."

The 1983 amendment, effective for taxable years beginning on or after Jan. 1, 1983, substituted "Code" for "Internal Revenue Code" in subdivision (d)(2)b and in subsection (i).

## § 105-145. Exchanges of property.

(e) In administering this section and in interpreting the clause "property of like kind," the Secretary shall whenever applicable use as a guide the federal rules and regulations in the administration of § 1031 of the Code to the extent that same are not in conflict with the provisions of this section. (1939, c. 158, s. 320; 1943, c. 400, s. 4; 1955, c. 1239, ss. 1-3; 1957, c. 1340, s. 4; 1959, c. 1259, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; 1983, c. 713, s. 82.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amend-

ment, effective for taxable years beginning on or after Jan. 1, 1983, substituted "Code" for "Federal Internal Revenue Code of 1954" in subsection (e).

## § 105-147. Deductions.

In computing net income there shall be allowed as deductions the following items:

- (1) All the ordinary and necessary expenses paid during the income year in carrying on any trade or business, including:
  - a. As to individuals, reasonable wages of employees for services rendered in producing such income.
  - b. As to partnership, reasonable wages of employees and a reasonable allowance for copartners or members of a firm, for services actually rendered in producing such income, the amount of such salary allowance to be included in the personal return of the copartner receiving same.
  - c. As to taxpayers engaged in the business of farming, reasonable expenses paid during the income year for the purpose of soil and water conservation or prevention of erosion of land to the extent allowable for federal income tax purposes under the provisions of section 175 of the Code.
  - d. Repealed by Session Laws 1967, c. 1110, s. 3.
  - e. As to taxpayers engaged in the business of farming, reasonable expenses paid during the income year for the purpose of clearing land to make such land suitable for the purpose of farming to the extent allowable under section 182 of the Code.
  - f. Repealed by Session Laws 1981 (Regular Session, 1982), c. 1205, s. 2.
  - g. As to taxpayers engaged in the commercial growing of trees, reasonable expenses paid for reforestation and cultivation, including site preparation, natural and artificial forestation, noncommercial removal of residual stands for silvicultural purposes, and cultivation of established young growth of desirable trees. Such expenses may, at the taxpayer's option, be amortized based on a period of 60 months. No deduction shall be allowable under this subdivision for amounts deducted under other provisions of this Division. The deduction provided under this subdivision shall be reduced by amounts received for incentive payments excludable from income under this Division. No adjustment to the basis of property shall be made for expenses deducted under this subdivision. The election under this subdivision for any taxable year shall be made within the time prescribed by law (including extensions thereof) for filing the return for the taxable year. The election shall be made in such manner as the Secretary of Revenue may prescribe, and such election may not be revoked.
  - h. As to State legislators, expenses incurred away from home to the extent allowable under section 162 of the Internal Revenue Code. For State income tax purposes, the term "legislative day" as used in section 162(h) of the Code includes any day the General Assembly was not in session but the legislator's physical presence was recorded at a meeting of a board, commission, committee, or council, funded wholly or partly from state funds, of which the legislator was a member.
- (7) Dividends from stock issued by any corporation to the extent herein provided. As soon as may be practicable after the close of each calen-

dar year, the Secretary of Revenue shall determine from each corporate income tax return filed with him during such year, and due from the filing corporation during such year, the proportion of the entire net income or loss of the corporation allocable to this State under the provisions of G.S. 105-130.4, except as provided herein; if a corporation has a net taxable income in North Carolina and a net loss from all sources wherever located, or, if a corporation has a net loss in North Carolina and a net income from all sources wherever located, the Secretary shall require the use of the allocation fraction determined under the provisions of G.S. 105-130.4. A taxpayer who is a stockholder in any such corporation shall be allowed to deduct from his gross income the same proportion of the dividends received by him from such corporation during his income year ending at or after the end of such calendar year. Provided that notwithstanding any other provision of this subdivision, a taxpayer who is a stockholder in a holding company as defined in G.S. 105-130.7(5) shall determine the deductible portion of dividend received from such holding company as provided therein. No deduction shall be allowed for any part of any dividend received by such taxpayer from any corporation which filed no income tax return with the Secretary of Revenue during such calendar year. Dividends received by a taxpayer from stock in any insurance company of this State taxed under the provisions of G.S. 105-228.5 shall be deductible from the gross income of such taxpayer, and a proportionate part of any dividends received from stock in any foreign insurance corporation shall be deductible, such part to be determined on the basis of the ratio of premiums reported for taxation in this State to total premiums collected both in and out of the State. Dividends received on shares of capital stock owned in a stock-owned savings and loan association taxed under Article 8D of this Chapter shall be deductible. A taxpayer shall be allowed to deduct such proportionate part of dividends received by him from a regulated investment company and real estate investment trust as defined in G.S. 105-130.12 as represents and corresponds to income received by such regulated investment company and real estate investment trust which would not be taxed by this State if received directly by the North Carolina resident. In no case shall the total amount of dividends that are deducted from a taxpayer's gross income as a result of the application of the provisions of this subdivision be in excess of fifteen thousand dollars (\$15,000) for the taxable year, except that this limitation shall not apply to dividends received from a corporation for which a valid election to be taxed under Subchapter S of Chapter 1 of the Code is in effect.

- (8) In the case of an individual moving from one location to another, moving expenses paid or incurred during the taxable year to the extent allowed or allowable for federal income tax purposes under the provisions of section 217 of the Code; except, that no individual, other than a resident of North Carolina who qualifies for moving expense deductions under the provisions of subsection (i) of section 217 of the Code, shall be allowed the deduction for such moving expenses unless the income earned at the new principal place of employment is reportable for taxation to North Carolina under the provisions of this Division for the period of time required under section 217 of the Code for qualifying for the moving expense deduction for federal income tax purposes and only to the extent allowed or allowable under that section for federal income tax purposes; provided, that if the reimbursement for the moving expenses is reportable for taxation to North Carolina under the provisions of G.S. 105-141(a)(21), the deduc-

tion for moving expenses shall be allowed to the extent allowed for federal income tax purposes; and provided further, that when only a portion of the income earned at the new principal place of employment is reportable for taxation to North Carolina under the provisions of this Division, the moving expense deduction shall be apportioned under rules and regulations prescribed by the Secretary of Revenue. Where joint federal returns are filed by husband and wife for federal income tax purposes, the deduction otherwise allowable under this subsection shall be limited to such amount as would have been allowable if separate federal income tax returns had been filed. The deduction allowed by this subdivision for moving expenses shall be allowed as a business expense deductible from gross income in arriving at adjusted gross income.

- (12) Except as provided in this subdivision, an allowance for depreciation and obsolescence of property and an allowance for depletion of mines, oil and gas wells, other natural deposits, and timber to the extent allowed under the Code. When the basis of property differs for State and federal purposes, this difference shall be taken into consideration in determining the depreciation, obsolescence, or depletion allowed under this subdivision.

A taxpayer may deduct as depletion only the amount allowed as a cost depletion allowance for mines, oil and gas wells, and other natural deposits under the Code instead of the amount allowed as a percentage depletion allowance for these items under the Code. This paragraph does not apply to depletion deductions for clay, gravel, phosphate rock, lime, shells, stone, sand, feldspar, gemstones, mica, talc, lithium compounds, tungsten, coal, peat, olivine, pyrophyllite, and other solid minerals or rare earths extracted from the soil or waters of this State.

- (13) In lieu of any depreciation allowance pursuant to this section, at the option of the taxpayer, an allowance with respect to the amortization, based on a period of 60 months, of the cost of:

a. Any air-cleaning device, 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 discharge of sewage and industrial wastes or other polluting materials or substances into streams, lakes, or rivers, or the emission of air contaminants into the outdoor atmosphere. The deduction provided herein shall apply to the facilities or equipment of private or public utilities built and installed primarily for the purpose of providing sewer service to residential and outlying areas. The deduction provided for the items enumerated in this paragraph shall be allowed by the Secretary only upon the condition that the person or firm claiming such allowance shall furnish to the Secretary a certificate from the Department of Natural Resources and Community Development certifying that said Environmental Management Commission has found as a fact that the waste treatment plant, air-cleaning device, or air or water pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that such plant or equipment complies with the requirements of said Environmental Management Commission with respect to such plants or equipment, that such plant, device, 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,

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.

- b. 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. The deduction provided for the items enumerated in this paragraph shall be allowed by the Secretary of Revenue only upon the condition that the person claiming such allowance shall furnish to the Secretary a certificate from the Department of Human Resources certifying that the Department of Human 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 Human Resources, and that recycling or resource recovering is the primary purpose of the facility or equipment.

The deduction herein provided for shall also be allowed as to plants or equipment constructed or installed before January 1, 1955, but only with respect to the undepreciated value of such plants or equipment.

- c. Rehabilitating certain certified historic structures, but only to the extent allowed by section 191 of the Code.
- d. Any equipment mandated by the Occupational Safety and Health Act, including the cost of planning, acquiring, constructing, modifying, and installing said equipment.

The term "equipment mandated by the Occupational Safety and Health Act" has the same meaning as in G.S. 105-130.10A.

- (15) Contributions or gifts made by individuals, firms and partnerships within the income year to corporations, trusts, community chests, funds, foundations or associations organized, and operated exclusively for religious, charitable, literary, scientific, or educational purposes or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or contributions or gifts made by individuals, firms and partnerships within the income tax year to posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations, if such posts, organizations, units, or societies are organized in the United States or any of its possessions, and if no part of their net earnings inures to the benefit of any private shareholder or individual, or the organization known as Alcoholics Anonymous or any local chapter thereof, or to a cemetery company owned and operated exclusively for the benefit of its members, or any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, if such company or corporation is not operated for profit and no part of the net earnings of such company or corporation inures to the benefit of any private shareholder or individual; or rescue squads, Radio Emergency Association of Citizens Teams (REACT), and volunteer fire departments, if such organization is not operated for profit and no part of the net earnings of such organization inures to the benefit of any private shareholder, member or individual: Provided, that in the case of such contributions or gifts by a partnership, such amounts shall not be deductible in determining the net income of the partnership but shall be allocated to each partner on the basis of the ratio used for determining each partner's share of the distributive gain or loss of the partnership, and shall be claimed to the extent allowable on each partner's individual return; and, provided

further, that in the case of such contributions or gifts by individuals, the amount allowed as a deduction shall be limited to an amount not in excess of fifteen per centum (15%) of the individual's adjusted gross income. A mileage rate equal to ninety percent (90%) of the mileage rate allowed by the Secretary of Revenue for business expenses shall be allowed as compensation for the cost of operating an automobile in connection with gratuitous services rendered to an organization listed in this subdivision. That portion of a contribution that is claimed as a tax credit pursuant to G.S. 105-151.12 shall not be eligible for a deduction pursuant to this subsection.

- (15a) Contributions or gifts of property included in, or eligible for inclusion in, the National Register of Historical Places, when made by individuals, firms and partnerships within the income year to nonprofit corporations, trusts, foundations or associations organized and operated exclusively for charitable or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and one of whose purposes includes the preservation or conservation of real or personal property of architectural, archeological, historic, artistic, cultural, natural or scenic significance. In the case of such contributions or gifts by a partnership, such amounts shall not be deductible in determining the net income of the partnership but shall be allocated to each partner on the basis of the ratio used for determining each partner's share of the distributive gain or loss of the partnership, and shall be claimed to the extent allowable on each partner's individual return.

Any taxpayer who makes a contribution deductible under the provisions of this subsection may elect to claim one fifth of the deduction with respect to the year in which the contribution was made, and the remaining four fifths may be claimed in equal amounts with respect to the four taxable years next succeeding the year in which the contribution was made. If a timely election is made on the basis prescribed above, the election shall be binding on the taxpayer and he may not after the date prescribed for filing his return change to another method of claiming the deduction; and, in like manner, if a timely election is made to claim the deduction wholly in the year in which the contribution was made, that election shall likewise be binding on the taxpayer.

A taxpayer shall not be entitled to a deduction under the provisions of this section for a contributions deduction claimed under the provisions of G.S. 105-147(15) or (16).

- (16) Contributions or gifts made by individuals, firms, and partnerships within the income year to the State of North Carolina, any of its institutions, instrumentalities, or agencies, any county or municipality of this State, their institutions, instrumentalities, or agencies, contributions or gifts made by individuals, firms, and partnerships within the income year to educational institutions or nonprofit hospitals or the Civil Air Patrol located within North Carolina, and contributions or gifts made by individuals, firms, and partnerships within the income year to public-supported community foundations or public-supported community trusts, no part of the net earnings of which inures to the benefit of any private stockholder or individual; provided that in the case of contributions or gifts by a partnership such amounts shall not be deductible in determining the net income of the partnership but shall be allocated to each partner on the basis of the ratio used for determining each partner's share of the distributive gain or loss of the partnership; and shall be claimed to the extent allowable on each partner's individual return. For the purpose of this

subdivision, the words "educational institution" shall mean only an educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where the educational activities are carried on.

The words "educational institution" shall be deemed to include all of such institution's departments, schools and colleges, a group of "educational institutions" and an organization (corporation, trust, foundation, association or other entity) organized and operated exclusively to receive, hold, invest and administer property and to make expenditures to or for the sole benefit of an "educational institution" or group of "educational institutions."

For the purpose of this subdivision, the words "public-supported community foundations or public-supported community trusts" shall mean those community foundations or community trusts which are deemed to be publicly supported under the Code.

A mileage rate equal to ninety percent (90%) of the mileage rate allowed by the Secretary of Revenue for business expenses shall be allowed as compensation for the cost of operating an automobile in connection with gratuitous services rendered to an organization listed in this subdivision. That portion of a contribution that is claimed as a tax credit pursuant to G.S. 105-151.12 shall not be eligible for a deduction pursuant to this subsection.

- (18) In the case of a nonresident individual or partnership, the deductions allowed in this section other than deductions connected with income arising from sources within the State shall be allowed only in the proportion that the individual's adjusted gross income reportable to North Carolina relates to his total adjusted gross income, if the nonresident's state of principal residence allows similar apportionment of personal deductions. The proper apportionment and allocation of the deductions with respect to sources of income within and without the State shall be determined under rules prescribed by the Secretary of Revenue.
- (20) Reasonable amounts paid by employers to trusts which qualify for exemption under subsection (f)(1)a of G.S. 105-161 and plans established by employers for the benefit of their employees which meet the requirements of section 401(a) of the Code; deductible employee contributions as described in subsection 72(o)(5) of the Code; reasonable amounts paid by a self-employed individual or owner-employee to a retirement program pursuant to a plan adopted by such individual and approved by the Internal Revenue Service, to the extent allowed under the Code; reasonable amounts paid by or on behalf of an individual for his benefit or for the benefit of himself and his spouse to an individual retirement account described in section 408(a) of the Code, for an individual retirement annuity described in section 408(b) of the Code, or for a retirement bond described in section 409 of the Code (but only if the bond is not redeemed within 12 months of the date of its issuance); and reasonable amounts paid by employers to nonqualified plans or trusts established by employers for the benefit of their employees, but only to the extent that such amounts contributed by such employers shall be required under the provisions of this Division to be included in the gross income of such employees.
- (22) Individual income taxpayers whose income is reportable to the State for income tax purposes, may, at their option, under such rules and regulations as the Secretary of Revenue may prescribe, elect to claim a standard deduction equal to ten percent (10%) of their adjusted gross income or five hundred fifty dollars (\$550.00) whichever is lesser, in

lieu of all deductions other than those incurred in the deriving of the income and other than personal exemptions and dependency deductions provided that where both spouses have income taxable in this State and one spouse elects to take credit for the standard deduction provided herein, the other spouse must also take such standard deduction. For the purpose of this subdivision, the phrase "adjusted gross income" shall mean adjusted gross income as defined in G.S. 105-141.3 of this division.

- (25a) The purchase price of a hearing-ear dog designated as such by the North Carolina Council for the hearing impaired, actually purchased and used by a person who is hearing impaired as defined in G.S. 8B-1(2), or purchased by a parent or guardian for the use of a hearing impaired child and/or all of the cost of maintenance and upkeep of a hearing-ear dog, including veterinary expenses. The amount claimed under this subdivision shall not be allowed as a deduction under G.S. 105-147(11).

- (26) Repealed by Session Laws 1981, c. 899, s. 1, effective January 1, 1981.

(1939, c. 158, s. 322; 1941, c. 50, s. 5; 1943, c. 400, s. 4; c. 668; 1945, c. 708, s. 4; c. 752, s. 3; 1947, c. 501, s. 4; c. 894; 1949, c. 392, s. 3; 1951, c. 643, s. 4; c. 937, s. 4; 1953, c. 1031, s. 1; c. 1302, s. 4; 1955, c. 1100, s. 1; c. 1331, s. 1; cc. 1332, 1342; c. 1343, s. 1; 1957, c. 1340, ss. 4, 8; 1959, c. 1259, s. 4; 1961, c. 201, s. 1; c. 1148; 1963, c. 1169, s. 2; 1965, c. 1048; 1967, cc. 259, 550; c. 892, s. 6; c. 1110, s. 3; c. 1252, s. 2; 1969, cc. 725, 1082, 1123; c. 1175, s. 2; 1971, c. 1087, s. 2; c. 1206, s. 2; 1973, c. 476, s. 193; c. 1053, s. 5; c. 1262, s. 23; c. 1282; c. 1287, s. 5; c. 1338; 1975, c. 236, s. 1; c. 559, s. 1; c. 661, s. 1; c. 764, s. 5; 1977, c. 487; c. 657, s. 5; c. 771, s. 4; c. 890, ss. 1, 2; c. 900, s. 1; 1979, c. 179, s. 2; c. 659; c. 776, s. 2; c. 801, ss. 41-47; 1981, c. 653, s. 1; c. 704, s. 17; c. 899, s. 1; c. 957; c. 973, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1177, s. 2; c. 1205, ss. 2, 3; c. 1211, s. 4; 1983, c. 155, s. 1; c. 303, s. 1; c. 706, s. 1; c. 713, ss. 77, 78, 82, 84; c. 793, s. 4.)

**Only Part of Section Set Out.** — As the rest of the section was not affected, it is not set out.

**Editor's Note.** — The introductory language and subdivision (1) of this section are set out above to correct an erroneous reference to the Internal Revenue Code in paragraph f of the subdivision in the replacement volume.

Session Laws 1983, c. 155, s. 2, makes the act effective April 8, 1983, and applicable to taxable years beginning on or after Jan. 1, 1982.

Session Laws 1983, c. 303, s. 2, makes the act effective for taxable years beginning on or after January 1, 1983."

Session Laws 1983, c. 706, s. 3, provides that the act applies to contributions made and to the estates of decedents dying on or after Jan. 1, 1983.

Session Laws 1983, c. 713, s. 109 makes the amendments to this section by that act effective for taxable years beginning on or after Jan. 1, 1983.

Session Laws 1983, c. 793, s. 5, makes the act effective for taxable years beginning on and after Jan. 1, 1983.

**Effect of Amendments.** — Session Laws 1981, c. 653, s. 1, effective with respect to

taxable years beginning on and after Jan. 1, 1981, added subdivision (15a).

Session Laws 1981, c. 704, s. 17, added "or for the purpose of reducing the volume of hazardous waste generated" at the end of the first sentence of paragraph d of subdivision (13). As to short title and purpose of Session Laws 1981, c. 704, see note to § 105-122.

Session Laws 1981, c. 899, s. 1, effective for income tax years beginning on and after Jan. 1, 1981, deleted subdivision (26), which related to deductions for employment-related expenses, defined as amounts paid for expenses for household services and for the care of certain qualified individuals if such expenses were incurred to enable the taxpayer to be gainfully employed. As to credits against personal income tax for child care and certain employment-related expenses, see § 105-151.11.

Session Laws 1981, c. 957, effective for taxable years beginning on and after Jan. 1, 1982, added the second sentence of subdivision (15), and added the last paragraph of subdivision (16).

Session 1981, Laws c. 973, ss. 1 and 2, effective with respect to taxable years beginning on and after Jan. 1, 1981, rewrote subdivision (18),

and deleted the former second paragraph of subdivision (22), which read "Provided, further, that the provisions of this subdivision shall not apply to taxpayers who are not residents of this State."

The first 1981 (Reg. Sess., 1982) amendment, effective for taxable years beginning on or after Jan. 1, 1982, added subdivision (25a).

The second 1981 (Reg. Sess., 1982) amendment, effective for taxable years beginning on and after Jan. 1, 1982, repealed subdivision (1)f, which read: "As to a North Carolina resident any amounts deductible as certain expenses of living abroad under the provisions of section 913 of the Internal Revenue Code of 1954 as amended."

The third 1981 (Reg. Sess., 1982) amendment substituted "G.S. 105-130.7(5)" for "G.S. 105-130.7(6)" in the fourth sentence of subdivision (7).

Session Laws 1983, c. 155, s. 1, effective April 8, 1983, added subdivision (1)h.

Session Laws 1983, c. 303, s. 1, inserted "Radio Emergency Association of Citizens Teams (REACT)" in the first sentence of subdivision (15). For effective date of this amendment, see Editor's Note.

Session Laws 1983, c. 706, s. 1, effective Jan. 1, 1983, inserted "deductible employee contributions as described in subsection 72(o)(5) of the United States Internal Revenue

Code" near the beginning of subdivision (20). (Reference to "United States Internal Revenue Code" changed to "Code" by subsequent 1983 amendment by c. 713.)

Session Laws 1983, c. 713, ss. 77, 78, 82, 84, rewrote subdivision (12); substituted "under the Code" for "purposes of the Internal Revenue Code of 1954, as amended, or regulations promulgated pursuant thereto" in the third paragraph of subdivision (16); in subdivision (20), inserted "to the extent allowed under the Code" following "plan adopted by such individual and approved by the Internal Revenue Service" and deleted "provided, that amounts which are deductible for federal income tax purposes shall be prima facie allowable as deductions hereunder" at the end of that subdivision, and substituted "Code" for references to the Internal Revenue Code in subdivisions (1)c, (1)e, (7), (8), (12), (13)c, and (20). For effective date of this amendment, see Editor's Note.

Session Laws 1983, c. 793, s. 4, added the last sentence of subdivision (15) and added the second sentence of the last paragraph of subdivision (16). For effective date of this amendment, see Editor's Note.

Session Laws 1981, c. 704, s. 27, contains a severability clause.

**Legal Periodicals.** — For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

## CASE NOTES

**Interest on Estate Tax Deficiency Not Part of Tax.** — Although collected as part of the tax, interest paid on an estate or inheritance tax deficiency is not part of the tax, but something in addition to the tax. *Holt v. Lynch*, 307 N.C. 234, 297 S.E.2d 594 (1982).

**No distinction between interest paid on debt created to pay taxes and interest paid on tax itself.** To deny a deduction merely because the government is the lending party has the practical effect of treating such interest in the same manner as a penalty if the estate does not have sufficient taxable income to benefit from deducting the interest paid on its income tax returns. Interest in the tax law, as elsewhere, is merely the cost of the use of

money and is not a penalty. *Holt v. Lynch*, 307 N.C. 234, 297 S.E.2d 594 (1982).

**Interest on Tax Is Deductible.** — Inasmuch as the definition of "tax" in § 105-241.1(i1) specifically applies to the subchapter dealing with state inheritance taxes, interest on tax, although administratively treated as tax for assessment, collection and payment purposes, remains substantively interest paid for the use of money and is deductible. *Holt v. Lynch*, 307 N.C. 234, 297 S.E.2d 594 (1982).

**Cited in** *W.R. Co. v. North Carolina Property Tax Comm'n*, 48 N.C. App. 245, 269 S.E.2d 636 (1980).

## § 105-149. Exemptions.

**Legal Periodicals.** — For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

## CASE NOTES

Stated in *Coleman v. Arnette*, 48 N.C. App. 733, 269 S.E.2d 755 (1980).

### § 105-151.1. Tax credit for construction of dwelling units for handicapped persons.

There shall be allowed to resident owners of multifamily rental units located in North Carolina as a credit against the tax imposed by this Division, an amount equal to five hundred fifty dollars (\$550.00) for each dwelling unit constructed by such resident owner which conforms to the recommendations of section (11x) of the North Carolina Building Code for the taxable year within which the construction of such dwelling units is completed; provided, that credit will be allowed under this section only for the number of such dwelling units completed during the taxable year which were required to be built in compliance with section (11x) of the North Carolina Building Code; provided further, that if the credit allowed by this section exceeds the tax imposed by this Division reduced by all other credits allowed by the provisions of this Division, such excess shall be allowed against the tax imposed by this Division for the next succeeding year; and provided further, that in order to secure the credit allowed by this section the taxpayer shall file with his income tax return for the taxable year with respect to which such credit is to be claimed, a copy of the occupancy permit on the face of which there shall be recorded by the building inspector the number of units completed during the taxable year which conform to section (11x) of the North Carolina Building Code. When he has recorded the number of such units on the face of the occupancy permit, the building inspector shall promptly make and forward a copy of the permit to the Special Office for the Handicapped, Department of Insurance. (1973, c. 910, s. 2; 1979, c. 803, ss. 3, 4; 1981, c. 682, s. 17.)

**Effect of Amendments.** — The 1981 amendment, effective July 1, 1981, substituted "(11x)" for "(IIX)" in three places.

### § 105-151.2. Credit against personal income tax for solar hot water, heating and cooling.

(a) Any person (to include partnerships) who causes to be constructed or installed a solar hot water, heating or cooling system in any residence or other building in North Carolina shall be allowed as a credit against the tax imposed by this Division, an amount equal to twenty-five percent (25%) of the installation and equipment cost of the solar hot water, heating or cooling equipment; provided, that credit allowed under this section shall not exceed one thousand dollars (\$1,000) per system or per year on any single building or for each family dwelling unit of a multi-dwelling building which is individually metered for electric power or natural gas or with separate furnace for oil heat paid for by the occupant; provided further, that to obtain the credit the taxpayer must own or control the use of the building at the time of the installation, except that in the case of a building constructed or modified for sale in which a solar system is constructed or installed, the credit shall be allowed to the owner who first occupies the building for use after the construction or installation of the system or the owner-lessor who first leases the building for use after the construction or installation of the system; provided further, that the credit shall not be allowed to the extent that any of the cost of the system was provided by federal,

State, or local grants; and provided further, that if the credit allowed by this section exceeds the taxes imposed by this Division reduced by all other credits allowed by the provisions of this Division, such excess shall be allowed against the taxes imposed by this Division for the next three succeeding years.

(c) For the purpose of this section, the term "solar hot water, heating and cooling equipment" means any hot water, heating, cooling, or heating and cooling equipment which meets the definitive performance criteria established by the U.S. Secretary of the Treasury or any other performance criteria approved and published by the Secretary of Revenue, or passive solar systems that meet the eligibility criteria approved and published by the Secretary of Revenue. (1977, c. 792, s. 3; 1979, c. 892, s. 2; 1981, c. 921, ss. 5, 6.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amendment, effective for taxable years beginning on and after Jan. 1, 1981, substituted "causes to be constructed or installed" for "constructs or installs" near the beginning of subsection (a), inserted "per system or per year" following

"(\$1,000)" near the middle of the first proviso to subsection (a), substituted the second and third provisos to subsection (a) for the former second proviso, relating to similar subject matter, and added "or passive solar systems that meet the eligibility criteria approved and published by the Secretary of Revenue" at the end of subsection (c).

### § 105-151.5. Credit against personal income tax for conversion of industrial boiler to wood fuel.

Any person who modifies or replaces an oil or gas-fired boiler or kiln and the associated fuel and residue handling equipment used in the manufacturing process of a manufacturing business located in this State with one which is capable of burning wood shall be allowed as a credit against the tax imposed by this Division, an amount equal to fifteen percent (15%) of the installation and equipment cost of such conversion; provided, that in order to secure the credit allowed by this section, the taxpayer must own or control the business in which such boiler or kiln is used at time of such conversion and payment in part or in whole for such installation and equipment must be made by the taxpayer during the tax year for which the credit is claimed; and the amount of credit allowed for any one income year shall be limited to fifteen percent (15%) of such costs paid during the year; and the credit allowed by this section shall not exceed the amount of the tax imposed by this Division for the taxable year reduced by the sum of all credits allowable under this Division, except for payments of tax made by or on behalf of the taxpayer. If a credit is granted under this section to a taxpayer engaged in the business of poultry production and that credit exceeds the tax imposed under this Division, the excess may be carried forward and applied to the tax imposed under this Division for the succeeding five years. (1979, c. 801, s. 68; 1979, 2nd Sess., c. 1318, s. 2; 1983, c. 929, s. 1.)

**Effect of Amendments.** — The 1979, 2nd Sess., amendment inserted "and the associated fuel and residue handling equipment" near the beginning of the section.

The 1983 amendment, effective July 22, 1983, and applicable to credits allowed in taxable years beginning on or after Jan. 1, 1982, added the last sentence.

### § 105-151.6. Credit against personal income tax for construction of a fuel ethanol distillery.

(a) Any person who constructs in North Carolina a distillery to make ethanol from agricultural or forestry products for use as a motor fuel shall be allowed a credit against the tax imposed by this Division equal to twenty percent (20%) of the installation and equipment costs of construction, and an additional ten percent (10%) of those costs if the distillery is powered primarily by use of an alternative fuel source. In order to secure the credit allowed by this section, the taxpayer must own or control the distillery at the time of construction and payment for the installation and equipment must be made by the taxpayer during the tax year for which the credit is claimed. The amount of the credit allowed for any one income year shall be limited to twenty percent (20%) of the costs paid during the year, or thirty percent (30%) of those costs if the distillery is powered primarily by use of an alternative fuel source. Invoices or receipts shall be furnished to substantiate a claim of a credit under this section if requested by the Secretary of Revenue. The credit allowed by this section shall not exceed the amount of the tax imposed by this Division for the taxable year reduced by the sum of all credits allowable under this Division, except for payments of tax made by or on behalf of the taxpayer.

(b) For purposes of this section, "alternative fuel source" includes agricultural and forestry products, waste petroleum products, and peat, but does not include other petroleum products, coal, or natural gas.

(c) The amount of credit allowed under this section may be carried over for the next succeeding five years. (1979, 2nd Sess., c. 1265, s. 3.)

**Effect of Amendments.** — Session Laws effective with respect to taxable years 1979, 2nd Sess., c. 1265, s. 3, makes this section beginning on and after July 1, 1980.

### § 105-151.6A. Credit against personal income tax for construction of a peat facility.

(a) Any person who constructs in North Carolina a facility which uses peat as the feedstock for the production of a commercially manufactured energy source to replace petroleum, natural gas or other nonrenewable energy sources shall be allowed a credit against the tax imposed by this Division equal to twenty percent (20%) of the installation and equipment costs of construction; provided, that the credit shall not be allowed to the extent that any of the cost of the system was provided by federal, State, or local grants. In order to secure the credit allowed by this section, the taxpayer must own or control such facility at the time of construction, and the credit allowed by this section shall not exceed the amount of the tax imposed by this Division for the taxable year reduced by the sum of all credits allowable under this Division, except for payments of tax made by or on behalf of the taxpayer.

(b) The amount of unused credit allowed under this section may be carried over for the next succeeding five years. (1981 (Reg. Sess., 1982), c. 1204, s. 2.)

**Editor's Note.** — Session Laws 1981 (Reg. Sess., 1982), c. 1204, s. 3, provides: "This act shall become effective with respect to taxable years beginning on and after January 1, 1982."

### **§ 105-151.7. Credit against personal income tax for installation of a hydroelectric generator.**

(a) Any person who constructs or installs a hydroelectric generator with a capacity of at least three kilowatts (3KW) at an existing dam or free flowing stream located in this State shall be allowed a credit against the tax imposed by this Division equal to ten percent (10%) of the installation and equipment costs of the hydroelectric generator. The credit allowed under this section may not exceed five thousand dollars (\$5,000) for any single installation. This credit shall not be allowed to the extent that any of the costs of the system were provided by federal, State, or local grants. To secure the credit allowed by this section, the taxpayer must own or control the site at the time the hydroelectric generator is installed. The credit allowed by this section may not exceed the amount of the tax imposed by this Division for the taxable year reduced by the sum of all credits allowable under this Division, except payments of tax made by or on behalf of the taxpayer.

(b) In the case of property owned by the entirety, where both spouses are required to file North Carolina income tax returns, each spouse may claim one half of the credit allowed by this section or one spouse may claim the entire credit allowed by this section by agreement with the other spouse, provided both spouses were living together at the end of the taxable year and file their separate returns for the taxable year on the combined form. Where only one spouse is required to file a North Carolina income tax return, such spouse may claim the credit allowed by this section.

(c) The term "installation costs" includes spillway and other site construction and modifications necessary to accommodate the hydroelectric generator.

(d) As used in this section, "hydroelectric generator" means a machine that produces electricity by water power or by the friction of water or steam. (1981, c. 921, s. 2.)

**Editor's Note.** — Session Laws 1981, c. 921, s. 7, makes this section effective for taxable years beginning on and after Jan. 1, 1981.

### **§ 105-151.8. Credit against personal income tax for installation of solar equipment for the production of industrial heat.**

(a) Any person who constructs or installs solar equipment for the production of heat in the manufacturing process of a manufacturing business located in this State shall be allowed a credit against the tax imposed by this Division equal to twenty percent (20%) of the installation and equipment costs of the solar equipment. The credit allowed under this section may not exceed eight thousand dollars (\$8,000) for any single installation. This credit shall not be allowed to the extent that any of the costs of the system were provided by federal, State, or local grants. To secure the credit allowed by this section, the taxpayer must own or control the business at the time the solar equipment is installed. The credit allowed by this section may not exceed the amount of the tax imposed by this Division for the taxable year reduced by the sum of all credits allowable under this Division, except payment of tax made by or on behalf of the taxpayer. In no case shall a tax credit be allowed both under the provisions of this section and G.S. 105-151.2.

(b) In the case of property owned by the entirety, where both spouses are required to file North Carolina income tax returns, each spouse may claim one

half of the credit allowed by this section or one spouse may claim the entire credit allowed by this section by agreement with the other spouse, provided both spouses were living together at the end of the taxable year and file their separate returns for the taxable year on the combined form. Where only one spouse is required to file a North Carolina income tax return, such spouse may claim the credit allowed by this section.

(c) As used in this section, "solar equipment" means equipment and materials designed to collect, store, transport, or control energy derived directly from the sun. (1981, c. 921, s. 2.)

**Editor's Note.** — Session Laws 1981, c. 921, s. 7, makes this section effective for taxable years beginning on and after Jan. 1, 1981.

### **§ 105-151.9. Credit against personal income tax for installation of a wind energy device.**

(a) Any person who constructs or installs a wind energy device for the production of electricity at a site located in this State shall be allowed a credit against the tax imposed by this Division equal to ten percent (10%) of the installation and equipment costs of the wind energy device. The credit allowed under this section may not exceed one thousand dollars (\$1,000) for any single installation. This credit shall not be allowed to the extent that any of the costs of the system were provided by federal, State, or local grants. To secure the credit allowed by this section, the taxpayer must own or control the site at the time the wind energy device is installed. The credit allowed by this section may not exceed the amount of the tax imposed by this Division for the taxable year reduced by the sum of all credits allowable under this Division, except payments of tax made by or on behalf of the taxpayer.

(b) In the case of property owned by the entirety, where both spouses are required to file North Carolina income tax returns, each spouse may claim one half of the credit allowed by this section or one spouse may claim the entire credit allowed by this section by agreement with the other spouse, provided both spouses were living together at the end of the taxable year and file their separate returns for the taxable year on the combined form. Where only one spouse is required to file a North Carolina income tax return, such spouse may claim the credit allowed by this section.

(c) As used in this section, "wind energy device" means equipment (and parts solely related to the functioning of the equipment) that, when installed on a site, transmits or uses wind energy to generate electricity. (1981, c. 921, s. 2.)

**Editor's Note.** — Session Laws 1981, c. 921, s. 7, makes this section effective for taxable years beginning on and after Jan. 1, 1981.

### **§ 105-151.10. Credit against personal income tax for construction of a methane gas facility.**

(a) Any person who constructs in North Carolina a facility for the production of methane gas from renewable biomass resources shall be allowed a credit against the tax imposed by this Division equal to ten percent (10%) of the installation and equipment costs of construction. The credit allowed under this section may not exceed two thousand five hundred dollars (\$2,500) for any single installation. This credit shall not be allowed to the extent that any of the

costs of the system were provided by federal, State, or local grants. To secure the credit allowed by this section, the taxpayer must own or control the facility at the time of construction. The credit allowed by this section may not exceed the amount of the tax imposed by this Division for the taxable year reduced by the sum of all credits allowable under this Division, except payments of tax made by or on behalf of the taxpayer.

(b) In the case of property owned by the entirety, where both spouses are required to file North Carolina income tax returns, each spouse may claim one half of the credit allowed by this section or one spouse may claim the entire credit allowed by this section by agreement with the other spouse, provided both spouses were living together at the end of the taxable year and file their separate returns for the taxable year on the combined form. Where only one spouse is required to file a North Carolina income tax return, such spouse may claim the credit allowed by this section.

(c) As used in this section, "renewable biomass resources" means organic matter produced by terrestrial and aquatic plants and animals such as standing vegetation, aquatic crops, forestry and agricultural residues and animal wastes that can be used for the production of energy. (1981, c. 921, s. 2.)

**Editor's Note.** — Session Laws 1981, c. 921, s. 7, makes this section effective for taxable years beginning on and after Jan. 1, 1981.

### **§ 105-151.11. Credit against personal income tax for child-care and certain employment-related expenses.**

(a) Any person who maintains a household which includes as a member one or more qualifying individuals shall be allowed as a credit against the tax imposed by this Division an amount equal to seven percent (7%) of the employment-related expenses as defined in subdivision (b)(2) herein. The employment-related expenses on which the credit is computed shall not exceed four thousand dollars (\$4,000) during any one taxable year.

In the case of such expenses for services outside the taxpayer's household incurred for the care of a qualifying individual described in (b)(1)a below, the amount on which the credit is computed during any one taxable year shall not exceed two thousand dollars (\$2,000) per qualifying individual, subject, however, to the four thousand dollar (\$4,000) limitation set out above.

(b) For the purposes of this section:

(1) The term "qualifying individual" means:

- a. A dependent of the taxpayer who is under the age of 15 and with respect to whom the taxpayer is entitled to a deduction under G.S. 105-149(5) [105-149(a)(5)];
- b. A dependent of the taxpayer who is physically or mentally incapable of caring for himself; or
- c. The spouse of the taxpayer, if the spouse is physically or mentally incapable of caring for himself or herself.

(2) The term "employment-related expenses" means amounts paid for expenses for household service and for the care of a qualifying individual, but only if such expenses are incurred to enable the taxpayer to be gainfully employed.

(3) a. For the purposes of this section, an individual shall be treated as maintaining a household for any period only if over half of the cost of maintaining the household during such period is furnished by such individual.

- b. In the case of a married person living with his or her spouse and such spouse is maintaining the household, the credit provided for herein shall be allowed with respect to employment-related expenses in connection with any qualifying individuals, except as limited herein, of the spouse not maintaining the household.
- (4) If a child (as defined in G.S. 105-149(a)(5)) who is under the age of 15 or who is physically or mentally incapable of caring for himself receives over half of his support during the calendar year from his parents who are divorced or separated with the intent to remain separate and apart, and such child is in the custody of one or both of his parents for more than one half of the calendar year, in the case of any taxable year beginning in such calendar year such child shall be treated as being a qualifying individual described in subparagraph a or b of subdivision (b)(1), as the case may be, with respect to that parent who has custody for a longer period during such calendar year than the other parent, and shall not be treated as being a qualifying individual with respect to such other parent.
- (c) (1) If the taxpayer is married and living with his spouse for any period during the taxable year, there shall be taken into account employment-related expenses incurred during any month of such period only if:
- a. Both spouses are gainfully employed on a substantially full-time basis, or one spouse is gainfully employed on a substantially full-time basis and the other spouse is a full-time student, which shall mean an individual who during each of five calendar months during the taxable year is a full-time student at an educational institution, or
  - b. The spouse is a qualifying individual described in subdivision (b)(1)c.
- (2) No credit shall be allowed under this section with respect to any amount paid by the taxpayer to an individual with respect to whom a deduction is allowable under G.S. 105-149(5) [105-149(a)(5)] to the taxpayer or his spouse, or who is a child of the taxpayer (within the meaning of G.S. 105-149(a)(5)) who has not attained the age of 19 at the close of the taxable year.
- (3) In the case of employment-related expenses incurred during any taxable year solely with respect to a qualifying individual (other than an individual who is also described in subdivision (b)(1)a), the amount of such expenses which may be taken into account for purposes of this section shall be reduced:
- a. If such individual is described in subdivision (b)(1)b, by the amount by which the sum of:
    1. Such individual's adjusted gross income for such taxable year, and
    2. The disability payments received by such individual during such year, exceed one thousand dollars (\$1,000), or
  - b. In the case of a qualifying individual described in subdivision (b)(1)c, by the amount of disability payments received by such individual during the taxable year.
- For purposes of this paragraph, the term "disability payment" means a payment (other than a gift) which is made on account of the physical or mental condition of an individual and which is not included in gross income.
- (d) If a husband and wife are living together at the end of the taxable year, no credit under this section shall be allowed unless they file a combined return for the year.

(e) No credit shall be allowed under this section unless the taxpayer completes and attaches to his return the necessary form or forms as may be required by the Secretary of Revenue, nor shall any deduction be allowed under G.S. 105-147(11) for amounts claimed under this subdivision.

(f) The credit allowed by this section shall not exceed the amount of tax imposed by this Division for the taxable year reduced by the sum of all credits allowable under this Division, except for payments of tax made by or on behalf of the taxpayer.

(g) No credit shall be allowed under this section with respect to employment-related expenses paid by a nonresident of this State. (1981, c. 899, s. 1.)

**Editor's Note.** — Session Laws 1981, c. 899, s. 2, makes this section effective for income tax years beginning on and after Jan. 1, 1981.

### § 105-151.12. Credit for certain real property donations.

(a) Any person that makes a qualified donation of interests in real property located in North Carolina during the taxable year that is useful for public beach access or use, public access to public waters or trails, fish and wildlife conservation, or other similar land conservation purposes, shall be allowed a credit against the taxes imposed by this Division equal to twenty-five percent (25%) of the fair market value of the donated property interest. To be eligible for this credit, the interest in property must be donated to and accepted by either the State, local government or a body that is both organized to receive and administer lands for conservation purposes and is qualified to receive charitable contributions pursuant to G.S. 105-147(15) or (16); provided, however, that lands required to be dedicated pursuant to local governmental regulation or ordinance and dedications made to increase building density levels permitted under such regulations or ordinances shall not be eligible for this credit. The credit allowed under this section may not exceed five thousand dollars (\$5,000). To support the credit allowed by this section, the taxpayer shall file with the income tax return for the taxable year in which the credit is claimed, a certification by the Department of Natural Resources and Community Development that the property donated is suitable for one or more of the valid public benefits set forth by this subsection.

(b) The credit allowed by this section may not exceed the amount of tax imposed by this Division for the taxable year reduced by the sum of all credits allowed under this Division, except payments of tax made by or on behalf of the taxpayer.

(c) Any unused portion of this credit may be carried forward for the next succeeding five years.

(d) The fair market value, or any portion thereof, of a qualifying donation that is not eligible for a credit pursuant to this section may be considered as a charitable contribution pursuant to G.S. 105-147(15) or (16). That portion of the donation allowed as a credit pursuant to this section shall not be eligible as a charitable contribution.

(e) In the case of property owned by the entirety, where both spouses are required to file North Carolina income tax returns, each spouse may claim one half of the credit allowed by this section or one spouse may claim the entire credit allowed by this section by agreement with the other spouse, provided both spouses were living together at the end of the taxable year and file their separate returns for the taxable year on the combined form. Where only one spouse is required to file a North Carolina income tax return, such spouse may claim the credit allowed by this section. (1983, c. 793, s. 3.)

**Editor's Note.** — Session Laws 1983, c. 793, s. 5, makes this section effective for taxable years beginning on and after Jan. 1, 1983.

## § 105-154. Information at the source.

### CASE NOTES

**Applied** in *Reddington v. Thomas*, 45 N.C. App. 236, 262 S.E.2d 841 (1980).

N.C. 561, 273 S.E.2d 247 (1981); *Davis v. Davis*, 58 N.C. App. 25, 293 S.E.2d 268 (1982).

**Cited** in *Lowder v. All Star Mills, Inc.*, 301

## § 105-159. Corrections and changes.

### CASE NOTES

**This section imposes, etc.** —

This section imposes a positive duty upon taxpayers beyond the requirements as to their original return. *State v. Patton*, 57 N.C. App. 702, 292 S.E.2d 172 (1982).

**Correction of Net Income by Federal Officer Requires New Return.** — The taxpayer whose net income for any year is corrected by the Commissioner of Internal Revenue or other authorized federal officer

must file a new return reflecting his corrected net income within two years after receipt of the federal agent's report. Failure to make such a new return within the time specified subjects the taxpayer to all penalties provided by § 105-236 including, when applicable, the criminal penalty provided by § 105-236(7). *State v. Patton*, 57 N.C. App. 702, 292 S.E.2d 172 (1982).

## § 105-159.1. Designation of tax by individual to political party.

(a) Every individual whose income tax liability for the taxable year is one dollar (\$1.00) or more may designate on his or her income tax return that one dollar (\$1.00) of the amount of tax paid by him or her to the Department of Revenue shall thereafter be paid by the Secretary of Revenue, in the manner hereinafter prescribed, to the State Treasurer for the use of all political parties as defined herein upon a pro rata basis according to their respective party voter registrations according to the most recent certification of the State Board of Elections; Provided, however, that no political party with less than one percent (1%) of the total number of registered voters in the State shall receive any such funds, and the registration of such parties shall not be included in calculating the pro rata distribution. For purposes of this section, political party shall mean a political party which at the last preceding general State election received at least ten percent (10%) of the entire vote cast in the State for Governor, or for presidential electors, or a group of voters who by July 1 of the preceding calendar year, by virtue of a petition as a new political party, had duly qualified as a new political party within the meaning of Chapter 163 of the General Statutes of North Carolina.

(c) Repealed by Session Laws 1983, c. 481, effective January 1, 1983.

(d) The Secretary of Revenue shall amend the income tax return in order that all taxpayers desiring to make the political contributions authorized herein shall do so by designating same on the front face of the tax return. The line of authorization for such designation shall be color contrasted with the color scheme of the remainder of the income tax return. Such return, or accom-

panying explanatory instruction, shall readily indicate that any such designations neither increase nor decrease an individual's tax liability. (1977, 2nd Sess., c. 1298, s. 1; 1979, c. 801, s. 69; 1983, cc. 139; 480; 481.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** — Session Laws 1981, c. 963, s. 1, amended Session Laws 1977, 2nd Sess., c. 1298, s. 3, as set out in the Editor's Note in the bound volume, so as to delete the expiration date of this section, which formerly was Dec. 31, 1981.

**Effect of Amendments.** — The first 1983 amendment, effective with respect to taxable years beginning on and after Jan. 1, 1983, substituted the present first sentence of subsection (a) for the former first and second sentences thereof.

The second 1983 amendment, effective with respect to taxable years beginning on or after

Jan. 1, 1983, deleted "immediately above the signature line" at the end of the first sentence of subsection (d).

The third 1983 amendment, effective with respect to taxable years beginning on or after Jan. 1, 1983, deleted subsection (c), which read: "Notwithstanding the total amount of money actually collectively designated by taxpayers to be forwarded to the State Treasurer, on behalf of any one particular political party, for any taxable year, any designated sums to one particular party in excess of four hundred thousand dollars (\$400,000) shall not be remitted to the State Treasurer, but shall instead be placed in the General Fund of the State."

### DIVISION III. INCOME TAX—ESTATES, TRUSTS, AND BENEFICIARIES.

## § 105-161. Estates and trusts.

#### (d) Deductions. —

- (1) Allowable Deductions: Except as otherwise provided in this section, the same deductions allowed individuals under G.S. 105-147 shall be allowed in computing the net income of an estate or trust.
- (2) Deductions for Depreciation and Depletion: In case of property held in trust, the deduction for depreciation and depletion shall be apportioned between the income beneficiaries and the trustee in accordance with the instrument creating the trust, or in the absence of such provisions, on the basis of the trust income allocable to each. In the case of an estate, the allowable depreciation deduction shall be apportioned between the estate and the heirs, legatees, and devisees on the basis of the portion of the income of the estate allocable to each.
- (3) Double Deduction Not Allowed: The amounts allowable under G.S. 105-9 as a deduction in computing the taxable estate of a decedent for inheritance tax purposes, to the extent that they consist of those items which would be allowable as a deduction under G.S. 105-147 (or as an offset against the sales price of property in determining gain or loss) for income tax purposes, shall not be allowed as a deduction in computing the taxable income of the estate or of any other person unless there is filed, within the time and in the manner and form prescribed by the Secretary of Revenue, a statement that such amounts have not been allowed as deductions under G.S. 105-9 and a waiver of the right to have such amounts allowed as deductions under G.S. 105-9. This subdivision shall not apply with respect to deductions allowed under G.S. 105-142.1(e) (relating to income in respect of decedents).
- (4) Amounts Paid or Permanently Set Aside for Charity:
  - a. Deduction: In determining the net income of an estate or trust for purposes of this section (other than a trust described in subsection (d)(5) of this section), there shall be allowed as a deduction in

computing the taxable income of the estate or trust (in lieu of the deductions allowed by G.S. 105-147(15) and (16)) any amount of the gross income, without limitation, which pursuant to the terms of the governing instrument is, during the taxable year, paid for a religious, charitable, scientific, literary, or educational purpose or for the prevention of cruelty to children or animals, or for a distributee specified in G.S. 105-147(15) or 105-147(16); provided further, that trusts entitled to the deduction for amounts permanently set aside for charitable purposes under the provisions of section 642(c) of the Code shall also qualify for such deduction under this Division.

In the case of an estate there shall be allowed as a deduction in computing its taxable income any amount of gross income, without limitation, which pursuant to the terms of its governing instrument is during the taxable year, permanently set aside for religious, charitable, scientific, literary, or educational purposes or for a distributee specified in G.S. 105-147(15) or 105-147(16).

b. Limitation on Deduction:

1. Trade or Business Income: In computing the deduction allowable under paragraph a of this subdivision to a trust, no amount otherwise allowable under paragraph a shall be allowable as a deduction with respect to income of the taxable year which is allocable to its unrelated business income for such year. For purposes of the preceding sentence, the term "unrelated business income" means an amount equal to the amount which, if such trust were exempt from tax under subsection (f)(1) of this section, would be computed as its unrelated business taxable income under subsection (f)(2) of this section, (relating to income derived from certain business activities).

2. Prohibited Transactions: The amount otherwise allowable under paragraph a of this subdivision as a deduction shall not be allowable if the trust has engaged in a prohibited transaction. For purposes of this subdivision, the term "prohibited transaction" means any transaction after January 1, 1967, in which any trust while holding income or corpus which has been permanently set aside or is to be used exclusively for charitable or other purposes described in paragraph a of this subdivision:

- I. Lends any part of such income or corpus, without receipt of adequate security and a reasonable rate of interest, to;
  - II. Pays any compensation from such income or corpus, in excess of a reasonable allowance for salaries or other compensation for personal services actually rendered, to;
  - III. Makes any part of its services available on a preferential basis to;
  - IV. Uses such income or corpus to make any substantial purchase of securities or any other property, for more than an adequate consideration in money or money's worth from;
  - V. Sells any substantial part of the securities or other property comprising such income or corpus, for less than an adequate consideration in money or money's worth, to;
  - VI. Engages in any other transaction which results in a substantial diversion of such income or corpus to;
- the creator of such trust; any person who has made a substantial contribution to such trust; a member of a family (includ-

ing for these purposes brothers and sisters, whether by whole or half blood, spouse, ancestors, and lineal descendants) of an individual who is the creator of the trust or who has made a substantial contribution to the trust; or a corporation controlled by any such creator or person through the ownership, directly or indirectly, of fifty percent (50%) or more of the total combined voting power of all classes of stock of the corporation.

The amount otherwise allowable under paragraph a of this subdivision as a deduction shall be denied by reason of having engaged in a prohibited transaction only for taxable years after the taxable year during which the trust is notified by the Secretary of Revenue that it has engaged in such transaction, unless such trust entered into such prohibited transaction with the purpose of diverting such corpus or income from the purposes described in paragraph a of this subdivision, and such transaction involved a substantial part of such corpus or income. Provided, that if the deduction of any trust under paragraph a has been denied as herein provided, such trust, with respect to any taxable year following the taxable year in which notice is received of denial of the deduction under paragraph a, may, in such manner as prescribed by the Secretary of Revenue, file claim for the allowance of the unlimited deduction under paragraph a, and if the Secretary of Revenue is satisfied that such trust will not knowingly again engage in a prohibited transaction the denial of the deduction provided herein shall not apply with respect to the taxable years after the year in which such claim is filed.

3. Accumulated Income: If the amounts permanently set aside, or to be used exclusively for the charitable and other purposes described in paragraph a of this subdivision during the taxable year or any prior taxable year and not actually paid out by the end of the taxable year:

- I. Are unreasonable in amount or duration in order to carry out such purposes of the trust;
- II. Are used to a substantial degree for purposes other than those prescribed in paragraph a of this subdivision; or
- III. Are invested in such manner as to jeopardize the interests of the religious, charitable, scientific, etc., beneficiaries, the amount otherwise allowable under paragraph a of this subdivision shall be limited to the amount actually paid out during the taxable year.

(5) Deduction for Trusts Distributing Current Income Only:

- a. Deduction: In the case of any trust the terms of which provide that all of its income is required to be distributed currently, and do not provide that any amounts are to be paid, permanently set aside, or used for the purposes specified in subsection (d)(4) of this section (relating to deduction for charitable, etc., purposes), there shall be allowed as a deduction in computing the taxable income of the trust the amount of the income for the taxable year which is required to be distributed currently. This subdivision shall not apply in any taxable year in which the trust makes distributions other than amounts of income required to be distributed currently.
- b. Limitation of the Deduction: If the amount of income required to be distributed currently exceeds the distributable net income of the

trust for the taxable year, the deduction shall be limited to the amount of the distributable net income. For this purpose, the computation of distributable net income shall not include items of income which are not included in the gross income of the trust and the deductions allocable thereto.

(6) Deductions for Estates and Trusts Accumulating Income or Distributing Corpus:

- a. Deduction: In any taxable year there shall be allowed as a deduction in computing the taxable income of an estate or trust (other than a trust to which subsection (d)(5) applies), the sum of:
  1. Any amount of income for such taxable year required to be distributed currently (including any amount required to be distributed which may be paid out of income or corpus to the extent such amount is paid out of income for such taxable year); and
  2. Any other amounts properly paid, credited, or required to be distributed for such taxable year. In no case shall this deduction exceed the distributable net income of the estate or trust.
- b. Character of Amounts Distributed: The amount determined under paragraph a shall be treated as consisting of the same proportion of each class of items entering into the computation of distributable net income of the estate or trust as the total of each class bears to the total distributable net income of the estate or trust in the absence of the allocation of different classes of income under the specific terms of the governing instrument. In the application of the preceding sentence, the items of deduction entering into the computation of distributable net income (including the deduction allowed under subsection (d)(4)) shall be allocated among the items of distributable net income in such manner as may be prescribed by the Secretary of Revenue.
- c. Limitation on the Deduction: No deduction shall be allowed under paragraph a in respect of any portion of the amount allowed as a deduction under that paragraph (without regard to this paragraph) which is treated under paragraph b as consisting of any items of distributable net income which are not included in the gross income for the estate or trust.
- d. Exclusion: There shall not be included as amounts falling within subsection (d)(6) of this section:
  1. Any amount which, under the terms of the governing instrument, is properly paid or credited as a gift or bequest of a specific sum of money or of specific property and which is paid or credited all at once or in not more than three installments. For this purpose, an amount which can be paid or credited only from the income of the estate or trust shall not be considered as a gift or bequest of a specific sum of money.
  2. Any amount paid or permanently set aside or otherwise qualifying for the deduction provided in subsection (d)(4) of this section.
  3. Any amount paid, credited, or distributed in the taxable year, if subsection (d)(5) or (d)(6) applied to such for a preceding taxable year of an estate or trust because credited or required to be distributed in such preceding taxable year.
- e. Separate Shares Treated as Separate Trusts: For the sole purpose of determining the amount of distributable net income in the application of subsection (d)(6) of this section and subsection (b) of G.S. 105-162, in the case [of] a single trust having more than

one beneficiary substantially separate and independent shares of different beneficiaries in the trust shall be treated as separate trusts. The existence of such substantially separate and independent shares and the manner of treatment as separate trusts shall be determined as prescribed by the Secretary of Revenue.

- (7) Deduction for Personal Exemption: The following personal exemption deductions shall be allowed under this section:

- a. An estate shall be allowed a deduction of one thousand dollars (\$1,000).
- b. A trust which, under its governing instrument, is required to distribute all of its income currently shall be allowed a deduction of five hundred dollars (\$500.00).
- c. All other trusts shall be allowed a deduction of two hundred dollars (\$200.00).

- (8) Deductible Dividends: Where dividend income is received by a fiduciary of an estate or trust and is distributed or distributable to a beneficiary during the taxable year so that it is includible in the gross income of the beneficiary for that taxable year, the dividends or the portion of such dividends which would be deductible to an individual under the provisions of subdivision (7) of G.S. 105-147 shall be deductible by such beneficiary during that taxable year. If the portion of the dividend income distributable to the beneficiary cannot be determined under the governing instrument, the amount of the deduction by the beneficiary shall be that amount which bears the same ratio to the total of the deductible portion of all dividends received by the estate or trust as the amount of income received by the beneficiary bears to the distributable net income of the estate or trust, except that in no case may the deduction claimed by the beneficiary under this subsection exceed the income distributed or required to be distributed to him from the estate or trust during the taxable year.

- (9) Apportionment of Deductions: Deductions allowable under this section shall be apportioned between the beneficiaries and the trust or estate in such manner as prescribed by the Secretary of Revenue unless otherwise provided in this section.

- (10) The Standard Deduction: The standard deduction allowed individuals under subdivision (22) of G.S. 105-147 shall not be allowed an estate or trust.

(f) Exempt Trusts. —

- (1) The following trusts shall be exempt from taxation under this Division:

- a. Pension, profit-sharing, stock bonus and annuity trusts, or combinations thereof, established by employers for the purpose of distributing both the principal and income thereof exclusively to eligible employees, or the beneficiaries of such employees, and so constituted that no part of the corpus or income may be used for, or diverted to, any purpose other than for the exclusive benefit of the employees or their beneficiaries; provided, there is no discrimination, as to eligibility requirements, contributions or benefits, in favor of officers, shareholders, supervisors, or highly paid employees; provided further, that the interest of individual employees participating therein shall be irrevocable and nonforfeitable to the extent of any contributions made thereto by such employees; and provided further, the Secretary of Revenue shall be empowered to promulgate rules and regulations regarding the qualification of such trusts for exemption under this subdivision. The exemption of any trust under the provisions of the federal income tax law shall be a prima facie basis for exemption of said trust under this paragraph.

b. Any trust created for religious, charitable, scientific or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any individual.

c. Any individual retirement account which is exempt from taxation under section 408(e) of the Code.

(2) Trusts described in subdivision (1) of this subsection shall be subject to the tax provided for in this section to the following extent: Gross income derived by any of these trusts from any trade or business the conduct of which is not substantially related to the exercise or performance of those functions constituting the basis for its exemption in subdivision (1) of this subsection, less all deductions allowed by this section directly connected with carrying on such trade or business, provided, this paragraph shall not apply to interest, royalties, dividends, or rent; provided further, this paragraph shall not apply to any trade or business:

a. In which substantially all of the work in carrying on such trade or business is performed for the trust without compensation; or

b. Which is the selling of merchandise, substantially all of which is given to it.

(1939, c. 158, ss. 314, 315, 324, 325, 327, 332; 1941, c. 50, s. 5; c. 204, s. 1; 1943, c. 400, s. 4; 1945, c. 708, s. 4; c. 752, s. 3; 1947, c. 501, s. 4; 1949, c. 392, s. 3; c. 1173; 1951, c. 643, s. 4; c. 937, s. 1; 1955, c. 17, s. 2; c. 1313, s. 1; 1957, c. 1340, s. 4; 1959, c. 1259, ss. 2, 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; c. 1287, s. 6; 1975, c. 559, s. 2; c. 637, s. 1; 1977, c. 657, s. 5; 1983, c. 713, s. 82.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amendment, effective for taxable years beginning on

or after Jan. 1, 1983, substituted "Code" for "Internal Revenue Code of 1954, as amended" in the first paragraph of subdivision (d)(4)a and for "Internal Revenue Code of 1954 as amended" at the end of subdivision (f)(1)c.

## § 105-163. Grantor trusts.

(c) Other Powers of the Grantor. — The grantor or other person shall be treated as the owner of any portion of a trust in which he has reserved for himself powers other than those described in subsection (b) above to the extent that he is determined to be the owner of such portion under the provisions of §§ 674 through 678 of the Code unless contrary to the context or intent of this Division. (1967, c. 1110, s. 3; 1973, c. 1287, s. 6; 1983, c. 713, s. 82.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amend-

ment, effective for taxable years beginning on or after Jan. 1, 1983, substituted "Code" for "Internal Revenue Code of 1954 as amended" in subsection (c).

## DIVISION IV. MANUFACTURER'S INCOME TAX CREDIT.

### § 105-163.01. Short title.

**Legal Periodicals.** — For survey of 1978 law on taxation, see 57 N.C.L. Rev. 1142 (1979).

DIVISION V. POULTRY OR LIVESTOCK PRODUCER'S INCOME TAX  
CREDIT.

**§ 105-163.05. Credit for local property taxes paid by producer upon poultry and livestock.**

(a) A credit against the income tax imposed in this Article may be claimed by any producer of poultry or livestock for that portion of annual property taxes due and paid on a timely basis during the income year by such producer to counties and municipalities in this State upon poultry and livestock.

(b) The poultry and livestock producer's income tax credit shall be applied against the income tax due from the producer for the taxable year in which the property tax which is the basis for the credit was actually paid. If such credit, when combined with all other credits allowed by this Article, exceeds the income tax due from, or if a loss is sustained by the producer for such taxable year, the excess credit may be carried forward for not more than five taxable years next succeeding the taxable year in which the credit first became available to the producer. In such case, the excess credit shall be applied against income tax due in the earliest taxable year possible and to its maximum extent before any excess credit may be carried forward to a latter taxable year.

(c) For purposes of this section, "property taxes" shall have the same meaning as in G.S. 105-163.02(8). (1979, 2nd Sess., c. 1179, s. 1.)

**Editor's Note.** — Session Laws 1979, 2nd Sess., c. 1179, s. 2, provides that this section shall apply to taxable years beginning on and after January 1, 1981.

ARTICLE 4A.

*Withholding of Income Taxes from Wages and  
Filing of Declarations of Estimated  
Income and Payment of Income  
Tax by Individuals.*

**§ 105-163.1. Definitions.**

As used in this Article,

(6) The term "wages" means all remuneration (other than fees paid to a public official) for service performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include remuneration paid:

- a. For agricultural labor where such remuneration is paid to workers employed on the farm for services rendered on the farm in the production, harvesting, and transportation of agricultural products to market for the farmer-employer; or
- b. For domestic service in a private home, local college club, or local chapter of a college fraternity or sorority; or
- c. For service not in the course of the employer's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for such service is fifty dollars (\$50.00) or more and such service is performed by an individual who is regularly employed by such employer to perform such service. For purposes of this paragraph, an individual shall be deemed to be regularly employed by an employer during a calendar quarter only if:

1. On each of some 24 days during such quarter such individual performs for such employer for some portion of the day service not in the course of the employer's trade or business; or
2. Such individual was regularly employed (as determined under subparagraph 1 above) by such employer in the performance of such service during the preceding calendar quarter; or
- d. For services not in the course of the employer's trade or business, to the extent paid in any medium other than cash; or
- e. To, or on behalf of, an employee or his beneficiary —
  1. From or to a trust described in § 401(a) of the Code which is exempt from tax under § 501(a) of the Code at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust; or
  2. Under or to an annuity plan which, at the time of such payment, meets the requirements of § 401(a) (3), (4), (5), and (6) of the Code.

(11) "Code" means the Internal Revenue Code as enacted as of April 1, 1983, and includes any provisions enacted as of that date which become effective after that date.

(1959, c. 1259, s. 1; 1967, c. 716, s. 3; 1973, 476, s. 193; 1977, c. 657, s. 5; 1979, c. 801, s. 70; 1983, c. 713, ss. 79, 82.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amend-

ment, effective for taxable years beginning on or after Jan. 1, 1983, rewrote subdivision (11), and substituted "Code" for "Internal Revenue Code" in subdivision (6)e 1 and (6)e 2.

## § 105-163.2. Withholding.

(a) Every employer making payment of wages on or after January 1, 1960, shall deduct and withhold with respect to the wages of each employee for each payroll period an amount determined as follows:

Such amount which, if an equal amount was collected for each similar payroll period with respect to a similar amount of wages for each payroll period during an entire calendar year, would aggregate or approximate the income tax liability of such employee under Article 4 of this Chapter after making allowance for the personal exemptions to which such employee would be entitled on the basis of his status during such payroll period and after making allowance for withholding purposes for a deduction from wages of the amount of the standard deduction allowed under G.S. 105-147(22) and without making allowance for any other deductions. (1959, c. 1259, s. 1; 1973, c. 476, s. 193; 1981, c. 13.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amendment, effective for taxable years beginning on or after Jan. 1, 1980, substituted "the amount of

the standard deduction allowed under G.S. 105-147(22)" for "ten percent (10%) thereof, but not exceeding five hundred dollars (\$500.00) per calendar year" near the end of the second paragraph of subsection (a).

### § 105-163.5. Exemptions allowable; certificates.

(f) In addition to any criminal penalty provided by law, if an individual furnishes his employer with an exemption certificate that contains information which has no reasonable basis and that results in a lesser amount of tax being withheld under this Article than would have been withheld if the individual had furnished reasonable information, the individual is subject to a penalty of fifty percent (50%) of the amount not properly withheld. (1959, c. 1259, s. 1; 1973, c. 476, s. 193; 1981 (Reg. Sess., 1982), c. 1277.)

**Only Part of Section Set Out.** — As the rest of the section was not changed by the amendment, only subsection (f) is set out.

**Effect of Amendments.** — The 1981 (Reg.

Sess., 1982) amendment, applicable to offenses committed on and after June 22, 1982, added subsection (f).

### § 105-163.9. Refund to employer; application.

(a) Where there has been an overpayment to the Secretary by the employer or withholding agent under the provisions of this Article, refund shall be made to the employer or withholding agent, as the case may be, only to the extent that the amount of such overpayment was not deducted and withheld by the employer or withholding agent from the employee's wages, and such refund shall be paid together with interest thereon at the rate established in G.S. 105-241.1(i) for assessments; provided, that interest on any such refund shall be computed from a date 90 days after the date the overpayment was originally made by the employer or withholding agent.

(1959, c. 1259, s. 1; 1973, c. 476, s. 193; 1975, c. 74, s. 1; 1981 (Reg. Sess., 1982), c. 1223, s. 3.)

**Only Part of Section Set Out.** — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

**Effect of Amendments.** — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982

and applicable to refunds and assessments made on and after that date, substituted "established in G.S. 105-241.1(i) for assessments" for "of six percent (6%) per annum" preceding the proviso in subsection (a).

### § 105-163.16. Overpayment refunded.

(a) Where the amount of wages withheld at the source under G.S. 105-163.2 exceeds the tax imposed by Article 4 of this Chapter against which the tax so withheld may be credited under G.S. 105-163.10, the amount of such excess shall be considered an overpayment by the employee, and, notwithstanding the provisions of G.S. 105-266 and G.S. 105-266.1, overpayment by the employee shall be refunded by the Secretary under the provisions of this section unless the taxpayer elects to apply the overpayment to his estimated income tax liability for the following year pursuant to G.S. 105-269.4.

(b) Where the amount of estimated tax paid under the provisions of G.S. 105-163.14 exceeds the taxes imposed by Article 4 of this Chapter against which the estimated tax so paid may be credited under the provisions of this Article, the amount of such excess shall be considered an overpayment by the taxpayer, and, notwithstanding the provisions of G.S. 105-266 and G.S. 105-266.1, such overpayment by the taxpayer shall be refunded by the Secretary under the provisions of this section unless the taxpayer elects to apply the overpayment to his estimated income tax liability for the following year pursuant to G.S. 105-269.4.

(c) Where there has been an overpayment (as specified in subsections (a) and (b) of this section) of any tax imposed under Article 4 of this Chapter, as

disclosed by the taxpayer's annual return required to be filed by Article 4, the amount of such overpayment shall be refunded to the taxpayer; except that overpayments of less than one dollar (\$1.00) shall be refunded only upon receipt by the Secretary of a written demand for such refund from the taxpayer and except that there shall be no refund to the taxpayer of any sum set-off under the provisions of Chapter 105A, the Set-off Debt Collection Act. Every refund authorized by this section shall be made as expeditiously as possible, and within six months from the date on which the annual return is filed or due to be filed, whichever is later, insofar as the same is practicable; except that no refunds for overpayment of estimated tax shall be made by the Secretary prior to the date on which the final return is filed by the taxpayer. No interest shall be paid with respect to any such refund if the refund is made within the six months' period above referred to. Interest computed at the rate established in G.S. 105-241.1(i) for assessments shall be paid on refunds made after the expiration of said six months' period, such interest to be computed from the time of the expiration of said six months' period until paid. It shall not be necessary for the Attorney General or any member of his staff to approve such refund. The making of such refund does not absolve any taxpayer of any income tax liability which may in fact exist and the Secretary may make any assessment for any deficiency in the manner provided in Article 4 of this Chapter. No overpayment of tax by the taxpayer shall be refunded irrespective of whether upon discovery or receipt of written demand if such discovery is not made or such demand is not received within three years from the date set by the statute for the filing of the annual return by the taxpayer or within six months of the payment of the tax alleged to be an overpayment, whichever date is the later.

(e) Any taxpayer who shall be entitled to a refund of taxes withheld or estimated taxes paid as provided by this section may elect to contribute all or any part of such refund to the Wildlife Fund for the support of wildlife management and protection programs primarily for nongame wildlife species and wildlife species which are or may hereafter be designated as endangered or threatened. The Secretary shall provide appropriate language and space on the individual income tax form in which to make such election and shall note the same in his instructions as a contribution qualifying as a deduction under G.S. 105-147(16). Any such election shall become irrevocable upon filing the taxpayer's income tax return for the taxable year. All of such contributions shall be transmitted to the State Treasurer for credit to the Wildlife Fund which shall be made available to the Wildlife Resources Commission for the support of management and protection programs primarily for nongame wildlife and endangered and threatened species and to match federal funds which may become available for such purposes. (1959, c. 1259, s. 1; 1967, c. 702, s. 2; 1973, c. 476, s. 193; c. 903, s. 3; 1975, c. 74, s. 2; 1979, c. 801, s. 71; 1981 (Reg. Sess., 1982), c. 1223, s. 1; 1983, c. 663, s. 2; c. 865, s. 1.)

**Only Part of Section Set Out.** — As the rest of the section was not changed by the amendment, only subsection (c) is set out.

**Editor's Note.** —

Session Laws 1983, c. 865, ss. 3 and 4 provided:

"Sec. 3. At least seventy-five percent (75%) of the total amount of the funds derived during any year from the contributions made pursuant to this act must be used for nongame, endangered and threatened species, and urban wildlife programs, and the remainder may be used by the Wildlife Resources Commission for other wildlife management programs."

"Sec. 4. Notwithstanding G.S. 105-163.16(e)

and G.S. 105-130.35, the Department of Revenue may deduct and retain from the funds so contributed an amount equal to the cost of implementing this act, but not to exceed forty-five thousand dollars (\$45,000) per fiscal year. Any such retainage is subject to the approval of the Director of the Budget."

**Effect of Amendments.** — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982 and applicable to refunds and assessments made on and after that date, substituted "established in G.S. 105-241.1(i) for assessments" for "of six percent (6%) per annum" in the fourth sentence of subsection (c).

The first 1983 amendment, effective July 1,

1983, and applicable to income tax returns filed for taxable years beginning on or after Jan. 1, 1984, inserted "unless the taxpayer elects to apply the overpayment to his estimated income tax liability for the following year pursuant to

G.S. 105-269.4" at the end of subsections (a) and (b).  
The second 1983 amendment, effective as to all taxpayers whose taxable years begin on or after Jan. 1, 1983, added subsection (e).

ARTICLE 4B.

*Filing of Declarations of Estimated Income Tax and  
Installment Payments of Estimated Income Tax by  
Corporations.*

§§ 105-163.25 to 105-163.37: Recodified as §§ 105-163.38 to 105-163.44.

**Editor's Note.** — This Article was rewritten by Session Laws 1983, c. 713, s. 86, and has been recodified as Article 4C of Chapter 105. Session Laws 1983, c. 713, s. 109, provides that s. 86 of the Act applies to taxable years beginning on or after June 25, 1983.

ARTICLE 4C.

*Filing of Declarations of Estimated Income Tax and  
Installment Payments of Estimated Income Tax by  
Corporations.*

§ 105-163.38. Definitions.

As used in this Article, unless the context requires otherwise:

- (1) "Corporation" means a corporation that has a reasonably estimated tax liability of at least five thousand dollars (\$5,000). The term "corporation" includes joint-stock companies or associations that meet these requirements.
- (2) "Estimated tax" means the amount of income tax the corporation estimates as the amount imposed by Article 4 for the taxable year. The appropriate percentage of estimated tax payable during the taxable year shall be determined by the following table:

For Taxable Years Beginning On and After:	Percentages
June 25, 1983, and before June 25, 1984	25%
June 25, 1984, and before June 25, 1985	50%
June 25, 1985, and before June 25, 1986	75%
June 25, 1986	100%
- (3) "Fiscal year" means an accounting period of 12 months ending on the last day of any month other than December.
- (4) "Secretary" means the Secretary of Revenue.
- (5) "Taxable year" means the calendar year or fiscal year used as a basis to determine net income under Article 4. If no fiscal year has been established, "fiscal year" means the calendar year. In the case of a return made for a fractional part of the year under Article 4, or under rules prescribed by the Secretary, "taxable year" means the period for which the return is made. (1959, c. 1259, s. 1A; 1973, c. 476, s. 193; 1983, c. 713, s. 86.)

**Editor's Note.** — This Article is Article 4B, as rewritten by Session Laws 1983, c. 713, s. 86, and recodified. Where appropriate, the historical citations to the sections in the former Article have been added to corresponding sec-

tions in the Article as rewritten and recodified.

Session Laws 1983, c. 713, s. 109 provides that s. 86 of the Act applies to taxable years beginning on or after June 25, 1983.

### § 105-163.39. Declarations of estimated income tax required.

(a) **Declaration Required.** — Every corporation subject to taxation under Article 4 shall submit a declaration of estimated tax to the Secretary. This declaration is due at the time established in G.S. 105-163.40, and payment of the estimated tax is due at the time and in the manner prescribed in that section.

(b) **Content.** — In the declaration of estimated tax, the corporation shall state its estimated total net income from all sources for the taxable year, the proportion of its total net income allocable to this State, its estimated tax, and any other information required by the Secretary.

(c) **Amendments to Declaration.** — Under rules prescribed by the Secretary, a corporation may amend a declaration of estimated tax. (1959, c. 1259, s. 1A; 1973, c. 476, s. 193; 1983, c. 713, s. 86.)

### § 105-163.40. Time for submitting declaration; time and method for paying estimated tax.

(a) **Due Dates of Declarations.** — Declarations of estimated tax are due at the same time as the corporation's first installment payment. Installment payments are due as follows:

- (1) If, before the 1st day of the 4th month of the taxable year, the corporation's estimated tax equals or exceeds five thousand dollars (\$5,000), the corporation shall pay the estimated tax in four equal installments on or before the 15th day of the 4th, 6th, 9th and 12th months of the taxable year.
- (2) If, after the last day of the 3rd month and before the 1st day of the 6th month of the taxable year, the corporation's estimated tax equals or exceeds five thousand dollars (\$5,000), the corporation shall pay the estimated tax in three equal installments on or before the 15th day of the 6th, 9th and 12th months of the taxable year.
- (3) If, after the last day of the 5th month and before the 1st day of the 9th month of the taxable year, the corporation's estimated tax equals or exceeds five thousand dollars (\$5,000), the corporation shall pay the estimated tax in two equal installments on or before the 15th day of the 9th and 12th months.
- (4) If, after the last day of the 8th month and before the 1st day of the 12th month of the taxable year, the corporation's estimated tax equals or exceeds five thousand dollars (\$5,000), the corporation shall pay the estimated tax on or before the 15th day of the 12th month of the taxable year.

(b) **Payment of Estimated Tax When Declaration Amended.** — When a corporation submits an amended declaration after making one or more installment payments on its estimated tax, the amount of each remaining installment shall be the amount that would have been payable if the estimate in the amended declaration was the original estimate, increased or decreased as appropriate by the amount computed by dividing:

- (1) The absolute value of the difference between:

a. The amount paid and

b. The amount that would have been paid if the estimate in the amended declaration was the original estimate by

(2) The number of remaining installments.

(c) Short Taxable Year. — Payment of estimated tax for taxable years of less than 12 months shall be made in accordance with rules promulgated by the Secretary. (1959, c. 1259, s. 1A; 1973, c. 476, s. 193; 1983, c. 713, s. 86.)

### § 105-163.41. Penalty for underpayment.

(a) Except as provided in subsection (d), if the amount of estimated tax paid by a corporation during the taxable year is less than the amount of tax imposed upon the corporation under Article 4 for the taxable year, the corporation shall be assessed an additional tax as a penalty in an amount determined by multiplying the amount of the underpayment as determined under subsection (b), for the period of the underpayment as determined under subsection (c), by the percentage established as the rate of interest on assessments under G.S. 105-241.1(i) that is in effect for the period of the underpayment.

(b) The amount of the underpayment shall be the difference between:

(1) The amount of the installment the corporation would have been required to pay if the corporation's estimated tax equalled eighty percent (80%) of the tax imposed under Article 4 for the taxable year, assuming the same schedule of installments, or eighty percent (80%) of the tax imposed for the taxable year if the corporation made no installment payments; and

(2) The amount, if any, of the corresponding installment timely paid by the corporation.

(c) The period of the underpayment shall run from the date the installment was required to be paid to the earlier of:

(1) The 15th day of the 3rd month following the close of the taxable year, or

(2) With respect to any portion of the underpayment, the date on which the portion is paid. An installment payment of estimated tax shall be considered a payment of any previous underpayment only to the extent the payment exceeds the amount of the installment determined under subdivision (1) of subsection (b) for that installment date.

(d) The penalty for underpayment shall not be imposed if the total amount of all payments of estimated tax made on or before the last date prescribed for the payment of the installments equals or exceeds the amount that would have been required to be paid on or before that date if the estimated tax was equal to the least of:

(1) The tax shown on the return of the corporation for the preceding taxable year, if the corporation filed a return for the preceding taxable year and the preceding year was a taxable year of 12 months;

(2) An amount equal to the tax computed at the rates applicable to the taxable year but otherwise on the basis of the facts shown on the return of the corporation for, and the law applicable to, the preceding taxable year; or

(3) An amount equal to eighty percent (80%) of the tax for the taxable year computed by placing on an annualized basis the taxable income:

a. For the first three months of the taxable year, in the case of the installment required to be paid in the 4th month;

b. For the first three months or for the first five months of the taxable year, in the case of the installment required to be paid in the 6th month;

c. For the first six months or for the first eight months of the taxable year, in the case of the installment required to be paid in the 9th month; and

- d. For the first nine months or for the first 11 months of the taxable year, in the case of the installment required to be paid in the 12th month of the taxable year.
- (4) For purposes of this subdivision, the taxable income shall be placed on an annualized basis by multiplying by 12 the taxable income referred to in the preceding sentence, and dividing the resulting amount by the number of months in the taxable year (3, 5, 6, 8, 9, or 11 as the case may be) referred to in that sentence. (1959, c. 1259, s. 1A; 1973, c. 476, s. 193; 1977, c. 1114, s. 9; 1983, c. 713, s. 86.)

### § 105-163.42. Filing of declarations and other returns.

The declarations, amended declarations, or any information returns required under the provisions of this Article from any corporation shall be signed by its president, vice-president, treasurer, assistant treasurer, secretary, or assistant secretary. If a receiver, trustee in bankruptcy, or assignee, by order of a court of competent jurisdiction or by operation of law or otherwise, has possession of or holds title to all or substantially all of the property or business of a corporation, whether or not the property or business is being operated, the receiver, trustee, or assignee shall make and sign the declarations, amended declarations, or any information returns for the corporation in the same manner and form as required of the corporation. (1959, c. 1259, s. 1A; 1983, c. 713, s. 86.)

### § 105-163.43. Overpayment refunded.

Any overpayment of estimated tax shall be credited to the taxpayer and applied to the tax imposed upon the taxpayer by Article 4. The Secretary shall not refund any overpayment before the corporation files its annual return. If, upon examining the annual return, the Secretary finds that the estimated tax paid by the corporation exceeds the amount of tax imposed upon the corporation under Article 4, the Secretary shall refund the amount of the overpayment in accordance with the provisions of Article 9. (1959, c. 1259, s. 1A; 1967, c. 1110, s. 5; 1973, c. 476, s. 193; 1983, c. 713, s. 86.)

### § 105-163.44. Willful failure to pay estimated tax.

Any person required by this Article to pay any estimated tax who willfully fails to pay the estimated tax at the time or times required by law or rules shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be punishable by a fine not to exceed five hundred dollars (\$500.00) or by imprisonment not to exceed six months, or both. (1959, c. 1259, s. 1A; 1983, c. 713, s. 86.)

## ARTICLE 5.

### *Schedule E. Sales and Use Tax.*

#### DIVISION I. TITLE, PURPOSE AND DEFINITIONS.

### § 105-164.1. Short title.

#### CASE NOTES

**The purpose of the Sales and Use Tax Act** is to impose a use tax, credited with any sales tax previously paid, upon the user of any tangible personal property in this State. Oscar Miller

Contractor v. North Carolina Tax Review Bd., — N.C. App. —, 301 S.E.2d 511 (1983).

**If property is used to produce something which will add to the taxpayer's profit** but the thing produced will not be sold subject to the sales tax, the sale of the property is not a sale to a manufacturer within the meaning of

the Sales and Use Tax Act. Such a sale is subject to the Use Tax at the rate of four percent (three percent for the state and one percent for the county). Oscar Miller Contractor v. North Carolina Tax Review Bd., — N.C. App. —, 301 S.E.2d 511 (1983).

## § 105-164.2. Purpose.

### CASE NOTES

**Quoted** in Rent-A-Car Co. v. Lynch, 298 N.C. 559, 259 S.E.2d 564 (1979).

**Cited** in Stam v. State, 47 N.C. App. 209, 267 S.E.2d 335 (1980).

## § 105-164.3. Definitions.

The words, terms and phrases when used in this Article shall have the meanings ascribed to them in this section except when the context clearly indicates a different meaning:

- (15) "Sale" or "selling" shall mean any transfer of title or possession, or both, exchange, barter, lease, license to use or consume, or rental of tangible personal property, conditional or otherwise, in any manner or by any means whatsoever, however effected and by whatever name called, for a consideration paid or to be paid, and includes the fabrication of tangible personal property for consumers by persons engaged in business who furnish either directly or indirectly the materials used in the fabrication work, and the furnishing, preparing, or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing, or serving such tangible personal property or consumed at the place at which such property is prepared, served or sold. A transaction whereby the possession of the property is transferred but the seller retains title or security for the payment of the price shall be deemed a sale.
- (20) "Tangible personal property" means and includes personal property which may be seen, weighed, measured, felt or touched or is in any other manner perceptible to the senses. The term "tangible personal property" shall not include stocks, bonds, notes, insurance or other obligations or securities, nor shall it include electricity, gas or water delivered by or through main lines or pipes either for commercial or domestic use or consumption. The term includes all "canned" or prewritten computer programs, either in the form of written procedures or in the form of storage media on which or in which the program is recorded, held, or existing for general or repeated sale, lease, or license to use or consume. The term does not include the design, development, writing, translation, fabrication, lease, license to use or consume, or transfer for a consideration of title or possession of a custom computer, program, other than a basic operational program, either in the form of written procedures or in the form of storage media on which or in which the program is recorded, or any required documentation or manuals designed to facilitate the use of the custom computer program.

As used in this subdivision:

- a. "Basic operational program" or "control program" means a computer program that is fundamental and necessary to the functioning of a computer. A basic operational program is that part of an operating system, including supervisors, monitors, executives, and control or master programs, which consists of the control program elements of that system. A control or master program, as opposed to a processing program, controls the operation of a computer by managing the allocation of all system resources, including the central processing unit, main storage, input/output devices, and processing programs. A processing program is used to develop and implement the specific applications the computer is to perform.
- b. "Computer program" means the complete plan for the solution of a problem, such as the complete sequence of automatic data-processing equipment instructions necessary to solve a problem, and includes both systems and application programs and subdivisions, such as assemblers, compilers, routines, generators, and utility programs.
- c. "Custom computer program" means a computer program prepared to the special order of the customer. Custom computer programs include one of the following elements:
  1. Preparation or selection of the programs for the customer's use requires an analysis of the customer's requirements by the vendor; or
  2. The program requires adaptation by the vendor to be used in a particular make and model of computer utilizing a specified output device."
- d. "Storage media" means punched cards, tapes, disks, diskettes, or drums.

(1957, c. 1340, s. 5; 1959, c. 1259, s. 5; 1961, c. 1213, s. 1; 1967, c. 1110, s. 6; 1973, c. 476, s. 193; c. 1287, s. 8; 1975, c. 104; c. 275, s. 6; 1979, c. 48, s. 2; c. 71; c. 801, s. 72; 1983, c. 713, ss. 87, 88.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amendment, effective Aug. 1, 1983, inserted "license

to use or consume" in subdivision (15) and, in subdivision (20), inserted the last two sentences of the first paragraph and the second paragraph with its paragraphs a. through d.

#### CASE NOTES

**Applied** in *Young Roofing Co. v. North Carolina Dep't of Revenue*, 42 N.C. App. 248, 256 S.E.2d 306 (1979).

**Quoted** in *In re Proposed Assmt. of Addi-*

*tional Sales & Use Tax*, 46 N.C. App. 631, 265 S.E.2d 461 (1980).

**Cited** in *Rent-A-Car Co. v. Lynch*, 298 N.C. 559, 259 S.E.2d 564 (1979).

## DIVISION II. TAXES LEVIED.

## Part 1. Retail Sales Tax.

## § 105-164.4. Imposition of tax; retailer.

There is hereby levied and imposed, in addition to all other taxes of every kind now imposed by law, a privilege or license tax upon every person who engages in the business of selling tangible personal property at retail, renting or furnishing tangible personal property or the renting and furnishing of rooms, lodgings and accommodations to transients, in this State, the same to be collected and the amount to be determined by the application of the following rates against gross sales and rentals, to wit:

- (1) At the rate of three percent (3%) of the sales price of each item or article of tangible personal property when sold at retail in this State, the tax to be computed on total net taxable sales as defined herein but for the purpose of computing the amount due the State each and every taxable retail sale, or retail sales upon which the tax has been collected, or the amount of tax actually collected, whichever be greater and whether or not erroneously collected, shall be included in the computation of tax due the State. Provided, however, that in the case of the sale of any aircraft, railway locomotive, railway car or the sale of any motor vehicle or boat, the tax shall be only at the rate of two percent (2%) of the sales price, but at no time shall the maximum tax with respect to any one such aircraft, railway locomotive, railway car or motor vehicle or boat, including all accessories attached thereto at the time of delivery thereof to the purchaser, be in excess of three hundred dollars (\$300.00).

The separate sale of a new motor vehicle chassis and a new motor vehicle body to be installed thereon, whether by the same retailer or by different retailers shall be subject only to the tax herein prescribed with respect to a single motor vehicle. No tax shall be imposed upon a body mounted on the chassis of a motor vehicle which temporarily enters the State for the purpose of having such body mounted thereon by the manufacturer thereof.

Notwithstanding G.S. 105-164.3(16), the sales price of a motor vehicle is the gross sales price of the motor vehicle less any allowance given for a motor vehicle taken in trade as part of the consideration for the purchased motor vehicle.

The tax levied under this section applies to all retail sales of motor vehicles, regardless whether the seller is engaged in business as a retailer of motor vehicles and regardless whether a tax has previously been paid under this Article with respect to the vehicle. Purchasers of motor vehicles from sellers who are not retailers are liable for payment of the tax. These purchasers shall pay the tax to the Commissioner of Motor Vehicles when applying for a certificate of title, registration, or registration plate for the vehicle. The sales price of a motor vehicle purchased from a seller who is not a retailer is considered to be either the standard value for the year, make, and model of that vehicle as established in schedules of value adopted by the Secretary or the amount paid by the purchaser for that vehicle, whichever is greater, provided the seller does not take a motor vehicle in trade as part of the purchase price. If the seller takes a motor vehicle in trade as part of the purchase price, the sales price of the motor vehicle sold is considered to be the difference in the standard value of the sold vehicle and the traded-in vehicle or the net amount paid by the purchaser, whichever is greater.

Every retail dealer of motor vehicles who sells a motor vehicle shall, when applying for a transfer of title for that vehicle, certify to the Commissioner of Motor Vehicles that he has collected the sales tax due on the sale of that vehicle and will remit the tax to the Secretary, and shall report the following information to the Commissioner:

- a. His name;
- b. The name of the purchaser; and
- c. The make and serial number of the vehicle sold.

The Commissioner of Motor Vehicles shall prepare forms to be used by retailers to make the certification and report required by this subsection. A retail dealer of motor vehicles who transfers a motor vehicle to another person by means other than a retail sale shall state on the certification form that no tax is due on the transfer of the motor vehicle because the transfer is not a retail sale.

No certificate of title, registration, or registration plate, shall be issued for any motor vehicle transferred pursuant to a retail sale unless the tax levied under this section is paid when application is made for transfer of title or the retailer who sold the vehicle makes the required certification and report when applying for transfer of title. The Commissioner of Motor Vehicles shall remit taxes collected by him under this subsection to the Secretary.

Persons who lease or rent motor vehicles shall collect and remit the tax imposed by this Article on the separate retail sale of a motor vehicle in addition to the tax imposed on the proceeds from the lease or rental of the motor vehicle.

Provided further, the tax shall be only at the rate of one percent (1%) of the sales price on the following items:

- a. Horses or mules by whomsoever sold.
- b. Semen to be used in the artificial insemination of animals.
- c. Sales of fuels to farmers to be used by them for any farm purposes other than preparing food, heating dwellings and other household purposes. The quantity of fuel purchased or used at any one time shall not in any manner be a determinative factor as to whether any sale or use of fuel is or is not subject to the one percent (1%) rate of tax imposed herein.
- d. Sales of fuel to manufacturing industries and manufacturing plants for use in connection with the operation of such industries and plants other than sales of fuels to be used for residential heating purposes. The quantity of fuel purchased used at any one time shall not in any manner be a determinative factor as to whether any sale or use of fuel is or is not subject to the one percent (1%) rate of tax imposed herein.
- e. Sales of fuel to commercial laundries or to pressing and dry-cleaning establishments for use in machinery used in the direct performance of the laundering or the pressing and cleaning service.
- f. Sales to freezer locker plants of wrapping paper, cartons and supplies consumed directly in the operation of such plant.

Provided further, the tax shall be only at the rate of one percent (1%) of the sales price, subject to a maximum tax of eighty dollars (\$80.00) per article, on the following items:

- g. Sales of machines and machinery, whether animal or motor drawn or operated, and parts and accessories for such machines and machinery to farmers for use by them in the planting, cultivating, harvesting or curing of farm crops, and sales of machines and machinery and parts and accessories for such machines and machinery to dairy operators, poultry farmers, egg producers, and

livestock farmers for use by them in the production of dairy products, poultry, eggs or livestock.

The term "machines and machinery" as used in this subdivision is defined as follows:

The term shall include all vehicular implements, designed and sold for any use defined in this subdivision, which are operated, drawn or propelled by motor or animal power, but shall not include vehicular implements which are operated wholly by hand, and shall not include any motor vehicles required to be registered under Chapter 20 of the General Statutes.

The term shall include all nonvehicular implements and mechanical devices designed and sold for any use defined in this subdivision, which have moving parts, or which require the use of any motor or animal power, fuel, or electricity in their operation but shall not include nonvehicular implements which have no moving parts and are operated wholly by hand.

The term shall also include metal flues sold for use in curing tobacco, whether such flues are attached to handfired furnaces or used in connection with mechanical burners.

- h. Sales of mill machinery or mill machinery parts and accessories to manufacturing industries and plants, and sales to contractors and subcontractors purchasing mill machinery or mill machinery parts and accessories for use by them in the performance of contracts with manufacturing industries and plants, and sales to subcontractors purchasing mill machinery or mill machinery parts and accessories for use by them in the performance of contracts with general contractors who have contracts with manufacturing industries and plants.
- i. Sales of central office equipment and switchboard and private branch exchange equipment to telephone companies regularly engaged in providing telephone service to subscribers on a commercial basis, and sales to these companies of prewritten computer programs used in providing telephone service to their subscribers.
- j. Sales to commercial laundries or to pressing and dry-cleaning establishments of machinery used in the direct performance of the laundering or the pressing and cleaning service and of parts and accessories thereto.
- k. Sales to freezer locker plants of machinery used in the direct operation of said freezer locker plant and of parts and accessories thereto.
- l. Sales of broadcasting equipment and parts and accessories thereto and towers to commercial radio and television companies which are under the regulation and supervision of the Federal Communications Commission.
- m. Sales to farmers of bulk tobacco barns and racks and all parts and accessories thereto and similar apparatus used for the curing and drying of any farm produce.
- n. Sales to farmers of commercially manufactured swine, livestock, or poultry equipment or facilities and accessories thereto. The sale of the total number of poultry cages to be served by the same automatic feeder, automatic waterer, or automatic egg collector constitutes the sale of a single article that is separate and distinct from a feeder, waterer, or egg collector.
- o. Sales to farmers of grain, feed or soybean storage facilities and accessories thereto, whether or not dryers are attached, and all similar apparatus and accessories thereto for the storage of grain, feed or soybeans.

- p. Repealed by Session Laws 1983, c. 805, s. 2, effective July 1, 1983.
- q. Sales of containers to farmers or producers for use in the planting, producing, harvesting, curing, marketing, packaging, sale, or transporting or delivery of their products when such containers do not go with and become part of the sale of their products at wholesale or retail.

- (3) Operators of hotels, motels, tourist homes, tourist camps, and similar type businesses and persons who rent private residences and cottages to transients are considered retailers under this Article. There is levied upon every such retailer a tax of three percent (3%) of the gross receipts derived from the rental of any room or rooms, lodgings, or accommodations furnished to transients for a consideration. This tax does not apply to any private residence or cottage that is rented for less than 15 days in a calendar year or to any room, lodging, or accommodation supplied to the same person for a period of 90 or more continuous days.

As used in this subdivision, the term "persons who rent to transients" means (i) owners of private residences and cottages who rent to transients and (ii) rental agents, including "real estate brokers" as defined in G.S. 93A-2, who rent private residences and cottages to transients on behalf of the owners. If a rental agent is liable for the tax imposed by this subdivision, the owner is not liable.

(1957, c. 1340, s. 5; 1959, c. 1259, s. 5; 1961, c. 826, s. 2; 1963, c. 1169, ss. 3, 11; 1967, c. 1110, s. 6; c. 1116; 1969, c. 1075, s. 5; 1971, c. 887, s. 1; 1973, c. 476, s. 193; c. 1287, s. 8; 1975, c. 752; 1977, c. 903; 1977, 2nd Sess., c. 1218; 1979, c. 17, s. 1; c. 22; c. 48, s. 1; c. 527, s. 1; c. 801, s. 73; 1981, c. 984, ss. 1, 2; 1981 (Reg. Sess., 1982), cc. 1207, 1273; 1983, c. 510; c. 713, ss. 89, 93; c. 805, ss. 1, 2.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendments, it is not set out.

**Editor's Note.** —

Session Laws 1983, c. 761, s. 140, provides that, notwithstanding G.S. 105-164.4(1), the Department of Transportation may deduct and retain from the sales tax on motor vehicles an amount equal to the cost to the Division of collecting this tax, not to exceed \$475,000 per year and the cost of collecting this tax shall be determined by the Secretary of Transportation subject to the approval of the State Budget Officer. The section also provides that notwithstanding G.S. 20-63(h) the cost of collection shall include an increase in the commission paid to the branch agents of the Division to 64¢ per transaction. Subsection (b) of such section, as amended by Session Laws 1983, c. 923, s. 217, makes the section effective Aug. 1, 1983. Session Laws 1983, c. 923, s. 267 makes that act effective July 22, 1983.

Session Laws 1983, c. 761, s. 259, is a severability clause.

**Effect of Amendments.** — The 1981 amendment, applicable to all sales made on or after July 1, 1979, inserted "feed" in two places in paragraph o of the present eighth paragraph of subdivision (1), and made changes in former

paragraph p of the eighth paragraph of subdivision (1).

The first 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, rewrote former paragraph p of the present eighth paragraph of subdivision (1).

The second 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, added paragraph q to the present eighth paragraph of subdivision (1).

The first 1983 amendment, effective July 1, 1983, rewrote subdivision (1)i, which read: "Sales of central office equipment and switchboard and private branch exchange equipment to telephone and telegraph companies regularly engaged in providing telephone and telegraph service to subscribers on a commercial basis."

The second 1983 amendment, effective Aug. 1, 1983, in subdivision (1) substituted "three hundred dollars (\$300.00)" for "one hundred twenty dollars (\$120.00)" at the end of the second sentence of the first paragraph, deleted the former third paragraph, and inserted the present third through seventh paragraphs, and rewrote subdivision (3).

The third 1983 amendment, effective July 1, 1983, substituted "swine, livestock, or poultry equipment" for "portable swine equipment" in

the first sentence of subdivision (1)n, added the second sentence of such subdivision and deleted subdivision (1)p, relating to sales to farmers of bulk feed handling equipment used to raise,

feed or produce livestock or poultry products.

**Legal Periodicals.** — For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

### CASE NOTES

**Taxpayer Has Burden of Showing Lower Tax Rate Applies.** — When a taxing statute provides a lower tax rate than is generally applied, a partial exemption is created; the taxpayer claiming an exemption has the burden of showing that he comes within that exception. *Deep River Farms, Ltd. v. Lynch*, 58 N.C. App. 165, 292 S.E.2d 752 (1982).

**Apartment Owners Must Pay Sales Tax on Laundry Machine Receipts.** — The General Assembly did not intend by the 1975 amendment to § 105-85, exempting apartment owners from the privilege license tax on laundries, to exclude the payment of sales tax by apartment owners on the gross receipts from coin-operated washers and dryers. In re Proposed Assmt. of Additional Sales & Use Tax, 46 N.C. App. 631, 265 S.E.2d 461 (1980).

**Hydroponic Growing Systems Are Not**

**"Machines".** — The definition of "machines" in paragraph g of subdivision (1) of this section does not include greenhouse-like structure used for hydroponic growing of tomatoes, as the hydroponic growing systems required substantial human activity within the system in order for the tomatoes to be cultivated and harvested. *Deep River Farms, Ltd. v. Lynch*, 58 N.C. App. 165, 292 S.E.2d 752 (1982).

**Applied** in *Young Roofing Co. v. North Carolina Dep't of Revenue*, 42 N.C. App. 248, 256 S.E.2d 306 (1979); *Development Assocs. v. Wake County Bd. of Adjustment*, 48 N.C. App. 541, 269 S.E.2d 700 (1980).

**Cited** in *Rent-A-Car Co. v. Lynch*, 298 N.C. 559, 259 S.E.2d 564 (1979); *Oscar Miller Contractor v. North Carolina Tax Review Bd.*, — N.C. App. —, 301 S.E.2d 511 (1983).

### Part 3. Use Tax.

#### § 105-164.6. Imposition of tax.

An excise tax is hereby levied and imposed on the storage, use or consumption in this State of tangible personal property purchased within and without this State for storage, use or consumption in this State, the same to be collected and the amount to be determined by the application of the following rates against the sales price, to wit:

- (1) At the rate of three percent (3%) of the cost price of each item or article of tangible personal property when the same is not sold but used, consumed, distributed or stored for use or consumption in this State; except that, whenever a rate of less than three percent (3%) is applicable under the sales tax schedule set out in G.S. 105-164.4 to the sale at retail of an item or article of tangible personal property, the same rate, and maximum tax if any, shall be used in computing any use tax due under this subdivision. The separate sale of a new motor vehicle chassis and a new motor vehicle body to be installed thereon, whether by the same retailer or by different retailers, shall be subject only to the tax herein prescribed with respect to a single motor vehicle.
- (2) At the rate of three percent (3%) of the monthly lease or rental price paid by the lessee or rentee, or contracted or agreed to be paid by the lessee or rentee, to the owner of the tangible personal property; except that, whenever a rate of less than three percent (3%) is applicable under the sales tax schedule set out in G.S. 105-164.4 to the sale at retail of an item or article of tangible personal property, then the same rate, and maximum tax if any, shall be used in computing any use tax due under this subdivision.
- (3) There is hereby levied and there shall be collected from every person, firm, or corporation, an excise tax of three percent (3%) of the purchase

price of all tangible personal property purchased or used which shall enter into or become a part of any building or other kind of structure in this State, including all materials, supplies, fixtures and equipment of every kind and description which shall be annexed thereto or in any manner become a part thereof. Said tax shall be levied against the purchaser of such property. Provided, that where the purchaser is a contractor, the contractor and owner shall be jointly and severally liable for said tax, but the liability of the owner shall be deemed satisfied if before final settlement between them the contractor furnishes to the owner an affidavit certifying that said tax has been paid. Provided further, that where the purchaser is a subcontractor, the contractor and subcontractor shall be jointly and severally liable for said tax, but the liability of the contractor shall be deemed satisfied if before final settlement between them the subcontractor furnishes to the contractor an affidavit certifying that said tax has been paid.

- (3a) Every person, firm, or corporation that purchases or acquires a motor vehicle shall pay a tax at the rate of two percent (2%) of the sales or purchase price of the vehicle, as determined in accordance with G.S. 105-164.4(1), not to exceed three hundred dollars (\$300.00) per vehicle. This tax shall be paid to the Commissioner of Motor Vehicles when applying for a certificate of title or registration plate for the vehicle. A purchaser who furnishes to the Commissioner of Motor Vehicles a certificate from a retailer of motor vehicles engaged in business in this State stating that the purchaser has paid the tax levied on the vehicle by this Article to the retailer is relieved of liability for the tax. No certificate of title, or registration and license plate or plates shall be issued for any motor vehicle purchased or acquired for use on the streets and highways of this State unless and until the tax provided for under this Article on motor vehicles has been paid. Nothing herein is intended to relieve any retailer of motor vehicles engaged in business in this State from his liability for collecting and remitting sales or use tax on his sales of motor vehicles for use by the purchasers thereof in this State and no retailer shall be absolved of this liability for his failure to collect the tax from such purchasers. The Commissioner of Motor Vehicles shall remit use taxes collected by him under this subdivision to the Secretary.

The tax levied under this section applies to all owners of motor vehicles, regardless whether the owner purchased or acquired the vehicle from a retailer of motor vehicles and regardless whether a tax has previously been paid under this Article with respect to the vehicle. The sales price of a motor vehicle acquired from a person who is not a retailer shall be determined in accordance with G.S. 105-164.4(1).

Persons who lease or rent motor vehicles shall collect and remit the tax imposed by this Article on the separate retail sale of a motor vehicle in addition to the tax imposed on the proceeds from the lease or rental of the motor vehicle.

- (4) Where a retail sales tax has already been paid with respect to said tangible personal property in this State by the purchaser thereof, said tax shall be credited upon the tax imposed by this Part. Where a retail sales and use tax is due and has been paid with respect to said tangible personal property in another state by the purchaser thereof for storage, use or consumption in this State, said tax shall be credited upon the tax imposed by this Part. If the amount of tax paid to another state is less than the amount of tax imposed by this Part, the purchaser shall pay to the Secretary an amount sufficient to make the tax paid to the other state and this State equal to the amount imposed by this Part. The Secretary of Revenue shall require such proof of

payment of tax to another state as he deems to be necessary and proper. No credit shall be given under this subdivision for sales or use taxes paid in another state if that state does not grant similar credit for sales taxes paid in North Carolina.

- (8) Notwithstanding any other provisions of this Article, a use tax, at the applicable use tax rate, as hereinbefore provided, is hereby levied upon the storage or use in this State of any motor vehicles, machines, machinery, tools or other equipment brought, imported or caused to be brought into this State for use in constructing, building or repairing any building, highway, street, sidewalk, bridge, culvert, sewer or water system, drainage or dredging system, railway system, reservoir or dam, hydraulic or power plant, transmission line, tower, dock, wharf, excavation, grading or other improvement or structure, or any part thereof. The owner or, if the property is leased the lessee of any such motor vehicle, machine, machinery, tools or other equipment shall be liable for the tax provided for in this paragraph, to be computed as set out below. The useful life of such motor vehicles, machines, tools or other equipment shall be determined by the Secretary in accordance with the experience and practices of the building and construction trades. Said use tax shall be computed on the basis of such proportion of the original purchase price of such property as the duration of time of use in this State bears to the total useful life thereof. Such tax shall become due immediately upon such property being brought into this State, and in the absence of satisfactory evidence as to the period of use intended in this State, it shall be presumed that such property will remain in this State for the remainder of its useful life. All provisions of this Article not directly in conflict with the provisions of this paragraph shall be applicable with respect to the matters herein set forth. The provisions of this paragraph shall not be applicable with respect to sales of such property within this State or to the use, storage or consumption of such property when purchased for use in this State, and in such cases the full sales or use tax shall be paid as in all other cases, irrespective of the period of intended use in this State. (1957, c. 1340, s. 5; 1959, c. 1259, s. 5; 1961, c. 826, s. 2; 1967, c. 1110, s. 6; 1973, c. 476, s. 193; 1979, c. 17, s. 2; c. 48, ss. 3, 4; c. 179, s. 3; c. 527, s. 2; 1979, 2nd Sess., c. 1100, s. 1; c. 1175; 1981, cc. 18, 65; 1983, c. 713, s. 90.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendments, it is not set out.

**Effect of Amendments.** — The first 1979, 2nd Sess., amendment, effective July 1, 1981, added the last sentence of subdivision (4).

The second 1979, 2nd Sess., amendment, effective October 1, 1980, rewrote all of subdivision (3) following the first sentence.

The first 1981 amendment, effective July 1, 1981, deleted "electric or steam" preceding "railway" near the middle of the first sentence of subdivision (8).

The second 1981 amendment, effective July

1, 1981, substituted "the same rate, and maximum tax if any, shall be used" for "the same rate shall be used" near the end of the first sentence of subdivision (1) and near the end of subdivision (2).

The 1983 amendment, effective Aug. 1, 1983, in subdivision (3a) substituted the present first three sentences of the first paragraph for the former first and second sentences thereof, added the last sentence of the first paragraph, and rewrote the second paragraph.

**Legal Periodicals.** — For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

## CASE NOTES

**Taxable Event, etc. —**

If property is used to produce something which will add to the taxpayer's profit but the thing produced will not be sold subject to the sales tax, the sale of the property is not a sale to a manufacturer within the meaning of the Sales and Use Tax Act. Such a sale is subject to

the Use Tax at the rate of four percent (three percent for the state and one percent for the county). *Oscar Miller Contractor v. North Carolina Tax Review Bd.*, — N.C. App. —, 301 S.E.2d 511 (1983).

**Cited in** *Rent-A-Car Co. v. Lynch*, 298 N.C. 559, 259 S.E.2d 564 (1979).

## Part 4. General Provisions.

## § 105-164.7. Sales tax part of purchase price.

## CASE NOTES

**Effect of Failure to Add Tax at Proper**

**Time.** — In an action to determine who was liable to the Secretary of Revenue for the sales tax from a transaction, plaintiff retailer could not collect from defendant purchaser for sales taxes on materials sold by plaintiff to defendant

where plaintiff failed to add sales taxes to the sales price of the material at the "time of selling or delivering or taking an order" as required by this section. *Carolina-Atlantic Distribs., Inc. v. Teachey's Insulation, Inc.*, 51 N.C. App. 705, 277 S.E.2d 460 (1981).

## DIVISION III. EXEMPTIONS AND EXCLUSIONS.

## § 105-164.13. Retail sales and use tax.

The sale at retail, the use, storage or consumption in this State of the following tangible personal property is specifically exempted from the tax imposed by this Article:

## Agricultural Group.

- (1) Commercial fertilizer on which the inspection tax is paid and lime and land plaster used for agricultural purposes whether the inspection tax is paid or not.
- (2) Seeds; remedies, vaccines, medications, litter materials, and feeds for livestock and poultry; rodenticides, insecticides, herbicides, fungicides, and pesticides for livestock, poultry, and agriculture; defoliants for use on cotton or other crops; plant growth inhibitors, regulators, or stimulators for agriculture including systemic and contact or other sucker control agents for tobacco and other crops.
- (3) Products of farms, forests and mines in their original or unmanufactured state when such sales are made by the producer in the capacity of producer.
- (4) Cotton, tobacco, peanuts or other farm products sold to manufacturers for further manufacturing or processing.
- (4.1) Baby chicks and poults sold for commercial poultry or egg production.

## Industrial Group.

- (5) Manufactured products produced and sold by manufacturers or producers to other manufacturers, producers, or registered wholesale or retail merchants, for the purpose of resale except as modified by Division I, G.S. 105-164.3, subdivision (23). Provided, however, this exemption shall not extend to or include retail sales to users or consumers not for resale.
- (6) Ice, whether sold by the manufacturer, producer, wholesale or retail merchant.
- (7) Sales of products of waters in their original or unmanufactured state when such sales are made by the producer in the capacity of producer. Fish and seafoods are likewise exempt when sold by the fisherman in that capacity.
- (8) Sales of tangible personal property to a manufacturer which enters into or becomes an ingredient or component part of tangible personal property which is manufactured.
- (9) Sales of boats, fuel oil, lubricating oils, machinery, equipment, nets, rigging, paints, parts, accessories, and supplies to persons for use by them principally in commercial fishing operations within the meaning of G.S. 113-152, except when the property is for use by persons principally to take fish for recreation or personal use or consumption. As used in this subdivision, "fish" is defined as in G.S. 113-129(7).
- (10) Sales to commercial laundries or to pressing and dry cleaning establishments of articles or materials used for the identification of garments being laundered or dry cleaned, wrapping paper, bags, hangers, starch, soaps, detergents, cleaning fluids and other compounds or chemicals applied directly to the garments in the direct performance of the laundering or the pressing and cleaning service.

## Motor Fuels Group.

- (11) Gasoline or other motor fuel on which the tax levied in G.S. 105-434 and/or G.S. 105-435 of the General Statutes is due and has been paid, and the fact that a refund of the tax levied by either of said sections is made pursuant to the provisions of Subchapter V of Chapter 105 shall not make the sale or the seller of such fuels subject to the tax levied by this Article.

## Medical Group.

- (12) Crutches, artificial limbs, artificial eyes, hearing aids, false teeth, eyeglasses ground on prescription of physicians or optometrists, pulmonary respirators sold on prescription of physicians, whether worn on the person or not, and other orthopedic appliances when the same are designed to be worn on the person of the owner or user.
- (13) Medicines sold on prescription of physicians and dentists.

## Printed Materials Group.

- (14) Holy Bibles; public school books on the adopted list, the selling price of which is fixed by State contract.
- (14a) Printed material which is sold by a printer to a purchaser within or without this State, when such printed material is delivered in this

State to a common carrier or to the United States Postal Service for delivery to the purchaser or the purchaser's designees outside this State, if the purchaser does not thereafter use the printed material in this State.

#### Transactions Group.

- (15) Accounts of purchasers, representing taxable sales, on which the tax imposed by this Article has been paid, that are found to be worthless and actually charged off for income tax purposes may, at corresponding periods, be deducted from gross sales, provided, however, they must be added to gross sales if afterwards collected.
- (16) Sales of used articles other than motor vehicles taken in trade, or a series of trades, as a credit or part payment on the sale of a new article, provided the tax levied in this Article is paid on the gross sales price of the new article. In the interpretation of this subsection, new article shall be taken to mean the original stock in trade of the merchant, and shall not be limited to newly manufactured articles. The resale of articles other than motor vehicles repossessed by the vendor shall likewise be exempt from gross sales taxable under this Article.

#### Exempt Status Group.

- (17) Sales which a state would be without power to tax under the limitations of the Constitution or laws of the United States or under the Constitution of this State.

#### Unclassified Group.

- (18) Funeral expenses, including coffins and caskets, not to exceed one hundred and fifty dollars (\$150.00). All other funeral expenses, including gross receipts for services rendered, shall be taxable at the rate of three percent (3%). However, "services rendered" shall not include those services which have been taxed pursuant to G.S. 105-164.4(4), or to those services performed by any beautician, cosmetologist, hairdresser or barber employed by or at the specific direction of the family or personal representative of a deceased; and "funeral expenses" and "services rendered" shall not include death certificates procured by or at the specific direction of the family or personal representative of a deceased. Where coffins, caskets or vaults are purchased direct and a separate charge is paid for services, the provisions of this subdivision shall apply to the total for both.
- (19) Sales by concession stands operated by the State prison system within the confines of the prisons where such sales are made to prison inmates and guards therein while on duty.
- (20) Sales by blind merchants operating under supervision of the Department of Human Resources.
- (21) The lease or rental of motion picture films used for exhibition purposes where the lease or rental of such property is an established business or part of an established business or the same is incidental or germane to said business of the lessee.
- (22) The lease or rental of films, motion picture films, transcriptions and recordings to radio stations and television stations operating under a certificate from the Federal Communications Commission.

- (23) Sales of wrapping paper, labels, wrapping twine, paper, cloth, plastic bags, cartons, packages and containers, cores, cones or spools, wooden boxes, baskets, coops and barrels, including paper cups, napkins and drinking straws and like articles sold to manufacturers, producers and retailers, when such materials are used for packaging, shipment or delivery of tangible personal property which is sold either at wholesale or retail and when such articles constitute a part of the sale of such tangible personal property and are delivered with it to the customer.
- (24) Sales of fuel and other items of tangible personal property for use or consumption by or on ocean-going vessels which ply the high seas in interstate or foreign commerce in the transport of freight and/or passengers for hire exclusively, when delivered to an officer or agent of such vessel for the use of such vessel; provided, however, that sales of fuel and other items of tangible personal property made to officers, agents, members of the crew or passengers of such vessels for their personal use shall not be exempted from payment of the sales tax.
- (25) Sales by merchants on the Cherokee Indian Reservation when such merchants are authorized to do business on the Reservation and are paying the tribal gross receipts levy to the Tribal Council.
- (26) Lunches to school children when such sales are made within school buildings and are not for profit.
- (27) Meals and food products served to students in dining rooms regularly operated by State or private educational institutions or student organizations thereof.
- (28) Sales of newspapers by newspaper street vendors and by newspaper carriers making door-to-door deliveries and sales of magazines by magazine vendors making door-to-door sales.
- (29) Sales to the North Carolina Museum of Art of paintings and other objects or works of art for public display, the purchases of which are financed in whole or in part by gifts or donations.
- (30) Sales from vending machines when sold by the owner or lessee of said machines at a price of one cent (1¢) per sale.
- (31) Sales of meals not for profit to elderly and incapacitated persons by charitable or religious organizations not operated for profit which are entitled to the refunds provided by G.S. 105-164.14(b), when such meals are delivered to the purchasers at their places of abode.
- (32) Sales of motor vehicles, as defined in G.S. 105-164.3(8a), to nonresident purchasers for immediate transportation to and use in another state in which such vehicles are required to be registered, provided the seller obtains from the purchaser and furnishes to the Secretary of Revenue an affidavit stating the name and address of the purchaser, the state in which the vehicle will be registered and operated, the make, model, and serial number of the vehicle, and such other information as the Secretary may require, and provided further that no exemption shall be allowed unless the affidavit is filed with the seller's sales and use tax report for the month during which the sale is made and such report is timely filed. For sales made by a seller who is not a retailer, this exemption applies if the purchaser furnishes the Secretary an affidavit containing the information otherwise required from a retailer within 45 days of the date of the sale.
- (33) Tangible personal property purchased solely for the purpose of export to a foreign country for exclusive use or consumption in that or some other foreign country, either in the direct performance or rendition of professional or commercial services, or in the direct conduct or operation of a trade or business, all of which purposes are actually consummated, or purchased by the government of a foreign country

for export which purpose is actually consummated. "Export" shall include the acts of possessing and marshalling such property, by either the seller or the purchaser, for transportation to a foreign country, but shall not include devoting such property to any other use in North Carolina or the United States. "Foreign country" shall not include any territory or possession of the United States.

In order to qualify for this exemption, an affidavit of export indicating compliance with the terms and conditions of this exemption, as prescribed by the Secretary of Revenue, must be submitted by the purchaser to the seller, and retained by the seller to evidence qualification for the exemption.

If the purposes qualifying the property for exemption are not consummated, the purchaser shall be liable for the tax which was avoided by the execution of the aforesaid affidavit as well as for applicable penalties and interest and the affidavit shall contain express provision that the purchaser has recognized and assumed such liability.

The principal purpose of this exemption is to encourage the flow of commerce through North Carolina ports that is now moving through out-of-state ports. However, it is not intended that property acquired for personal use or consumption by the purchaser, including gifts, shall be exempt hereunder.

- (34) Sales of items by a nonprofit civic, charitable, educational, scientific or literary organization when the net proceeds of the sales will be given or contributed to the State of North Carolina or to one or more of its agencies or instrumentalities, or to one or more nonprofit charitable organizations, one of whose purposes is to serve as a conduit through which such net proceeds will flow to the State or to one or more of its agencies or instrumentalities.
- (35) Sales by a nonprofit civic, charitable, educational, scientific, literary or fraternal organization continuously chartered or incorporated within North Carolina for at least two years when such sales are conducted only upon an annual basis for the purpose of raising funds for its activities, and when the proceeds thereof are actually used for such purposes; provided, however, that no such sale shall be exempt if not actually consummated within 60 days after the first solicitation of any sale made during said organization's annual sales period.
- (36) Advertising supplements and any other printed matter ultimately to be distributed with or as part of a newspaper. (1957, c. 1340, s. 5; 1959, c. 670; c. 1259, s. 5; 1961, c. 826, s. 2; cc. 1103, 1163; 1963, c. 1169, ss. 7-9; 1965, c. 1041; 1967, c. 756; 1969, c. 907; 1971, c. 990; 1973, c. 476, s. 143; c. 708, s. 1; cc. 1064, 1076; c. 1287, s. 8; 1975, 2nd Sess., c. 982; 1977, c. 771, s. 4; 1977, 2nd Sess., c. 1219, s. 43.6; 1979, c. 46, ss. 1, 2; c. 156, s. 1; c. 201; c. 625, ss. 1, 2; c. 801, ss. 74, 75; 1979, 2nd Sess., c. 1099, s. 1; 1981, cc. 14, 207, 982; 1983, c. 156; c. 570, s. 21; c. 713, ss. 91, 92; c. 873; c. 887.)

**Effect of Amendments.** — The 1979, 2nd Sess., amendment rewrote subdivision (33).

Session Laws 1979, c. 1099, s. 2, provides: "This act shall become effective October 1, 1980, but shall not affect any transaction before such date."

The first 1981 amendment, effective July 1, 1981, deleted "resident" preceding "newspaper street vendors", substituted "newspaper carriers" for "newsboys", and substituted

"door-to-door" for "house-to-house" in two places, all in subdivision (28).

The second 1981 amendment, effective July 1, 1981, inserted "litter materials" near the beginning of subdivision (2).

The third 1981 amendment substituted "literary or fraternal organization" for "or literary organization" and substituted "two years" for "five years" near the beginning of subdivision (35). The amendment also substituted

"exempt" for "exempted," "60 days after" for "60 days of," and made minor changes in punctuation, all in the proviso at the end of subdivision (35).

Session Laws 1983, c. 156, effective July 1, 1983, added subdivision (14a).

Session Laws 1983, c. 570, s. 21, effective Jan. 1, 1984, rewrote subdivision (9).

Session Laws 1983, c. 713, ss. 91, 92, effective

Aug. 1, 1983, inserted "other than motor vehicles" in two places in subdivision (16), and added the second sentence of subdivision (32).

Session Laws 1983, c. 873, effective July 20, 1983, added subdivision (36).

Session Laws 1983, c. 887, effective July 20, 1983, in the third sentence of subdivision (18), inserted the semicolon and the language which follows it.

## § 105-164.13A. Service charges on food, beverages, or meals.

When a service charge is imposed on food, beverages, or meals, so much of said service charge as does not exceed fifteen percent (15%) of the sales price is specifically exempted from the tax imposed by this Article when the service charge:

- (1) Is separately stated in the price list, menu, or written proposal and also in the invoice or bill; and
- (2) Is turned over to the personnel directly involved in the service of the food, beverages, or meals, in accordance with G.S. 95-25.6.

Such service charge shall be considered to be a tip. (1979, c. 801, s. 76; 1979, 2nd Sess., c. 1101.)

**Effect of Amendments.** — The 1979, 2nd Sess., amendment, effective October 1, 1980, rewrote this section, which formerly exempted

only the service charge imposed on prearranged group meals at approved facilities.

## § 105-164.14. Certain refunds authorized.

(b) The Secretary of Revenue shall make refunds semiannually to hospitals not operated for profit (including hospitals and medical accommodations operated by an authority created under the Hospital Authorities Law, Article 12 of Chapter 131), educational institutions not operated for profit, churches, orphanages and other charitable or religious institutions and organizations not operated for profit of sales and use taxes paid under this Article by such institutions and organizations on direct purchases of tangible personal property for use in carrying on the work of such institutions or organizations. Sales and use tax liability indirectly incurred by such institutions and organizations on building materials, supplies, fixtures and equipment which shall become a part of or annexed to any building or structure being erected, altered or repaired for such institutions and organizations for carrying on their nonprofit activities shall be construed as sales or use tax liability incurred on direct purchases by such institutions and organizations, and such institutions and organizations may obtain refunds of such taxes indirectly paid. The Secretary of Revenue shall also make refunds semiannually to all other hospitals (not specifically excluded herein) of sales and use tax paid by them on medicines and drugs purchased for use in carrying out the work of such hospitals. This subsection does not apply to organizations, corporations, and institutions that are owned and controlled by the United States, the State, or a unit of local government, except hospital facilities created under Article 12 of Chapter 131 of the General Statutes and nonprofit hospitals owned and controlled by a unit of local government that elect to receive semiannual refunds under this subsection instead of annual refunds under subsection (c). In order to receive the refunds herein provided for, such institutions and organizations shall file a written request for refund covering the first six months of the calendar year on or before the fifteenth day of October next following the close of said period, and

shall file a written request for refund covering the second six months of the calendar year on or before the fifteenth day of April next following the close of that period. Such requests for refund shall be substantiated by such proof as the Secretary of Revenue may require, and no refund shall be made on applications not filed within the time allowed by this section and in such manner as the Secretary may require.

(c) Upon receipt of timely applications for refund, the Secretary of Revenue shall make refunds annually to all governmental entities, as hereinafter defined, of sales and use tax paid under this Article by said governmental entities on direct purchases of tangible personal property. Sales and use tax liability indirectly incurred by such governmental entities on building materials, supplies, fixtures and equipment which shall become a part of or annexed to any building or structure being erected, altered or repaired which is owned or leased by such governmental entities shall be construed as sales or use tax liability incurred on direct purchases by such governmental entities, and such entities may obtain refunds of such taxes indirectly paid. The refund provisions contained in this subsection shall not apply to any governmental entities not specifically named herein. In order to receive the refund herein provided for, governmental entities shall file a written request for said refund within six months of the close of the fiscal year of the governmental entities seeking said refund, and such request for refund shall be substantiated by such records, receipts and information as the Secretary may require. No refunds shall be made on applications not filed within the time allowed by this section and in such manner as the Secretary may otherwise require. The term "governmental entities," for the purposes of this subsection, shall mean all counties, incorporated cities and towns, water and sewer authorities created and existing under the provisions of Chapter 162A of the General Statutes, sanitary districts, regional councils of governments created pursuant to G.S. 160A-470, area mental health boards (other than single-county boards) established pursuant to Article 2F of Chapter 122 of the General Statutes, district health departments, regional planning and economic development commissions created pursuant to G.S. 158-14, regional economic development commissions created pursuant to G.S. 158-8, regional planning commissions created pursuant to G.S. 153A-391, metropolitan sewerage districts and metropolitan water districts in this State.

(1957, c. 1340, s. 5; 1961, c. 826, s. 2; 1963, cc. 169, 1134; 1965, c. 1006; 1967, c. 1110, s. 6; 1969, c. 1298, s. 1; 1971, cc. 89, 286; 1973, c. 476, s. 193; 1977, c. 895, s. 1; 1979, c. 47; c. 801, ss. 77, 79-82; 1983, c. 594, s. 1; c. 891, s. 13.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** — Session Laws 1983, c. 594, s. 2 provides: "Any nonprofit hospital owned and controlled by a unit of local government may submit a written request to the Secretary of Revenue to receive semiannual refunds under G.S. 105-164.14(b) instead of annual refunds under G.S. 105-164.14(c). The request is effective beginning with the six-month refund period following the date of the request and applies to sales and use taxes paid on or after the first day of the refund period for which the request is effective."

Session Laws 1983, c. 891, s. 16, provides: "This act shall not affect any civil or criminal

litigation pending on the effective date of this act. Any act committed prior to the effective date of this act which violated any provision of the statutes repealed or amended by this act shall be subject to enforcement, prosecution, conviction and punishment as if this act had not been enacted. Any claim arising under any provisions of the statutes repealed or amended by this act prior to the effective date of this act shall remain valid as if this act had not been enacted."

**Effect of Amendments.** — The first 1983 amendment, effective June 23, 1983, rewrote the fourth sentence of subsection (b).

The second 1983 amendment, effective Jan. 1, 1984, inserted "district health departments" in the last sentence of subsection (c).

## DIVISION V. RECORDS REQUIRED TO BE KEPT.

**§ 105-164.29. Application for licenses by wholesale merchants and retailers.**

Every application for a license by a wholesale merchant or retailer shall be made upon a form prescribed by the Secretary and shall set forth the name under which the applicant transacts or intends to transact business, the location of his place or places of business, and such other information as the Secretary may require. The application shall be signed by the owner if a natural person; in the case of an association or partnership, by a member or partner; in the case of a corporation, by an executive officer or some other person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of his authority. Provided, however, that persons, firms, or corporations, whose business extends into more than one county shall be required to secure only one license under the provisions of this Article which license shall cover all operations of such company throughout the State of North Carolina.

When the required application has been made the Secretary shall grant and issue to each applicant such license. A license is not assignable and is valid only for the person in whose name it is issued and for the transaction of business at the place designated therein. It shall be at all times conspicuously displayed at the place of which issued.

A retailer whose license has been previously suspended or revoked shall pay the Secretary the sum of five dollars (\$5.00) for the reissuance or renewal of such license. A wholesale merchant whose license has been previously suspended or revoked shall pay the Secretary the sum of ten dollars (\$10.00) for the reissuance or renewal of such license for the year or fraction thereof for which said license is reissued or renewed.

Whenever any wholesale merchant or retailer fails to comply with any provision of this Article or any rule or regulation of the Secretary relating thereto, the Secretary, upon hearing, after giving the wholesale merchant or retailer 10 days' notice in writing, specifying the time and place of hearing and requiring him to show cause why his license should not be revoked, may revoke or suspend the license held by such wholesale merchant or retailer. The notice may be served personally or by registered mail directed to the last known address of the person. 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 of the General Statutes shall be applicable to this section.

Any wholesale merchant or retailer who engages in business as a seller in this State without a license or after his license has been suspended or revoked, and each officer of any corporation which so engages in business shall be guilty of a misdemeanor and subject to a fine of not exceeding five hundred dollars (\$500.00) for each such offense. (1957, c. 1340, s. 5; 1973, c. 476, s. 193; 1979, 2nd Sess., c. 1084.)

**Effect of Amendments.** — The 1979, 2nd Sess., amendment, effective July 1, 1980, increased the fee in the first sentence of the third paragraph from \$1.00 to \$5.00.

## DIVISION VIII. ADMINISTRATION AND ENFORCEMENT.

**§ 105-164.44A. Tax on motor vehicle items transferred to Highway Fund.**

Sales and use taxes collected on motor vehicle items and accessories shall be transferred from the general fund to the Highway Fund as follows:

On a quarterly basis during the fiscal year ending June 30, 1984, the State Treasurer shall transfer from the general fund to the Highway Fund the amount of twenty-five million eight hundred thousand dollars (\$25,800,000), which represents fifteen percent (15%) of the estimated 1983-84 fiscal year sales and use tax collections from motor vehicles, motor vehicle parts, supplies, and accessories, and other transportation items. The quarterly transfers required by this section shall be made during September, December, March, and June of the fiscal year. (1981, c. 690, s. 7; 1983, c. 713, s. 95.)

**Editor's Note.** — Session Laws 1981, c. 690, s. 37, makes this section effective July 1, 1981.

ment, effective July 8, 1983, rewrote this section.

**Effect of Amendments.** — The 1983 amend-

## ARTICLE 6.

*Schedule G. Gift Taxes.***§ 105-188. Gift taxes; classification of beneficiaries; exemptions; rates of tax.**

(i) The tax does not apply to tuition payments made on behalf of an individual to an educational institution or to medical payments made on behalf of an individual to a provider of medical care, as defined in G.S. 105-147(11)b1, for the care of that individual. The term "educational institution" includes only those institutions that normally maintain a regular faculty and curriculum and normally have a regularly organized body of students in attendance where the educational activities are conducted. (1939, c. 158, s. 600; 1943, c. 400, s. 7; 1945, c. 708, s. 7; 1947, c. 501, s. 6; 1957, c. 1340, s. 6; 1973, c. 505; c. 1287, s. 9; 1983, c. 685; s. 1.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** —

Session Laws 1983, c. 685, s. 2, makes the act effective retroactively to Jan. 1, 1983, and applicable to transfers made on or after that date.

**Effect of Amendments.** — The 1983 amendment added subsection (i). For effective date, see Editor's Note.

**Legal Periodicals.** — For note comparing federal and North Carolina estate, inheritance, and gift taxation with respect to creation and termination of tenancies by the entirety, see 15 Wake Forest L. Rev. 307 (1979).

## ARTICLE 7.

*Schedule H. Intangible Personal Property.***§ 105-199. Money on deposit.**

All money on deposit (including certificates of deposit and postal savings) with any bank or other corporation, firm or person doing a banking business, whether such money be actually in or out of this State, having a business, commercial or taxable situs in this State, shall be subject to an annual tax, which is hereby levied, of ten cents (10¢) on every one hundred dollars (\$100.00) of the total amount of such deposit without deduction for any indebtedness or liabilities of the taxpayer.

For the purpose of determining the amount of deposits subject to this tax every such bank or other corporation, firm or person doing a banking business shall set up the credit balance of each depositor on the fifteenth day of each February, May, August, and November in the calendar year next preceding the due date of tax return, and the average of such quarterly credit balances shall constitute the amount of deposit of each depositor subject to the tax herein levied; for the purposes of this section accounts having an average quarterly balance for the year of less than one thousand dollars (\$1,000) may be disregarded.

The tax levied in this section upon money on deposit shall be paid by the cashier, treasurer or other officer or officers of every such bank or other corporation, firm or person doing a banking business in this State by report and payment to the Secretary of Revenue on or before April 15 of each year; any taxes so paid as agent for the depositor shall be recovered from the owners thereof by the bank or other corporation, firm or person doing a banking business in this State by the deduction from the account of the depositor on November 16 of each year or on such date thereafter as in the ordinary course of business it becomes convenient to make such charge. The bank may immediately report and pay the tax due on any account closed out during any quarter in which the bank has withheld the amount of the tax. The tax on deposits represented by time certificates shall be chargeable to the original depositor unless such depositor has given notice to the depository bank of transfer of such certificate of deposit. Accounts that have been closed during the year, leaving no credit balance against which the tax can be charged, may be reported separately to the Secretary of Revenue and the tax due on such accounts shall become a charge directly against the depositor, and such tax may be collected by the Secretary of Revenue from the depositor in the same manner as other taxes levied in this section; the bank or other corporation, firm or person doing a banking business in this State shall not be held liable for the payment of the tax due on accounts so reported. None of the provisions of this section shall be construed to relieve any taxpayer of liability for a full and complete return of postal savings and of all money on deposit outside this State having a business, commercial or taxable situs in this State.

The tax levied in this section shall not apply to deposits by one bank, in another bank nor to deposits of the United States, State of North Carolina, political subdivisions of this State or agencies of this State or agencies of such governmental units. Deposits representing the actual payment of benefits to World War veterans by the federal government, when not reinvested, shall not be subject to the tax levied in this section. Further deposits in North Carolina banks by nonresident individuals and foreign corporations, when such deposits are not related to business activities in this State, shall not be subject to the tax levied in this section. The tax levied in this section shall not apply to deposits of foreign and alien insurance companies which pay the two and one-half percent (2½%) gross premium tax levied by G.S. 105-228.5. (1939, c.

158, s. 701; 1945, c. 708, s. 8; 1947, c. 501, s. 7; 1949, c. 392, s. 5; 1955, c. 19, s. 1; 1973, c. 476, s. 193; 1977, 2nd Sess., c. 1220; 1979, c. 801, ss. 84, 85; 1981, c. 682, s. 18.)

**Effect of Amendments.** — The 1981 amendment, effective July 1, 1981, inserted "a"

preceding "business" near the end of the last sentence of the third paragraph.

## § 105-201. Accounts receivable.

### CASE NOTES

"Accounts receivable" are ordinarily understood to be an amount owed from one person to another usually arising from the sale of goods or rendering of services and not supported by negotiable paper. *Moore & Van Allen v. Lynch*, — N.C. App. —, 301 S.E.2d 426 (1983).

Customer advances on construction contracts are not "accounts payable" which are deductible under this intangible tax statute. *Midrex Corp. v. Lynch*, 50 N.C. App. 611, 274 S.E.2d 853, cert. denied, 303 N.C. 181, 280 S.E.2d 453 (1981).

## § 105-202. Bonds, notes, and other evidences of debt.

All bonds, notes, demands, claims, deposits or share accounts in out-of-state building and loan and savings and loan associations and other evidences of debt however evidenced whether secured by mortgage, deed of trust, judgment or otherwise, or not so secured, having a business, commercial or taxable situs in this State on December 31 of each year shall be subject to an annual tax which is hereby levied, of twenty-five cents (25¢) on every one hundred dollars (\$100.00) of the actual value thereof, except that taxpayers reporting on a fiscal year basis for income tax purposes under the provisions of Article 4 shall report evidences of debt on the last day of such fiscal year ending during the year prior to the December 31 as of which such property would otherwise be reported; provided, that from the actual value of such bonds, notes, demands, claims and other evidences of debt there may be deducted like evidences of debt owed by the taxpayer as of the valuation date of the receivable evidences of debt. The term "like evidences of debt" deductible under this section shall not include:

- (1) Accounts payable; provided, however, that accounts payable to security brokers incurred directly for the purchase of bonds, debentures and similar investments taxable under this section shall be deductible;
- (2) Taxes of any kind owing by the taxpayer;
- (3) Reserves, secondary liabilities or contingent liabilities except upon satisfactory showing that the taxpayer will actually be compelled to pay the debt or liability;
- (4) Evidences of debt owed to a corporation of which the taxpayer is parent or subsidiary or with which the taxpayer is closely affiliated by stock ownership or with which the taxpayer is subsidiary of same parent corporation, unless the credits created by such evidences of debt are listed, if so required by law for ad valorem or property taxation, for taxation at the situs of such credits; or
- (5) Debts incurred to purchase assets which are not subject to taxation at the situs of such assets.

From the total actual value of bonds, notes, demands, claims and other evidences of debt returned to this State for taxation by or in behalf of any taxpayer who or which also owns other such evidences of debt as have situs outside of this State, like evidences of debt owed by the taxpayer may be

deducted only in the proportion which the total actual value of evidences of debt taxable under this section bears to the total actual value of all like evidences of debt owned by the taxpayer.

The tax levied in this section shall not apply to bonds, notes and other evidences of debt of the United States, State of North Carolina, political subdivisions of this State or agencies of such governmental units, or of nonprofit educational institutions organized or chartered under the laws of the State of North Carolina, but the tax shall apply to all bonds and other evidences of debt of political subdivisions and governmental units other than those specifically excluded herein.

In every action or suit in any court for the collection on any bonds, notes, demands, claims or other evidences of debt, the plaintiff shall be required to allege in his pleadings or to prove at any time before final judgment is entered

- (1) That such bonds, notes or other evidences of debt have been assessed for taxation for each and every tax year, under the provisions of this Article, during which the plaintiff was owner of same, not exceeding five years prior to that in which the suit or action is brought; or
- (2) That such bonds, notes or other evidences of debt sued upon are not taxable hereunder in the hands of the plaintiff; or
- (3) That the suitor has not paid, or is unable to pay such taxes, penalties and interest as might be due, but is willing for the same to be paid out of the first recovery on the evidence of debt sued upon.

When in any action at law or suit in equity it is ascertained that there are unpaid taxes, penalties and interest due on the evidence of debt sought to be enforced, and the suitor makes it appear to the court that he has not paid or is unable to pay said taxes, penalties and interest, but is willing for the same to be paid out of the first recovery on the evidence of debt, the court shall have authority to enter as a part of any judgment or decretal order in said proceedings that the amount of taxes, penalties and interest due and owing shall be paid to the proper officer out of the first collection on said judgment or decree. The title to real estate heretofore or hereafter sold under a deed of trust shall not be drawn in question upon the ground that the holder of the notes secured by such deed of trust did not list and return the same for taxation as required by this Article. (1939, c. 158, s. 704; 1947, c. 501, s. 7; 1957, c. 1340, s. 7; 1959, c. 1259, s. 6; 1963, c. 1169, s. 4; 1965, c. 834; 1973, c. 1287, s. 11; 1979, c. 179, s. 4.)

**Editor's Note.** — This section is set out to correct an error near the end of the second paragraph of the section as it appears in the 1981

replacement volume.

**Legal Periodicals.** — For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

#### CASE NOTES

**Applied in** *In re Alamance Mem. Park*, 41 N.C. App. 278, 254 S.E.2d 671 (1979).

### § 105-207. Fiduciaries to pay taxes.

**Legal Periodicals.** — For survey of 1981 tax law, see 60 N.C.L. Rev. 1460 (1982).

## § 105-212. Institution exempted; conditional and other exemptions.

None of the taxes levied in this Article or schedule shall apply to religious, educational, charitable or benevolent organizations not conducted for profit, nor to trusts established for religious, educational, charitable or benevolent purposes where none of the property or the income from the property owned by such trust may inure to the benefit of any individual or any organization conducted for profit, nor to any funds, evidences of debt, or securities held irrevocably in a charitable remainder trust meeting the requirements of section 664 of the Code or in a pooled income fund meeting the requirements of section 642(c)(5) of the Code, nor to any funds held irrevocably in trust exclusively for the maintenance and care of places of burial; nor to any funds, evidences of debt, or securities held irrevocably in pension, profit-sharing, stock bonus, or annuity trusts, or combinations thereof, established by employers for the purpose of distributing both the principal and income thereof exclusively to eligible employees, or the beneficiaries of such employees, if such trusts qualify for exemption from income tax under the provisions of G.S. 105-161(f)(1)a; nor to any funds, evidences of debt or securities held irrevocably in a pension, profit-sharing, stock bonus or annuity plan established by an employer for the benefit of his employees or for himself and his employees if such plan qualifies for exemption from income tax under the provisions of G.S. 105-141(b)(19); nor to any funds, evidences of debt, or securities held in an individual retirement account described in section 408(a) of the Code, or an individual retirement annuity described in section 408(b) of the Code, if such individual retirement account or individual retirement annuity is exempt from income tax under the provisions of G.S. 105-161(f)(1)c or 105-141(b)(19). Insurance companies reporting premiums to the Commissioner of Insurance of this State and paying a tax thereon under the provisions of Article 8B, Schedule I-B shall not be subject to the provisions of G.S. 105-201, 105-202 and 105-203; building and loan associations and savings and loan associations paying a tax under the provisions of Article 8D of Chapter 105 of the General Statutes shall not be subject to the provisions of G.S. 105-201, 105-202 and 105-203; State credit unions organized pursuant to the provisions of Subchapter III, Chapter 54, paying the supervisory fees required by law, shall not be subject to any of the taxes levied in this Article or schedule; banks, banking associations and trust companies shall not be subject to the tax levied in this Article or schedule on evidences of debt held by them when said evidences of debt represent investment of funds on deposit with such banks, banking associations and trust companies: Provided, that each such institution must, upon request by the Secretary of Revenue, establish in writing its claim for exemption as herein provided. The exemption in this section shall apply only to those institutions, and only to the extent, specifically mentioned, and no other.

Funds on deposit in savings and loan associations in this State, which associations pay taxes under Article 8D of this Chapter, shall not be subject to taxation under this Article.

Any corporation or trust doing business in North Carolina which in the opinion of the Secretary of Revenue of North Carolina qualifies as a "regulated investment company" under section 851 of the Code or as a "real estate investment trust" under the provisions of section 856 of the Code and which files with the North Carolina Department of Revenue its election to be treated as a "regulated investment company" or "real estate investment trust," shall not be subject to any of the taxes levied in this Article or schedule.

If any intangible personal property held or controlled by a fiduciary domiciled in this State is so held or controlled for the benefit of a nonresident or nonresidents, or for the benefit of any organization exempt under this section

for the tax imposed by this Article, such intangible personal property shall be partially or wholly exempt from taxation and under the provisions of this Article in the ratio which the net income distributed or distributable to such nonresident, nonresidents or organization, derived from such intangible personal property during the calendar year for which the taxes levied by this Article are imposed, bears to the entire net income derived from such intangible personal property during such calendar year. "Net income" shall be deemed to have the same meaning that it has in the income tax article. Where the intangible personal property for which this exemption is claimed is held or controlled with other property as a unit, allocation of appropriate deductions from gross income shall be made to that part of the entire gross income which is derived from the intangible personal property by direct method to the extent practicable; and otherwise by such other method as the Secretary of Revenue shall find to be reasonable: Provided, that each fiduciary claiming the exemption provided in this paragraph shall, upon the request of the Secretary of Revenue, establish in writing its claim to such exemption. No provisions of law shall be construed as exempting trust funds or trust property from the taxes levied by this Article except in the specific cases covered by this section.

A clerk of any court of this State may, upon written application therefor, obtain from the Secretary of Revenue a certificate relieving a depository bank of such clerk from the duty of collecting the tax levied in this Article or schedule from deposits of said clerk; provided, that such clerk of court shall be liable under his official bond for the full and proper remittance to the Secretary of Revenue under the provisions of this Article or schedule of taxes due on any deposits so handled.

As used in this section, the term "Code" means the Internal Revenue Code as enacted as of April 1, 1983, and includes any provisions enacted as of that date which become effective after that date. (1939, c. 158, s. 714; 1943, c. 400, s. 8; 1945, c. 708, s. 8; 1947, c. 501, s. 7; 1951, c. 937, s. 2; 1957, c. 1340, ss. 7, 9; 1967, c. 1110, s. 13; 1971, c. 827; 1973, c. 476, s. 193; c. 1287, s. 11; 1975, c. 559, s. 7; 1979, c. 179, s. 4; c. 801, ss. 86, 87; c. 1009; 1983, c. 713, ss. 67, 80, 82.)

**Effect of Amendments.** — The 1983 amendment, effective for taxable years beginning or after Jan. 1, 1983, substituted "section 851 of the Code" for "the provisions of United States Code Annotated Title 26, section 851" and sub-

stituted "section 856 of the Code" for "United States Code Annotated Title 26, section 856" in the third paragraph, added the last paragraph, and substituted "Code" for references to the Internal Revenue Code throughout the section.

### § 105-213. Separate records by counties; disposition and distribution of taxes collected; purpose of tax.

(a) The Secretary of Revenue shall keep a separate record by counties of the taxes collected under the provisions of this Article and shall, as soon as practicable after the close of each fiscal year, certify to the State Disbursing Officer and to the State Treasurer the amount of such taxes to be distributed to each county and municipality in the State. The State Disbursing Officer shall thereupon issue a warrant on the State Treasurer to each county and municipality in the amount so certified.

In determining the amount to be distributed there shall be deducted from net collections (total collections less refunds) the following:

- (1) The tax credit specified in the second paragraph of G.S. 105-122(d), and
- (2) The cost to the State to administer and collect the taxes levied under this Article for the preceding fiscal year, and
- (3) The cost to the State for the operation of the Ad Valorem Tax Division of the Department of Revenue and of the Property Tax Commission for the preceding fiscal year, and

- (4) The cost to the State of the operation of a training program in property tax appraisal and assessment administration by the Institute of Government for the preceding fiscal year.

The net amount after such deductions shall be distributed to the counties and municipalities of the State as follows:

The amount distributable to each county and to the municipalities therein from the revenue collected under G.S. 105-200, 105-201, 105-202, 105-203 and 105-204 shall be determined upon the basis of the amounts collected in each county; and the amount distributable to each county and to the municipalities therein from the revenue collected under G.S. 105-199 and 105-205 shall be determined upon the basis of population in each county according to the most recent annual estimates of population as certified to the Secretary of Revenue by the State Budget Officer. The amounts so allocated to each county shall in turn be divided between the county and all municipalities therein in proportion to the total amount of ad valorem taxes levied by each during the fiscal year preceding such distribution. For the purpose of computing the distribution of the intangibles tax to any county and the municipalities located therein for any year with respect to which the property valuation of a public service company is the subject of an appeal pursuant to the provisions of the Machinery Act, or to applicable provisions of federal law, and the Department of Revenue is restrained by operation of law or by a court of competent jurisdiction from certifying such valuation to the county and municipalities therein, the Department shall use the last property valuation of such public service company which has been so certified in order to determine the ad valorem tax levies applicable to such public service company in the county and the municipalities therein.

It shall be the duty of the chairman of the board of county commissioners of each county and the mayor of each municipality therein to report to the Secretary of Revenue such information as he may request for his guidance in making said allotments. In the event any county or municipality fails to make such report within the time prescribed, the Secretary of Revenue may disregard such defaulting unit in making said allotments. The amounts so allocated to each county and municipality shall be distributed and used by said county or municipality in proportion to other property tax levies made for the various funds and activities of the taxing unit receiving said allotment.

(1939, c. 158, s. 715; 1941, c. 50, s. 8; 1947, c. 501, s. 7; 1957, c. 1340, s. 7; 1967, c. 1196, s. 5; 1971, c. 298, s. 3; 1973, c. 476, s. 193; c. 500, s. 3; c. 537, s. 4; c. 1287, s. 11; 1979, 2nd Sess., c. 1137, s. 48; 1981, c. 4, s. 1; 1981 (Reg. Sess., 1982), c. 1282, s. 69.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendments, it is not set out.

**Effect of Amendments.** — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "State Budget Officer" for "Secretary of the North Carolina Department of Administration" at the end of the first sentence in the fourth paragraph of subsection (a).

The 1981 amendment, effective July 1, 1981, added the last sentence of the fourth paragraph of subsection (a).

The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, inserted "and" at the end of subdivision (3) and added subdivision (4) in the second unnumbered paragraph of subsection (a).

**Editor's Note.** — Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 70, as amended by Session Laws 1983, c. 27, provides that for the purpose of determining net collections for the fiscal year ending June 30, 1982, certain amounts shall be deducted in addition to the amounts specified by the second paragraph of G.S. 105-213(a), as amended by s. 69 of the act. The section further provides for distribution during the 1983-84 fiscal year of any such funds not expended during the 1982-83 fiscal year and states that the deductions from net collections required by G.S. 105-213(a) for the fiscal year ending June 30, 1983 shall be reduced by the amount of the unexpended funds.

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

**§ 105-214. Minimum tax for requirement of filing returns.**

When the combined tax of any taxpayer required to be paid under G.S. 105-200, 105-201, 105-202, 105-203, 105-204 and 105-205 does not exceed a tax of fifteen dollars (\$15.00), no return shall be required to be filed. This section shall not be construed to affect the provisions of G.S. 105-199, and the minimum tax herein provided shall not apply to said section. (1963, c. 1010; 1979, 2nd Sess., c. 1131, s. 1.)

**Effect of Amendments.** — The 1979, 2nd Sess., amendment, effective with respect to taxable years beginning on and after January 1, 1980, increased the tax in the first sentence from \$5.00 to \$15.00.

**ARTICLE 8B.*****Schedule I-B. Taxes upon Insurance Companies.*****§ 105-228.5. Taxes measured by gross premiums.**

Each and every insurance company shall annually pay to the Commissioner of Insurance at the time and at the rates hereinafter specified, a tax measured by gross premiums as hereinafter defined from business done in this State during the preceding calendar year; provided, however, that every company chartered in a state which requires companies chartered in North Carolina to pay taxes quarterly shall pay the taxes levied upon it herein quarterly, said taxes being paid on an estimated basis by the fifteenth day following the close of the first three calendar quarters and the balance by the next following March 15 in the same manner hereinafter provided for annual returns.

Gross premiums from business done in this State in the case of life insurance and annuity contracts, including any supplemental contracts thereto providing for disability benefits, accidental death benefits, or other special benefits, shall for the purposes of the taxes levied in this section mean any and all premiums collected in the calendar year (other than for contracts for reinsurance) for policies the premiums on which are paid by or credited to persons, firms or corporations resident in this State, or in the case of group policies for any contracts of insurance covering persons resident within this State, with no deduction for considerations paid for annuity contracts which are subsequently returned except as below specified, and with no other deduction whatsoever except for premiums returned under one or more of the following conditions: premiums refunded on policies rescinded for fraud or other breach of contract; premiums which were paid in advance on life insurance contracts and subsequently refunded to the insured, premium payer, beneficiary or estate; and in the case of group annuity contracts the premiums returned by reason of a change in the composition of the group covered. Said gross premiums shall be deemed to have been collected for the amounts as provided in the policy contracts for the time in force during the year, whether satisfied by cash payment, notes, loans, automatic premium loans, applied dividend or in any other manner whatsoever, except in the case of premiums waived by any of said companies pursuant to a contract for waiver of premium in case of disability.

Every insurer, in computing the premium tax, shall exclude from the gross amount of premiums all premiums received on or after July 1, 1973, from policies or contracts, issued in connection with the funding of a pension, annuity or profit-sharing plan, qualified or exempt under sections 401, 403, 404, 408 or 501 of the Code as defined in G.S. 105-135(15) and the gross amount of all such premiums shall be exempt from the tax levied by this section.

Gross premiums from business done in this State in the case of contracts for fire insurance, casualty insurance, and any other type of insurance except life and annuity contracts as above specified, including contracts of insurance required to be carried by the Workers' Compensation Act, shall for the purposes of the taxes levied in this section mean any and all premiums written during the calendar year, or the equivalent thereof in the case of self-insurers under the Workers' Compensation Act, for contracts covering property or risks in this State, other than for contracts of reinsurance, whether such premiums are designated as premiums, deposits, premium deposits, policy fees, membership fees, or assessments. Gross premiums shall be deemed to have been written for the amounts as provided in the policy contracts, new and renewal, becoming effective during the year irrespective of the time or method of making payment or settlement for such premiums, and with no deduction for dividends whether returned in cash or allowed in payment or reduction of premiums or for additional insurance, and without any other deduction except for return of premiums, deposits, fees or assessments for adjustment of policy rates or for cancellation or surrender of policies.

In determining the amount of gross premiums from business in this State all gross premiums received in this State, or credited to policies written or procured in this State, or derived from business written in this State shall be deemed to be for contracts covering persons, property or risks resident or located in this State except for such premiums as are properly reported and properly allocated as being received from business done in some other nation, territory, state or states, and except for premiums from policies written in federal areas for persons in military service who pay premiums by assignment of service pay.

On the basis of the gross amount of premiums, as above defined, each company or self-insurer shall pay as to:

The amounts collected on contracts applicable to liabilities under the Workers' Compensation Act, a tax at the rate of one and six-tenths percent (1.6%) in the case of domestic insurance companies and domestic self-insurers or self-insurers domesticated and doing business in North Carolina; and on the amounts collected on contracts applicable to liabilities under the Workers' Compensation Act in the case of foreign and alien self-insurers, except those which have been domesticated and are doing business in North Carolina, a tax at the rate of four percent (4%).

The amounts collected on annuities and all other contracts of insurance issued by domestic life insurance companies a tax at the rate of one and one-half percent (1½%).

The amounts collected on contracts of insurance issued by domestic insurance companies other than life insurance companies and other than corporations organized under Chapter 57 of the General Statutes, a tax of one percent (1%) or, in lieu thereof, any such company shall pay an income tax computed as in the case of other corporations, whichever is the greater. Any domestic life insurance company collecting more than half of its annual gross premiums from lines of business excluding those described in G.S. 58-72(1) and (2) and further excluding any premiums derived from credit life, credit health, or credit accident insurance may, prior to the return due date, elect to be taxed as a domestic casualty insurance company under the provisions of this paragraph.

The amounts collected on annuities and all other contracts of insurance a tax at the rate of two and one-half percent (2½%) in the case of foreign and alien companies.

The amounts collected on contracts of insurance applicable to fire and lightning coverage (marine and automobile policies not being included), a tax at the rate of one percent (1%). This tax shall be in addition to all other taxes imposed by G.S. 105-228.5.

The premium tax rates herein provided shall be applicable with respect to all premiums collected during the calendar year 1955, and each subsequent year.

The taxes levied herein measured by premiums shall be in lieu of all other taxes upon insurance companies except: fees and licenses under this Article, or as specified in Chapter 58 of the General Statutes of North Carolina as amended; taxes imposed by Chapter 118 of the General Statutes of North Carolina; taxes imposed by Article 5 of Chapter 105 of the General Statutes of North Carolina as amended; and ad valorem taxes upon real property and personal property owned in this State.

For the tax above levied as measured by gross premiums the president, secretary, or other executive officer of each insurance company doing business in this State shall within the first 15 days of March in 1946 and in each year thereafter file with the Commissioner of Insurance a full and accurate report of the total gross premiums as above defined collected in this State during the preceding calendar year. The report shall be in such form and contain such information as the Commissioner of Insurance may specify, and the report shall be verified by the oath of the company official transmitting the same or by some principal officer at the home or head office of the company or association in this country. At the time of making such report the taxes above levied with respect to the gross premiums shall be paid to the Commissioner of Insurance. The provisions above shall likewise apply as to reports and taxes for any firm, corporation, or association exchanging reciprocal or interinsurance contracts, and said reports and taxes shall be transmitted by their attorneys-in-fact.

The provisions as to reports and taxes as measured by gross premiums shall not apply to farmers' mutual assessment fire insurance companies above specified or to fraternal orders or societies that do not operate for a profit and do not issue policies on any person except members.

With respect to the taxes levied in this section on the equivalent of premiums of self-insurers under the provisions of the Workers' Compensation Act, the reports required herein shall be transmitted to and the taxes collected by the North Carolina Industrial Commission as provided in subsection (j) of G.S. 97-100 of the General Statutes of North Carolina. (1945, c. 752, s. 2; 1947, c. 501, s. 8; 1951, c. 643, s. 8; 1955, c. 1313, s. 5; 1957, c. 1340, s. 12; 1959, c. 1211; 1961, c. 783; 1963, c. 1096; 1969, c. 1221; 1973, cc. 142, 1019; 1975, c. 143; c. 559, s. 8; 1979, c. 714, s. 2; 1983, c. 713, s. 81.)

**Effect of Amendments.** — The 1983 amendment, effective for taxable years beginning on or after Jan. 1, 1983, substituted "Code as defined in G.S. 105-135(15)" for "United States Internal Revenue Code as now or hereafter amended" in the third paragraph.

**§ 105-228.7. Registration fees for agents, brokers and others.**

Each and every manager, organizer, adjuster, broker or agent of whatever kind representing in this State any company referred to in this Article and every motor vehicle damage appraiser as defined by G.S. 58-39.4 shall on or before the first day of April of each year apply for and obtain from the Commissioner of Insurance an annual certificate of registration, or license, and shall pay for said certificate an annual fee at the following rates, with no additional fee for affixing of seal to the certificate:

Insurance agent (local for each company represented) . . . . .	\$10.00
General agent or manager, for each company represented . . . . .	12.00

Special agent or organizer, for each company represented . . . . .	10.00
Insurance broker . . . . .	5.00
Nonresident broker . . . . .	50.00
Insurance adjuster	
(other than adjuster for hail damage to crops) . . . . .	50.00
Insurance adjuster for hail damage to crops . . . . .	10.00
Motor vehicle damage appraiser . . . . .	50.00
Company cancellation of agent license (paid by company) . . . . .	5.00

The above fees shall be in lieu of any and all other license fees.

In cases where temporary license may be issued pursuant to law the fee for a temporary certificate shall be at the same rates as above specified, and any amounts so paid for temporary license may be credited against the fees required for issuance of the annual license or certificate.

Any person not registered who is required by law or regulation to pass examination as a condition for securing of license shall upon application for registration pay to the Commissioner of Insurance an examination fee of ten dollars (\$10.00). In the event subsequent examinations are requested, an additional fee of ten dollars (\$10.00) shall be paid upon application for each such additional examination. The requirement for examination and examination fee shall not apply to agents for domestic farmers' mutual assessment fire insurance companies or associations specified in G.S. 105-228.4.

In the event a certificate issued under this section is lost or destroyed the Commissioner of Insurance for a fee of one dollar (\$1.00) may certify to its issuance, giving number, date, and form, which may be used by the original party named thereon in lieu of the annual certificate. There shall be no charge for the seal attached to such certification. (1945, c. 752, s. 2; 1947, c. 1023, s. 2; 1949, c. 958, s. 2; 1951, c. 105, s. 2; 1955, c. 1313, s. 5; 1971, c. 757, s. 9; 1983, c. 790, ss. 1-4.)

**Effect of Amendments.** — The 1983 amendment, effective July 1, 1983, increased the fees in the schedule of fees in the first paragraph; added "Company cancellation of agent license (paid by company) \$5.00" to the schedule of fees; substituted the present second sentence of the

third paragraph for language deleted from the first sentence of the third paragraph, relating to fees for additional examinations, and substituted "one dollar (\$1.00)" for "fifty cents (\$0.50)" in the first sentence of the last paragraph.

ARTICLE 8D.

*Schedule I-D. Taxation of Savings and Loan Associations.*

§ 105-228.22. Application.

This Article applies to all savings and loan associations and building and loan associations doing business in this State, whether organized under the laws of this State, another state, or the Home Owners Loan Act of 1933. All such associations are hereinafter referred to as savings and loan associations. (1957, c. 1340, s. 9; 1981, c. 450, s. 1; 1983, c. 26, s. 1.)

**Revision of Article.** — This Article, formerly consisting of §§ 105-228.22 through 105-228.27, was revised and rewritten by Session Laws 1981, c. 450, effective Jan. 1, 1982. No attempt has been made to point out the changes effected by the revision, but, where appropriate, the historical citations to the sections in the former Article have been added to

the corresponding sections in the Article as rewritten.

Session Laws 1981, c. 450, s. 3, provides: "The share and deposit tax levied under Article 8D of G.S. Chapter 105 prior to the effective date of this act shall not be collected for taxable years beginning on or after that date. This act shall apply for income tax purposes to taxable years

beginning on or after January 1, 1982, and shall apply for franchise tax purposes as of December 31, 1982."

**Effect of Amendments.** — The 1983 amend-

ment, effective July 1, 1983, rewrote this section.

**Legal Periodicals.** — For survey of 1981 commercial law, see 60 N.C.L. Rev. 1238 (1982).

## § 105-228.23. Income and franchise taxes.

(a) **Income Tax.** — Every savings and loan association shall annually file an income tax return with the Secretary of Revenue and pay an income tax equal to that which the association would be required to pay under Article 4 of Subchapter I of this Chapter if it was not exempt from that Article.

(b) **Franchise Tax.** — Every savings and loan association shall annually file a franchise tax return with the Secretary of Revenue and pay a franchise tax equal to that which the association would be required to pay under Article 3 of Subchapter I of this Chapter if it was subject to taxation under that Article. For purposes of this tax, "capital stock" does not include deposits in a savings and loan association.

(c) **Payment; Returns.** — Payment of the taxes levied in this section is due when the return is filed. The due dates of the returns required by this section are the same as those prescribed for corporations in Articles 3 and 4 of Subchapter I of this Chapter. All provisions of Articles 3 and 4 of Subchapter I of this Chapter, not inconsistent with this Article, apply in administering the taxes imposed herein. (1957, c. 1340, s. 9; 1971, c. 864, s. 17; 1973, c. 476, s. 193; 1981, c. 450, s. 1; 1983, c. 26, s. 1.)

**Effect of Amendments.** — The 1983 amendment, effective July 1, 1983, rewrote this section.

## § 105-228.24. Tax limitations.

(a) The taxes levied in this Article are in lieu of all other taxes except:

- (1) Ad valorem taxes imposed upon real property and tangible personal property;
- (2) Ad valorem taxes imposed upon intangible personal property under G.S. 105-199, 105-200, 105-204 and 105-205; and
- (3) Sales and use taxes levied by the State or any of its taxing units.

(b) Counties, cities and towns may not levy a license tax on a savings and loan association subject to taxation under this Article. (1957, c. 1340, s. 9; 1981, c. 450, s. 1; 1983, c. 26, s. 1.)

**Cross References.** — For present provisions as to savings and loan associations, see Chapter 54B.

**Effect of Amendments.** — The 1983 amendment, effective July 1, 1983, rewrote this section.

§§ 105-228.25 to 105-228.27: Repealed by Session Laws 1983, c. 26, s. 1, effective July 1, 1983.

## ARTICLE 9.

### *Schedule J. General Administration; Penalties and Remedies.*

§ 105-233. Officers, agents, and employees; failing to comply with tax law a misdemeanor.

#### CASE NOTES

Cited in Clinchfield R.R. v. Lynch, 700 F.2d 126 (4th Cir. 1983).

§ 105-236. Penalties.

#### Editor's Note. —

Chapter 18 of the General Statutes, referred to in subdivisions (7) and (11) was repealed by Session Laws 1971, c. 872. For present provisions governing regulation of alcoholic beverages, see Chapter 18B.

**Legal Periodicals.** — For article, "Foreign Corporations in North Carolina: The 'Doing Business' Standards of Qualification, Taxation, and Jurisdiction," see 16 Wake Forest L. Rev. 711 (1980).

#### CASE NOTES

**Penalty for Failure to File New Return.** — The taxpayer whose net income for any year is corrected by the Commissioner of Internal Revenue or other authorized federal officer must file a new return reflecting his corrected net income within two years after receipt of the federal agent's report. Failure to make such a new return within the time specified under § 105-159 subjects the taxpayer to all penalties provided by this section including, when applicable, the criminal penalty provided by subdivision (7) of this section. State v. Patton, 57 N.C. App. 702, 292 S.E.2d 172 (1982).

Failure to file an income tax return upon correction of income for three years by a federal tax audit and placing income in wife's bank

account committed in a willful attempt to evade or defeat income taxes, would constitute the offense defined by subdivision (7) of this section. State v. Patton, 57 N.C. App. 702, 292 S.E.2d 172 (1982).

**What Constitutes New Offense under Subdivision (7).** — An attempt to evade or defeat taxes on April 29, 1979, by failing to file a return for an earlier year within the time required by § 105-159 and by placing assets in the account of another would constitute a new offense, and the statute of limitations applicable to subdivision (7) of this section would begin to run anew as of that date. State v. Patton, 57 N.C. App. 702, 292 S.E.2d 172 (1982).

§ 105-241. Taxes payable in national currency; for what period, and when a lien; priorities.

**Legal Periodicals.** — For article, "Foreign Corporations in North Carolina: The 'Doing Business' Standards of Qualification, Taxation,

and Jurisdiction," see 16 Wake Forest L. Rev. 711 (1980).

### § 105-241.1. Additional taxes; assessment procedure.

(h) General Statutes 150A-29 does not apply to hearings before the Secretary of Revenue held pursuant to this section, but the provisions of G.S. 105-241.2, 105-241.3 and 105-241.4 with respect to review and appeal shall apply to any tax or additional tax assessed pursuant to this section.

(i) All assessments of taxes or additional taxes, exclusive of penalties assessed thereon, shall bear interest from the time the taxes or additional taxes were due until paid. The Secretary of Revenue shall set the rate of interest as follows: The Secretary shall, no later than December 1 of any year, set the rate to be in effect for the succeeding calendar year at the rate that will be in effect on January 1 of the succeeding year under the provisions of the Internal Revenue Code, or at a different rate, taking current market conditions into consideration. 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. For refunds and assessments made between July 1, 1982, and December 31, 1982, the rate shall be twelve percent (12%) per year.

From and after January 1, 1978, interest upon assessments and upon additional taxes shall be computed at the rate established by G.S. 105-241.1(i) and shall be computed without regard to any former rate of interest which might have been established by G.S. 105-241.1 for the taxable period for which said assessment was made, or for the period within which said taxes were due to be paid.

(1949, c. 392, s. 6; 1951, c. 643, s. 9; 1955, c. 1350, s. 23; 1957, c. 1340, s. 10; 1959, c. 1259, s. 8; 1969, c. 1132, s. 1; 1973, c. 476, s. 193; c. 1287, s. 13; 1977, c. 657, s. 6; c. 1114, ss. 1, 11; 1981 (Reg. Sess., 1982), c. 1211, s. 2; c. 1223, s. 4.)

**Only Part of Section Set Out.** — As the rest of the section was not changed by the amendments, only subsections (h) and (i) are set out.

**Effect of Amendments.** — The first 1981 (Reg. Sess., 1982) amendment substituted "General Statutes 150A-29 does not apply" for "The provisions of Article 33A of Chapter 143 of the General Statutes shall not apply" at the beginning of subsection (h).

The second 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982 and applicable to refunds and assessments made on and after that date, rewrote the first paragraph of subsection (i), so changing the paragraph that a detailed comparison is not here practical.

### CASE NOTES

**Deductibility of interest on estate and inheritance taxes** arises out of and only out of § 105-9(5) and subdivision (i1) of this section, and not out of § 105-9(8). *Holt v. Lynch*, 57 N.C. App. 532, 291 S.E.2d 920, rev'd on other grounds, 307 N.C. 234, 297 S.E.2d 594 (1982).

**Definition of "Tax" Applicable to Inheritance and Individual Income Taxes.** — Both the inheritance tax statutes and the individual income tax statutes fall within Subchapter I of this Chapter. Thus, the definition of "tax" found in subsection (i1) of this section applies to both taxing schemes. *Holt v. Lynch*, 57 N.C. App. 532, 291 S.E.2d 920, rev'd on other grounds, 307 N.C. 234, 297 S.E.2d 594 (1982).

**Interest on Estate Tax Deficiency Not Part of Tax.** — Although collected as part of the tax, interest paid on an estate or inheri-

tance tax deficiency is not part of the tax, but something in addition to the tax. *Holt v. Lynch*, 57 N.C. App. 532, 291 S.E.2d 920, rev'd on other grounds, 307 N.C. 234, 297 S.E.2d 594 (1982).

**Interest on Taxes Is Deductible.** — Inasmuch as the definition of "tax" in subdivision (i1) of this section specifically applies to the subchapter dealing with state inheritance taxes, interest on tax, although administratively treated as tax for assessment, collection and payment purposes, remains substantively interest paid for the use of money and is deductible. *Holt v. Lynch*, 57 N.C. App. 532, 291 S.E.2d 920, rev'd on other grounds, 307 N.C. 234, 297 S.E.2d 594 (1982).

**Cited in** *In re Estate of Kapoor*, 303 N.C. 102, 277 S.E.2d 403 (1981); *Ballinger v. Secretary of N.C.*, 59 N.C. App. 508, 296 S.E.2d 836 (1982).

**§ 105-241.2. Administrative review.****CASE NOTES**

Cited in *In re Alamance Mem. Park*, 41 N.C. App. 278, 254 S.E.2d 671 (1979); *In re Estate of Kapoor*, 303 N.C. 102, 277 S.E.2d 403 (1981).

**§ 105-241.3. Appeal without payment of tax from Tax Review Board decision.**

(a) Any taxpayer aggrieved by the decision of the Tax Review Board may, upon payment of the tax, penalties and interest asserted to be due or upon filing with the Secretary a bond in such form as the Secretary may prescribe in the amount of said taxes, penalties and interest conditioned on payment of any liability found to be due on an appeal, appeal said decision to the superior court under the provisions of Article 4 of Chapter 150A of the General Statutes; provided, neither this section nor the provisions of Article 4 of Chapter 150A shall be construed to prohibit a jeopardy assessment and execution made in accordance with the provisions of G.S. 105-241.2.

(1955, c. 1350, s. 6; 1957, c. 1340, s. 10; 1973, c. 476, s. 193; 1981 (Reg. Sess., 1982), c. 1211, s. 1.)

**Only Part of Section Set Out.** — As subsection (b) was not changed by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 (Reg.

Sess., 1982) amendment substituted "Article 4 of Chapter 150A" for "Article 33 of Chapter 143" in two places in subsection (a).

**CASE NOTES**

Cited in *In re Estate of Kapoor*, 303 N.C. 102, 277 S.E.2d 403 (1981).

**§ 105-242. Warrant for collection of taxes; certificate or judgment for taxes.**

(b) Bank deposits, rents, salaries, wages, and all other choses in action or property incapable of manual levy or delivery, 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. Provided, if the taxpayer no longer resides within North Carolina or cannot be located therein the notice may be served upon the taxpayer by registered or certified mail, return receipt requested, and such service shall be conclusively presumed to have been made upon the exhibition of the return receipt. Said notice shall show:

- (1) The name of the taxpayer, and if known his Social Security number or federal tax identification number and his address;
- (2) 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) Shall 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 10 percent of any taxpayer's salary or wages be required to be paid hereunder in any one month. 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. 105-267.1, 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.

(1939, c. 158, s. 913; 1941, c. 50, s. 10; 1949, c. 392, s. 6; 1951, c. 643, s. 9; 1955, c. 1285; c. 1350, s. 23; 1957, c. 1340, s. 10; 1959, c. 368; 1963, c. 1169, s. 6; 1969, c. 1071, s. 1; 1973, c. 476, s. 193; c. 1287, s. 13; 1979, c. 103, ss. 1, 2; c. 179, s. 5; 1979, 2nd Sess., c. 1085, s. 1.)

**Only Part of Section Set Out.** — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

**Effect of Amendments.** — The 1979, 2nd

Sess., amendment, effective October 1, 1980, inserted "or certified" near the beginning of the first and second sentences in the second paragraph of subsection (b).

## § 105-244. Additional remedies.

**Legal Periodicals.** — For a note on the rejection of the “public purpose” requirement for state tax exemption, see 17 Wake Forest L. Rev. 293 (1981).

## § 105-248. State taxes; purposes.

The taxes levied in this Subchapter are for the expenses of the State government, the appropriations to its educational, charitable, and penal institutions, pensions for Confederate soldiers and widows, the interest on the debt of the State, for public schools, and other specific appropriations made by law, and shall be collected and paid into the general fund of the State Treasurer.

Whenever in any law or act of incorporation, granted either under the general law or by special act, there is any limitation or exemption of taxation, the same is hereby repealed, and all the property and effects of all such corporations, other than the bonds of this State and of the United States government, shall be liable to taxation, except property belonging to the United States and to municipal corporations, and property of churches, religious societies, charitable, educational, literary, or benevolent institutions or orders, and also cemeteries: Provided, that no property whatever, held or used for investment, speculation, or rent, shall be exempt, other than bonds of this State and of the United States government, unless said rent or the interest on or income from such investment shall be used exclusively for religious, charitable, educational, or benevolent purposes, or the interest upon the bonded indebtedness of said religious, charitable, or benevolent institutions. (1939, c. 158, s. 919; 1981, c. 3.)

**Effect of Amendments.** — The 1981 amendment, effective July 1, 1981, deleted the former second and third paragraphs, which provided for the collection of taxes levied under authority of § 492 of Chapter 427 of the Public Laws of 1931.

**§ 105-250.1:** Repealed by Session Laws 1981 (Regular Session, 1982), c. 1209.

## § 105-251.1. Reporting of certain currency transactions.

(a) The purpose of this provision is to require certain reports and records of transactions involving United States currency where such reports have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

(b) As used in this section, the term:

- (1) “Secretary” means the Secretary of the North Carolina Department of Revenue.
- (2) “Currency” means currency and coin of the United States.
- (3) “Department” means the Department of Revenue of the State of North Carolina.
- (4) “Financial institution” means:
  - a. A State or national bank;
  - b. A trust company;
  - c. A building and loan association, State savings and loan association, or a federal savings and loan association;
  - d. A State or federal credit union; or
  - e. Any other corporation doing business in this State pursuant to the provisions of G.S. 53-1, et seq.

- (5) "Person" means natural persons, partnerships, trusts, estates, associations, corporations, and all entities cognizable as legal personalities.
- (c) (1) Every financial institution shall keep a record of currency transactions in excess of ten thousand dollars (\$10,000) and shall file with the Department within 15 days of the date of such transaction, pursuant to the regulations prescribed by the Secretary, a complete report of such currency transactions in excess of ten thousand dollars (\$10,000).
- (2) The reporting requirements set out in subsection (1) above may be fulfilled by providing to the Department a true and exact copy of all reports of currency transactions in excess of ten thousand dollars (\$10,000) reported to the Commissioner of the Internal Revenue Service pursuant to 31 U.S.C. § 1081 and 31 C.F.R. § 103, as those various statutes and regulations were in effect on January 1, 1983.
- (d) The Secretary shall prescribe such regulations as he may deem appropriate to carry out the purposes of this section and to provide for exemption of such transactions as the Secretary determines are clearly of a legitimate nature for which mandatory reporting would serve no useful purpose.
- (e) The North Carolina State Bureau of Investigation shall, through designation by the Attorney General pursuant to G.S. 105-259, have access to and shall be authorized to inspect and copy any reports filed with the Department pursuant to this section.
- (f) (1) For each willful violation of this Article, the Secretary may assess upon any financial institution and upon any director, officer, or employee thereof who willfully participates in the violation a civil penalty not exceeding one thousand dollars (\$1,000).
- (2) In the event of the failure of any person to pay any penalty assessed under this section, a civil action for recovery thereof may, in the discretion of the Secretary, be brought in the name of the State of North Carolina.
- (g) Except as provided in subsection (1) below, whoever willfully violates any provision of this Article shall be guilty of a misdemeanor.
- (1) Whoever willfully violates any provision of this Article where the violation is:
- a. Committed in furtherance of the commission of any other violation of North Carolina law; or
  - b. Committed as part of a pattern of illegal activity involving transactions exceeding one hundred thousand dollars (\$100,000) in any 12-month period
- shall be guilty of a Class I felony and, upon conviction thereof, shall be punished by a fine of not more than five hundred thousand dollars (\$500,000) or by imprisonment, or both. (1983, c. 815, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 815, s. 2, repeals all laws and parts of laws in conflict with the act.

Session Laws 1983, c. 815, s. 3, makes this section effective October 1, 1983.

### § 105-253. Personal liability of officers, trustees, or receivers.

(a) Any officer, trustee, or receiver of any corporation required to file report with the Secretary of Revenue, having in his custody funds of the corporation, who allows said funds to be paid out or distributed to the stockholders of said corporation without having satisfied the Secretary of Revenue for any State taxes which are due and have accrued, shall be personally responsible for the payment of said tax, and in addition thereto shall be subject to a penalty of not

more than the amount of tax, nor less than twenty-five percent (25%) of such tax found to be due or accrued.

(b) Each responsible corporate officer is made personally and individually liable:

- (1) For all sales and use taxes collected by a corporation upon taxable transactions of the corporation, which liability shall be satisfied upon timely remittance of such taxes to the Secretary by the corporation;
- (2) For all sales and use taxes due upon taxable transactions of the corporation but upon which the corporation failed to collect the tax, but only if the responsible officer knew, or in the exercise of reasonable care should have known, that the tax was not being collected; and
- (3) For all taxes due from the corporation pursuant to the provisions of Article 36 and Article 36A of Subchapter V of this Chapter.

His liability shall be satisfied upon timely remittance of such tax to the Secretary by the corporation. If said tax shall remain unpaid by the corporation, after the same is due and payable, the Secretary of Revenue may assess the tax against, and collect the tax from, any responsible corporate officer in accordance with the provisions of G.S. 105-241.1, which officer shall be the "taxpayer" in such case, as referred to in G.S. 105-241.1 et seq. As used in this section, the words "responsible corporate officers" mean the president and the treasurer of a corporation and may include such other officers as have been assigned the duty of filing tax returns and remitting the taxes to the Secretary of Revenue on behalf of the corporation. Any penalties which may be imposed pursuant to the provisions of G.S. 105-236 and which are applicable to a deficiency shall apply to any assessment provided for herein. All other provisions of Article 9, Schedule J of the Revenue Laws shall apply to such assessment to the extent that they are not inconsistent with the provisions of this section.

(c) The Secretary of State shall withhold the issuance of any certificate of dissolution to, or withdrawal of, any corporation, domestic or foreign, until the receipt by him of a notice from the Secretary of Revenue to the effect that any such corporation has met the requirements with respect to reports and taxes required by this Subchapter. (1939, c. 158, s. 923; 1941, c. 50, s. 10; 1955, c. 1350, s. 23; 1973, c. 476, s. 193; c. 1287, s. 13; 1983, c. 220, s. 1.)

**Effect of Amendments.** — The 1983 amendment, effective July 1, 1983, designated the three paragraphs of this section as subsections (a), (b) and (c), respectively; in subsection (b), deleted "and" at the end of subdivision (1),

inserted "and" at the end of subdivision (2), added subdivision (3), and, in the fourth sentence, substituted "the taxes" for "sales and use tax" following "duty of filing tax returns and remitting."

## § 105-259. Secrecy required of officials; penalty for violation.

With respect to any one of the following persons: (i) the Secretary of Revenue and all other officers or employees, and former officers and employees, of the Department of Revenue; (ii) local tax authorities (as defined in G.S. 105-289(e)) and former local tax authorities; (iii) any other person authorized in this section to receive information concerning any item contained in any report or return, or authorized to inspect any report or return; and (iv) the Commissioner of Insurance and all other officers or employees and former officers and employees of the Department of Insurance with respect to State and federal income tax returns filed with the Commissioner of Insurance by domestic insurance companies; and except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for any of said persons to divulge or make known in any manner the amount of income, income tax or other taxes of any taxpayer, or information relating thereto or from which the

amount of income, income tax or other taxes or any part thereof might be determined, deducted or estimated, whether the same be set forth or disclosed in or by means of any report or return required to be filed or furnished under this Subchapter, or in or by means of any audit, assessment, application, correspondence, schedule or other document relating to such taxpayer, notwithstanding the provisions of Chapter 132 of the General Statutes or of any other law or laws relating to public records. It shall likewise be unlawful to reveal whether or not any taxpayer has filed a return, and to abstract, compile or furnish to any person, firm or corporation not otherwise entitled to information relating to the amount of income, income tax or other taxes of a taxpayer, any list of names, addresses, social security numbers or other personal information concerning such taxpayer, whether or not such list discloses a taxpayer's income, income tax or other taxes, or any part thereof, except that when an election is made by a husband and wife under G.S. 105-152(e) to file their separate returns on a single form, or in order to determine an exemption allowable under G.S. 105-149(a)(2), any information given to one spouse concerning the income or income tax of the other spouse reported or reportable on such single return or on separate returns shall not be a violation of the provisions of this section.

Nothing in this section shall be construed to prohibit the publication of statistics, so classified as to prevent the identification of particular reports or returns, and the items thereof; the inspection of such reports or returns by the Governor, Attorney General, or their duly authorized representative; or the inspection by a legal representative of the State of the report or return of any taxpayer who shall bring an action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted to recover any tax or penalty imposed by this Subchapter; nor shall the provisions of this section prohibit the Department of Revenue furnishing information to other governmental agencies of persons and firms properly licensed under Schedule B, G.S. 105-33 to 105-113. The Department of Revenue may exchange information with the officers of organized associations of taxpayers under Schedule B, G.S. 105-33 to 105-113, with respect to parties liable for such taxes and as to parties who have paid such license taxes.

When any record of the Department of Revenue shall have been photographed, photocopied or microphotocopied pursuant to the authority contained in G.S. 8-45.3, the original of said record may thereafter be destroyed at any time upon the order of the Secretary of Revenue, notwithstanding the provisions of G.S. 121-5, G.S. 132-3 or any other law or laws relating to the preservation of public records. Any record which shall not have been so photographed, photocopied or microphotocopied shall be preserved for three years, and thereafter until the Secretary of Revenue shall order the same to be destroyed.

Any person, officer, agent, clerk, employee, local tax authority or former officer, employee or local tax authority violating the provisions of this section shall be guilty of a misdemeanor and fined not less than two hundred dollars (\$200.00) nor more than one thousand dollars (\$1,000) and/or imprisoned, in the discretion of the court; and if such offending person be a public officer or employee, he shall be dismissed from such office or employment, and shall not hold any public office or employment in this State for a period of five years thereafter.

Notwithstanding the provisions of this section, the Secretary of Revenue may permit the Commissioner of Internal Revenue of the United States, or the revenue officer of any other state imposing any of the taxes imposed in this Subchapter, or the duly authorized representative of either, to inspect the report or return of any taxpayer; or may furnish such officer or his authorized agent an abstract of the report or return of any taxpayer; or supply such officer with information concerning any item contained in any report or return, or

disclosed by the report of any investigation of such report or return of any taxpayer. Such permission, however, shall be granted or such information furnished to such officer, or his duly authorized representatives, only if the statutes of the United States or of such other state grants substantially similar privilege to the Secretary of Revenue of this State or his duly authorized representative. Notwithstanding contrary provisions of this section, the Secretary may also furnish to the Employment Security Commission account and identification numbers, and names and addresses, of taxpayers when said Commission requires such information for the purpose of administering Chapter 96 of the General Statutes. Nothing in this section or any other law shall prevent the exchange of information between the Department of Revenue and the Department of Motor Vehicles when such information is needed by either or both of said departments for the purpose of properly enforcing the laws with the administration of which either or both of said departments is charged.

Notwithstanding the provisions of this section, the Secretary of Revenue may contract with any person, firm or corporation to receive and address, sort, bag, or deliver to the United States Postal Service any bulk mailing originated by the Department of Revenue, and may deliver the mail to the contractor pursuant to the contract. To ensure performance of the contract, the contractor shall furnish a bond in a form and amount acceptable to the Secretary. (1939, c. 158, s. 928; 1951, c. 190, s. 2; 1973, c. 476, s. 193; c. 903, s. 4; c. 1287, s. 13; 1975, c. 19, s. 29; c. 275, s. 7; 1977, c. 657, s. 6; 1979, c. 495; 1983, c. 7.)

**Effect of Amendments.** — The 1983 amendment, effective Feb. 11, 1983, added the last paragraph.

## § 105-260. Deputies and clerks.

The Secretary of Revenue may appoint such deputies, clerks and assistants under his direction as may be necessary to administer the laws relating to the assessment and collection of all taxes provided for in this Subchapter; may remove and discharge same at his discretion, and shall fix their compensation within the rules and regulations prescribed by law. (1939, c. 158, s. 929; 1973, c. 476, s. 193; 1981, c. 859, s. 79; c. 1127, s. 53.)

**Effect of Amendments.** — The first 1981 amendment, effective July 1, 1981, inserted "and any auditing function associated with the International Registration Plan for motor vehicles" following "this Subchapter."

The second 1981 amendment, effective November 15, 1981, repealed the first 1981 amendment.

Session Laws 1981, c. 1127, s. 89, contains a severability clause.

## § 105-262. Rules and regulations.

The Secretary of Revenue shall, from time to time, initiate and prepare such regulations, not inconsistent with law, as may be useful and necessary to implement the provisions of all the Articles of Subchapter I (except Article 8B) and Article 36 of Subchapter V, such regulations to become effective when approved by the Tax Review Board. All regulations and amendments thereto shall be published and made available by the Secretary of Revenue.

The Secretary of Revenue may, from time to time, make and prescribe such administrative rules, not inconsistent with law and the regulations approved by the Tax Review Board, as may be useful for the administration of his department and the discharge of his responsibilities.

References to rules and regulations of the Secretary of Revenue in this Chapter and in any subsequent amendments or additions thereto (unless

expressly provided to the contrary therein) shall be construed to mean those rules and regulations promulgated under the provisions of this section. (1939, c. 158, s. 931; 1955, c. 1350, s. 2; 1973, c. 476, s. 193; 1981, c. 859, s. 80; c. 1127, s. 53.)

**Effect of Amendments.** — The 1981 amendment, effective July 1, 1981, added at the end of this section a sentence reading as follows: "The Secretary of Revenue may also adopt rules, and prescribe forms, as necessary for auditing associated with the International Registration Plan for motor vehicles."

The second 1981 amendment, effective November 15, 1981, repealed the first 1981 amendment.

Session Laws 1981, c. 1127, s. 89, contains a severability clause.

#### CASE NOTES

##### **Interpretation of Secretary Prima Facie Correct.** —

In accord with original. See *In re Alamance Mem. Park*, 41 N.C. App. 278, 254 S.E.2d 671 (1979).

Cited in *Oscar Miller Contractor v. North Carolina Tax Review Bd.*, — N.C. App. —, 301 S.E.2d 511 (1983).

### § 105-264. Construction of Subchapter; population.

#### CASE NOTES

Cited in *Oscar Miller Contractor v. North Carolina Tax Review Bd.*, — N.C. App. —, 301 S.E.2d 511 (1983).

### § 105-266. Overpayment of taxes to be refunded with interest.

If the Secretary of Revenue discovers from the examination of any return, or otherwise, that any taxpayer has overpaid the correct amount of tax (including penalties, interest and costs if any), such overpayment if the amount of three dollars (\$3.00) or more, shall be refunded to the taxpayer within 60 days after it is ascertained together with interest thereon at the rate established in G.S. 105-241.1(i) for assessments; provided, that interest on any such refund shall be computed from a date 90 days after the date the tax was originally paid by the taxpayer; except that there shall be no refund to the taxpayer of any sum set off under the provisions of Chapter 105A, the Set-off Debt Collection Act. If said overpayment is less than three dollars (\$3.00) said overpayment shall be refunded as aforesaid but only upon receipt by the Secretary of Revenue of a written demand for such refund from the taxpayer. Provided, however, that no overpayment shall be refunded irrespective of whether upon discovery or receipt of written demand if such discovery is not made or such demand is not received within three years from the date set by the statute for the filing of the return or within six months of the payment of the tax alleged to be an overpayment, whichever date is the later. The provisions of this paragraph shall not apply to interest required under G.S. 105-267. When a husband and wife have elected under G.S. 105-152(e) to file their separate income tax returns on a single form and a refund for overpayment of tax is made payable to both spouses as provided in that subsection, the provisions of this section shall apply to such refund. (1939, c. 158, s. 937; 1941, c. 50, s. 10; 1947, c. 501, s. 9; 1949, c. 392, s. 6; 1951, c. 643, s. 9; 1957, c. 1340, s. 14; 1973, c. 476, s. 193;

c. 903, s. 5; 1975, c. 74, s. 3; 1979, c. 801, s. 90; 1981 (Reg. Sess., 1982), c. 1223, s. 2.)

**Effect of Amendments.** — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982 and applicable to refunds and assessments made on and after that date, substituted "estab-

lished in G.S. 105-241.1(i) for assessments" for "of six percent (6%) per annum" near the middle of the first sentence.

## § 105-266.1. Refunds of overpayment of taxes.

(b) General Statutes 150A-29 does not apply to hearings before the Secretary of Revenue held pursuant to this section, but the provisions of G.S. 105-241.2, 105-241.3 and 105.241.4 with respect to review and appeal shall apply to any tax or additional tax assessed pursuant to this section.

(1957, c. 1340, s. 10; 1969, c. 44, s. 66; c. 1132, s. 2; 1973, c. 476, s. 193; 1979, c. 801, s. 91; 1981 (Reg. Sess., 1982), c. 1211, s. 2.)

**Only Part of Section Set Out.** — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

**Effect of Amendments.** — The 1981 (Reg. Sess., 1982) amendment substituted "General

Statutes 150A-29 does not apply" for "The provisions of Article 33A of Chapter 143 of the General Statutes shall not apply" at the beginning of subsection (b).

### CASE NOTES

Cited in *In re Estate of Kapoor*, 303 N.C. 102, 277 S.E.2d 403 (1981).

## § 105-267. Taxes to be paid; suits for recovery of taxes.

### CASE NOTES

Applied in *Rent-A-Car Co. v. Lynch*, 298 N.C. 559, 259 S.E.2d 564 (1979).

## § 105-267.1. Refund of taxes illegally collected and paid into State treasury.

Whenever taxes of any kind are or have been through clerical error, or misinterpretation of the law, or otherwise, collected and paid into the State treasury in excess of the amount legally due the State, upon certificate of the head of the department through which said taxes were collected or his successor in the performance of the functions of that department, with the approval of the Attorney General, and the Treasurer shall pay the same out of any funds in the treasury not otherwise appropriated: Provided, demand is made for the correction of such error or errors within two years from the time of such payment. (Ex. Sess. 1921, c. 96; C.S., s. 7979(a); 1971, c. 806, s. 2; 1983, c. 913, s. 12.)

**Effect of Amendments.** — The 1983 amendment, effective July 22, 1983, deleted "the State Auditor shall issue his warrant for the amount

so illegally collected, to the person entitled thereto" following "amount legally due the State."

## § 105-269.4. Election to apply income tax refund to following year's tax.

Any person required to file an income tax return under Article 4 of this Subchapter whose return shows that the person is entitled to a refund may elect to apply part or all of the refund to that person's estimated income tax liability for the following year. The Secretary of Revenue shall amend the income tax returns to permit the election authorized by this section. (1983, c. 663, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 663, s. 3, makes this section effective upon ratification and applicable to income tax returns filed

for taxable years beginning on or after Jan. 1, 1984. The act was ratified July 1, 1983.

## SUBCHAPTER II. LISTING, APPRAISAL, AND ASSESSMENT OF PROPERTY AND COLLECTION OF TAXES ON PROPERTY.

### ARTICLE 11.

#### *Short Title, Purpose, and Definitions.*

## § 105-271. Official title.

### CASE NOTES

#### **The assessment, listing, etc. —**

The discovery, assessment, listing and collection of ad valorem taxes on tangible personal property in North Carolina is regulated by the

Machinery Act. In re Plushbottom & Peabody, Ltd., 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

## § 105-272. Purpose of Subchapter.

### CASE NOTES

**Stated in** In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

## § 105-273. Definitions.

**Legal Periodicals.** — For article on the need to reform North Carolina property tax law, see 59 N.C.L. Rev. 675 (1981).

## CASE NOTES

**"Appraisal" and "Assessment" Synonymous for Public Service Companies.** — For public service companies, the true value of property is its tax value, and "appraisal" and "assessment" are synonymous. In re S. Ry., 59 N.C. App. 119, 296 S.E.2d 463,

cert. granted, 307 N.C. 468, 299 S.E.2d 222 (1982).

**Cited in** *City of Charlotte v. Little McMahan Properties, Inc.*, 52 N.C. App. 464, 279 S.E.2d 104 (1981).

## ARTICLE 12.

*Property Subject to Taxation.*

## § 105-274. Property subject to taxation.

**Legal Periodicals.** — For survey of 1978 law on taxation, see 57 N.C.L. Rev. 1142 (1979).

For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

## CASE NOTES

**Legislative Purpose.** — The legislature has decreed that all property, real and personal, within the jurisdiction of the State, is subject to taxation whether owned by a resident or a nonresident. The purpose of this strong decree is to treat all property owners equally so that the tax burden will be shared proportionately, and to gather in all the tax money to which the various counties and municipalities are entitled. In re Plushbottom & Peabody, Ltd., 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

**All property privately owned, etc.** —

All property, real and personal, within the jurisdiction of this State, whether owned by a

foreign corporation or a domestic corporation, is subject to taxation unless specifically excluded or exempted from the tax base. In re Plushbottom & Peabody, Ltd., 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

**Exemptions Strictly Construed.** — Exemption from taxation is exceptional. Such exemptions should be strictly construed. In re Notice of Attachment & Garnishment Issued by Catawba County Tax Collector, 59 N.C. App. 332, 296 S.E.2d 499 (1982), cert. denied, — N.C. —, 299 S.E.2d 645 (1983).

**Cited in** *In re McElwee*, 304 N.C. 68, 283 S.E.2d 115 (1981).

## § 105-275. Property classified and excluded from the tax base.

The following classes of property are hereby designated special classes under authority of Article V, Sec. 2(2), of the North Carolina Constitution and shall not be listed, appraised, assessed, or taxed:

- (8) a. Real and personal property that is used or, if under construction, is to be used exclusively for air cleaning or waste disposal or to abate, reduce, or prevent the pollution of air or water (including, but not limited to, waste lagoons and facilities owned by public or private utilities built and installed primarily for the purpose of providing sewer service to areas that are predominantly residential in character or areas that lie outside territory already having sewer service), if the [Department of Natural Resources and Community Development] furnishes a certificate to the tax supervisor of the county in which the property is situated or to be situated stating that the Environmental Management Commission has found that the described property:

1. Has been or will be construed or installed;

2. Complies with or that plans therefor which have been submitted to the Environmental Management Commission indicate that it will comply with the requirements of the Environmental Management Commission;
  3. Is being effectively operated or will, when completed, be required to operate in accordance with the terms and conditions of the permit, certificate of approval, or other document of approval issued by the Environmental Management Commission; and
  4. Has or, when completed, will have as its primary rather than incidental purpose the reduction of water pollution resulting from the discharge of sewage and waste or the reduction of air pollution resulting from the emission of air contaminants.
- b. Real or personal property that is used or, if under construction, is to be used exclusively for recycling or resource recovering of or from solid waste, if the Department of Human Resources furnishes a certificate to the tax supervisor of the county in which the property is situated stating the Department of Human Resources has found that the described property has been or will be constructed or installed, complies or will comply with the regulations of the Department of Human Resources, and has, or will have as its primary purpose recycling or resource recovering of or from solid waste.
- c. Tangible personal property that is used exclusively, or if being installed, is to be used exclusively, for the prevention or reduction of cotton dust inside a textile plant for the protection of the health of the employees of the plant, in accordance with occupational safety and health standards adopted by the State of North Carolina pursuant to Article 16 of G.S. Chapter 95. The Department of Revenue shall adopt guidelines to assist the tax supervisors in administering this exclusion.
- (25) Tangible personal property shipped into this State for the purpose of repair, alteration, maintenance or servicing and reshipment to the owner outside this State. This classification shall not include raw materials, supplies, or goods in process of manufacture in this State.
- (26) For the tax year immediately following transfer of title, tangible personal property manufactured in this State for the account of a nonresident customer and held by the manufacturer for shipment. For the purpose of this subdivision, the term "nonresident" means a taxpayer having no place of business in North Carolina.
- (27), (28) Repealed by Session Laws 1983, c. 643, s. 1, effective June 30, 1983.
- (29) Real property and easements wholly and exclusively held and used for nonprofit historic preservation purposes by a nonprofit historical association or institution, including real property owned by a nonprofit corporation organized for historic preservation purposes and held by its owner exclusively for sale under an historic preservation agreement prepared and recorded under the provisions of the Conservation and Historic Preservation Agreements Act, Article 4, Chapter 121 of the General Statutes of North Carolina. (1939, c. 310, s. 303; 1961, c. 1169, s. 8; 1967, c. 1185; 1971, c. 806, s. 1; c. 1121, s. 3; 1973, cc. 290, 451; c. 476, s. 128; c. 484; c. 695, s. 1; c. 790, s. 1; cc. 904, 962, 1028, 1034, 1077; c. 1262, s. 23; c. 1264, s. 1; 1975, cc. 566, 755; c. 764, s. 6; 1977, c. 771, s. 4; c. 782, s. 2; c. 1001, ss. 1, 2; 1977, 2nd Sess., c. 1200, s. 4; 1979, c. 200, s. 1; 1979, 2nd Sess., c. 1092; 1981, c. 86, s. 1; 1981 (Reg. Sess., 1982), c. 1244, ss. 1, 2; 1983, c. 643, ss. 1, 2; c. 693.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendments, it is not set out.

**Editor's Note.** —

Session Laws 1983, c. 643, s. 3, makes the act effective upon ratification and applicable to taxable years beginning on and after Jan. 1, 1983. Section 3 further provides: "Property meeting all of the conditions for exclusion under this act except the requirement of a permit or certificate, shall be eligible for the exclusion for 1983 if the owner of the property has filed a timely application for exclusion, and secures from the Environmental Management Commission and furnishes to the tax supervisor within 180 days after the date of the ratification of this act a copy of a permit or certificate as described in G.S. 105-275(8)a." The act was ratified June 30, 1983.

**Effect of Amendments.** — The 1979, 2nd Sess., amendment, effective January 1, 1981, added subdivision (25).

The 1981 amendment, effective Jan. 1, 1982, added subdivision (26).

The 1981 (Reg. Sess., 1982) amendment rewrote and recodified subdivision (8)a as subdivision (27) and recodified subdivision (8)b as subdivision (28). Session Laws 1981 (Reg. Sess., 1982), c. 1244, s. 3, provided that the act would become effective Jan. 1, 1983, except that subdivision (27)d would be effective upon ratification. The act was ratified June 18, 1982.

The first 1983 amendment, effective June 30, 1983, repealed Session Laws 1981 (Reg. Sess., 1982), c. 1244, and reenacted the provisions of subdivision (8) as they existed on Dec. 31, 1982. The first 1983 amendment also added a new paragraph (8)c.

The second 1983 amendment, effective Jan. 1, 1984, added subdivision (29).

**Legal Periodicals.** — For survey of 1978 law on taxation, see 57 N.C.L. Rev. 1142 (1979).

For article discussing legal issues of historic preservation for local government in North Carolina, see 17 Wake Forest L. Rev. 707 (1981).

## CASE NOTES

**Construction.** — This section provides an exemption from taxation and is strictly construed against the taxpayer and in favor of the State. In re Certain Tobacco, 52 N.C. App. 299, 278 S.E.2d 575 (1981).

While the courts have consistently held that tax exemption statutes must be strictly construed against exemption, they have also held that such statutes should not be given a narrow or stingy construction. In re Wake Forest Univ., 51 N.C. App. 516, 277 S.E.2d 91, cert. denied, 303 N.C. 544, 281 S.E.2d 391 (1981).

**Use, rather than ownership, etc.** —

It is not the nature or characteristic of the owning entity which ultimately determines whether property shall be exempt from taxation, but it is the use to which the property is dedicated which controls. In re Wake Forest Univ., 51 N.C. App. 516, 277 S.E.2d 91, cert. denied, 303 N.C. 544, 281 S.E.2d 391 (1981).

**Classification of Tobacco Generally.** — The legislature plainly intended to establish

two classes of property: (1) under subdivision (1) of this section, if tobacco is held or stored for shipment to any foreign country, it is exempt; and (2) under § 105-277(a), if tobacco (or other farm products) is held or stored for manufacture or processing, it is taxed at the preferential rate. In re Certain Tobacco, 52 N.C. App. 299, 278 S.E.2d 575 (1981).

**Raw Tobacco To Be Manufactured into Cigarettes and then Shipped.** — Raw tobacco is not exempt from taxation as being held or stored for shipment to a foreign country within the meaning of subdivision (1) of this section where the tobacco is to be manufactured into cigarettes and other tobacco products, and the cigarettes and other products will be shipped to a foreign country; rather, the tobacco is held or stored for processing or manufacture and is taxable at the preferential rate of 60 percent of value under § 105-277(a). In re Certain Tobacco, 52 N.C. App. 299, 278 S.E.2d 575 (1981).

## OPINIONS OF ATTORNEY GENERAL

**Property of a labor union** is not classified out of the ad valorem tax base by subdivision (19) of this section. See opinion of Attorney

General to J. Bourke Bilisoly, Wake County Tax Attorney, 50 N.C.A.G. 35 (1980).

## § 105-277. Property classified for taxation at reduced rates; certain deductions.

### CASE NOTES

**Classification of Tobacco Generally.** — The legislature plainly intended to establish two classes of property: (1) under § 105-275(1), if tobacco is held or stored for shipment to any foreign country, it is exempt; and (2) under subsection (a) of this section, if tobacco (or other farm products) is held or stored for manufacture or processing, it is taxed at the preferential rate. In re Certain Tobacco, 52 N.C. App. 299, 278 S.E.2d 575 (1981).

**When Tobacco Taxed Pursuant to Subsection (a).** — Tobacco that is being held or stored to be manufactured or processed is taxed pursuant to this section, where it is given a preferential rate of 60 percent of value for tax purposes. In re Certain Tobacco, 52 N.C. App. 299, 278 S.E.2d 575 (1981).

Tobacco is an agricultural product under this section until it is manufactured into the finished product. In re Certain Tobacco, 52 N.C. App. 299, 278 S.E.2d 575 (1981).

Raw tobacco is not exempt from taxation as being held or stored for shipment to a foreign country within the meaning of § 105-275(1) where the tobacco is to be manufactured into cigarettes and other tobacco products, and the cigarettes and other products will be shipped to a foreign country; rather, the tobacco is held or stored for processing or manufacture and is taxable at the preferential rate of 60 percent of value under subsection (a) of this section. In re Certain Tobacco, 52 N.C. App. 299, 278 S.E.2d 575 (1981).

## § 105-277.1. Property classified for taxation at reduced valuation.

(a) The following class of property is hereby designated a special class under authority of Article V, Sec. 2(2), of the North Carolina Constitution and shall not be assessed for taxation: The first eight thousand five hundred dollars (\$8,500) in assessed value of property owned by a North Carolina resident and, if real property or a mobile home, occupied by the owner as his or her permanent residence and, if household personal property, used by the owner in connection with his or her permanent residence, provided that, as of January 1 of the year for which the benefit of this section is claimed:

- (1) The owner is either (i) 65 years of age or older or (ii) totally and permanently disabled, and
- (2) The owner's disposable income for the immediately preceding calendar year did not exceed nine thousand dollars (\$9,000), and
- (3) The owner makes application as herein provided.

For married applicants residing with their spouses, the disposable income of both spouses must be included, whether or not the property is in both names.

(b) Definitions. — When used in this section, the following definitions shall apply:

- (1) An "owner" of property means a person who holds legal or equitable title to the property, either individually or as a tenant by the entirety, a joint tenant, a tenant in common, a life estate or an estate for the life of another. Property owned and occupied by husband and wife as tenants by the entirety shall be entitled to the full benefit of this classification notwithstanding that only one of them meets the age or disability requirements herein provided. If the residence is a mobile home and is jointly owned by husband and wife, it shall be treated as property held by the entirety. When property is owned by two or more persons other than husband and wife and one or more of such owners qualifies for this classification, each qualifying owner shall be entitled to the full amount of the exclusion not to exceed his or her proportionate share of the valuation of the property. No part of an exclusion

available to one co-owner may be claimed by any other co-owner and in no event shall the total exclusion allowed to a qualifying residence (including the household personal property therein) exceed eight thousand five hundred dollars (\$8,500).

- (2) "Disposable income" means adjusted gross income as defined for North Carolina income tax purposes in G.S. 105-141.3 plus all other moneys received from every source other than gifts or inheritances received from a spouse, lineal ancestors, or lineal descendants.
- (2a) "Household personal property" includes furniture, appliances, furnishings, cooking and eating utensils, lawn equipment and tools, clothing and other personal effects but not motor vehicles, boats or airplanes.
- (3) "Permanent residence" means legal residence. It includes the dwelling, the dwelling site, not to exceed one acre, and related improvements. The dwelling may be a single family residence, a unit in a multi-family residential complex or a mobile home. Notwithstanding the occupancy requirements of this classification, an otherwise qualified applicant shall not lose the benefit of the exclusion because of a temporary absence from his or her permanent residence for reasons of health, or because of an extended absence while confined to a rest home or nursing home, so long as the residence is unoccupied or occupied by the applicant's spouse or other dependent.
- (4) A "totally and permanently disabled person" means one who has a physical or mental impairment which substantially precludes him from obtaining gainful employment and such impairment appears reasonably certain to continue without substantial improvement throughout his lifetime.

(c) Application. — Applications for the exclusions provided by this section are to be filed during the regular listing period, but, shall be accepted at any time up to and through April 15 of the calendar year for which they are to be effective. When property is owned by two or more persons other than husband and wife and one or more of them qualifies for this exclusion, each such owner shall apply separately for his or her proportionate share of the exclusion.

- (1) Elderly Applicants. — Persons 65 years of age or older may apply for this exclusion by entering the appropriate information on a form made available by the tax supervisor under G.S. 105-282.1.
- (2) Disabled Applicants. — Persons who are totally and permanently disabled may apply for this exclusion by (i) entering the appropriate information on a form made available by the tax supervisor under G.S. 105-282.1 and (ii) furnishing acceptable proof of their disability. Such proof shall be in the form of a certificate from a physician licensed to practice medicine in North Carolina or from a governmental agency authorized to determine qualification for disability benefits. After a disabled applicant has qualified for this classification, he or she shall not be required to furnish an additional certificate unless the applicant's disability is reduced to the extent that the applicant could no longer be certified for the taxation at reduced valuation. (1971, c. 932, s. 1; 1973, c. 448, s. 1; 1975, c. 881, s. 2; 1977, c. 666, s. 1; 1979, c. 356, s. 1; c. 846, s. 1; 1981, c. 54, s. 1; c. 1052, s. 1.)

**Cross References.** — As to the 1981 application by any taxpayer under G.S. 105-309(f) for the exemption provided by this section, see the note to § 105-282.1. As to levy of penalties for failure of a taxpayer to give notice where the taxpayer has received an exemption for one taxable year but is not eligible for the exemp-

tion the next year, see § 105-309(g).

**Editor's Note.** — Session Laws 1979, c. 356, s. 2, as amended by Session Laws 1981, c. 28, provides: "This act is effective with respect to taxable years beginning on and after January 1, 1980. Notwithstanding the amendment made to G.S. 105-277.1(c) by the first section of this

act, applications for the exclusion provided by G.S. 105-277.1 for calendar year 1980 shall also be accepted as timely filed if filed at any time from April 16, 1980 through April 15, 1981. A properly completed application for calendar year 1980 received on or after April 16, 1980, but before April 16, 1981, shall constitute a request for release or refund, as provided in G.S. 105-381."

**Effect of Amendments.** — The first 1981 amendment, effective Jan. 1, 1982, substituted "on a form made available by the tax supervisor

under G.S. 105-282.1" for "on the abstract on which they list their property for taxation" at the end of subdivision (1) of subsection (c) and near the end of clause (i) of subdivision (2) of subsection (c).

The second 1981 amendment, effective Jan. 1, 1982, substituted "eight thousand five hundred dollars (\$8,500)" for "seven thousand five hundred dollars (\$7,500)" in the introductory paragraph of subsection (a) and at the end of subdivision (1) of subsection (b).

## § 105-277.1A. Property classified for taxation at reduced valuation; duties of tax collectors; reimbursement of localities for portion of tax lost.

(a) On September 1 of each year, the tax collector of each county and the tax collector of each city shall furnish to the Secretary of Revenue a list containing the name and address of each person who has qualified in that year for the exemption provided in G.S. 105-277.1. The list shall also contain for each name the total amount of property exempted, the tax rate the property is subject to, and the product obtained by multiplying those two numbers by each other. The lists shall be accompanied by an affidavit attesting to the accuracy of the list, and shall all be on a form prescribed by the Secretary of Revenue.

(b) In addition to the list required by subsection (a) of this section, the county or city may provide a supplemental list on December 1.

(c) The Secretary of Revenue may, for cause, grant an extension for the submission of the list required by this section.

(d) After receiving a certified list under subsections (a) through (c) of this section, the Secretary of Revenue shall, within 60 days, pay to the county or city fifteen percent (15%) of the total for the entire list of the product obtained by multiplying the tax exemption for each taxpayer times the applicable tax rate.

(e) Any funds received by any county or city pursuant to this section because the county or city was collecting taxes for another unit of government or special district shall be credited to the funds of that other unit or district in accordance with regulations issued by the Local Government Commission.

(f) In order to pay for the reimbursement under this section and the cost to the Department of Revenue for administering the reimbursement, the Secretary of Revenue may withhold from net collections received by the Department under Article 2A and Article 2C of Chapter 105 of the General Statutes an amount equal to the reimbursement and the cost of administration. (1981, c. 1052, ss. 2-4; 1981 (Reg. Sess., 1982), c. 1282, s. 70.1.)

**Editor's Note.** — Session Laws 1981, c. 1052, s. 5, makes this section effective Jan. 1, 1982.

**Effect of Amendments.** — The 1981 (Reg.

Sess., 1982) amendment, effective July 1, 1982, added subsection (f).

Session Laws 1981 (Reg. Sess., 1982), c. 1282, s. 81, contains a severability clause.

## § 105-277.2. Agricultural, horticultural and forestland — definitions.

**Legal Periodicals.** — For survey of 1980 tax law, see 59 N.C.L. Rev. 1233 (1981).

## CASE NOTES

**Principal Business of a Corporation.** — Factors which should be looked at in determining the principal business of a corporation for present use valuation other than gross income are net income or profit and its source, annual receipts and disbursement, the purpose of the corporation as stated in its corporate charter and the actual corporate function in relation to its stated corporate purpose. *W.R. Co. v. North Carolina Property Tax Comm'n*, 48 N.C. App. 245, 269 S.E.2d 636 (1980), cert. denied, 301 N.C. 727, 276 S.E.2d 287 (1981).

**Property to Be Valued on Ability to Produce Income in Present Use.** — Clear legislative intent under this section is that property be valued on the basis of its ability to produce income in the manner of its present use; all other uses for which the property might be employed, and the many factors enunciated in § 105-317(a), are irrelevant and immaterial. *In re McElwee*, 304 N.C. 68, 283 S.E.2d 115 (1981).

**Applied** in *Development Assocs. v. Wake County Bd. of Adjustment*, 48 N.C. App. 541, 269 S.E.2d 700 (1980).

### § 105-277.3. Agricultural, horticultural and forestland — classifications.

(a) The following classes of property are hereby designated special classes of property under authority of Article V, Sec. 2(2) of the North Carolina Constitution and shall be appraised, assessed and taxed as hereinafter provided:

- (1) Individually owned agricultural land, consisting of 10 acres or more and having gross income from the sale of agricultural products produced thereon (together with any payments received under a governmental soil conservation or land retirement program) averaging one thousand dollars (\$1,000) per year for each of the three years immediately preceding January 1 of the year for which the benefit of this section is claimed.
- (2) Individually owned horticultural land, consisting of five acres or more and having gross income from the sale of horticultural products produced thereon (together with any payments received under a governmental soil conservation or land retirement program) averaging one thousand dollars (\$1,000) per year for each of the three years immediately preceding January 1 of the year for which the benefit of this section is claimed.
- (3) Individually owned forest land, consisting of 20 acres or more unless the property is included in a farm unit qualifying under G.S. 105-277.3(a)(1).

(c) In addition, property may come within the classification described in subdivision (a)(1) or (2) above, if (1) it was appraised at its present use value pursuant to that section at the time title to the property passed to the present owner, and (2) at the time title to the property passed to the present owner he owned other property classified under subdivision (a)(1) or (2) above. Classification pursuant to this subsection shall not affect any liability for deferred taxes under G.S. 105-277.4(c) if such taxes were otherwise due at the time title passed to the present owner. (1973, c. 709, s. 1; 1975, c. 746, s. 2; 1983, c. 821; c. 826.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Cross References.** — As to taxation of lessees and users of tax-exempt cropland or forestland, see § 105-282.7.

**Effect of Amendments.** — The first 1983

amendment, effective on Jan. 1, 1984, and applicable to tax years beginning on or after that date, added subsection (c).

The second 1983 amendment, effective Jan. 1, 1984, substituted "five acres" for "10 acres" in subdivision (2) of subsection (a).

**Legal Periodicals.** — For survey of 1980 tax law, see 59 N.C.L. Rev. 1233 (1981).

#### CASE NOTES

**This section expressly indicates the constitutional base** found in N.C. Const., Art. V, § 2(2) upon which special classification is made and permitted. *W.R. Co. v. North Carolina Property Tax Comm'n*, 48 N.C. App.

245, 269 S.E.2d 636 (1980), cert. denied, 301 N.C. 727, 276 S.E.2d 287 (1981).

**Stated** in *In re McElwee*, 304 N.C. 68, 283 S.E.2d 115 (1981).

### § 105-277.4. Agricultural, horticultural and forestland — application for taxation at present-use value.

(c) Property meeting the conditions herein set forth shall be taxed on the basis of the value of the property for its present use. The difference between the taxes due on the present-use basis and the taxes which would have been payable in the absence of this classification, together with any interest, penalties or costs that may accrue thereon, shall be a lien on the real property of the taxpayer as provided in G.S. 105-355(a). The difference in taxes shall be carried forward in the records of the taxing unit or units as deferred taxes, but shall not be payable, unless and until (i) the owner conveys the property to anyone other than a spouse, child or sibling of the owner, or (ii) ownership of the property passes to anyone other than such an enumerated family member by will or intestacy, or (iii) ownership of the property passes to a corporation as defined in G.S. 105-277.2(4)b from anyone other than its principal shareholders or from such a corporation to anyone other than its principal shareholders, or (iv) the property loses its eligibility for the benefit of this classification for some other reason. The tax for the fiscal year that opens in the calendar year in which a disqualification occurs shall be computed as if the property had not been classified for that year, and taxes for the preceding three fiscal years which have been deferred as provided herein, shall immediately be payable, together with interest thereon as provided in G.S. 105-360 for unpaid taxes which shall accrue on the deferred taxes due herein as if they had been payable on the dates on which they originally became due. If only a part of the qualifying tract of land loses its eligibility, a determination shall be made of the amount of deferred taxes applicable to that part and that amount shall become payable with interest as provided above. Upon the payment of any taxes deferred in accordance with this section for the three years immediately preceding a disqualification, all liens arising under this subsection shall be extinguished. (1973, c. 709, s. 1; c. 905; c. 906, ss. 1, 2; 1975, c. 62; c. 746, ss. 3-7; 1981, c. 835.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amend-

ment, effective July 1, 1981, substituted "three years" for "five years" near the middle of the last sentence of subsection (c).

#### CASE NOTES

**Quoted** in *W.R. Co. v. North Carolina Property Tax Comm'n*, 48 N.C. App. 245, 269 S.E.2d 636 (1980).

**Stated** in *In re McElwee*, 304 N.C. 68, 283 S.E.2d 115 (1981).

## § 105-277.5. Agricultural, horticultural and forestland — notice of change in use.

### CASE NOTES

**Stated in** *W.R. Co. v. North Carolina Property Tax Comm'n*, 48 N.C. App. 245, 269 S.E.2d 636 (1980).

## § 105-277.6. Agricultural, horticultural and forestland — appraisal; computation of deferred tax.

### CASE NOTES

**Cited in** *In re McElwee*, 304 N.C. 68, 283 S.E.2d 115 (1981).

## § 105-277.8. Taxation of homeowners association properties.

**Legal Periodicals.** — For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

## § 105-278. Historic properties.

(a) Real property designated as a historic structure or site by a local ordinance adopted pursuant to G.S. 160A-399.4 is hereby designated a special class of property under authority of Article V, Sec. 2(2) of the North Carolina Constitution. Property so classified shall be taxed uniformly as a class in each local taxing unit on the basis of fifty percent (50%) of the true value of the property as determined pursuant to G.S. 105-285 and 105-286, or 105-287. (1977, c. 869, s. 2; 1981, c. 501.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amendment, effective Jan. 1, 1982, deleted "upon annual application of the property owner"

following "property so classified" near the beginning of the second sentence of subsection (a).

**Legal Periodicals.** — For article, "A Decade of Preservation and Preservation Law," see 11 N.C. Cent. L.J. 214 (1980).

## § 105-278.1. Exemption of real and personal property owned by units of government.

**Legal Periodicals.** — For survey of 1978 law on taxation, see 57 N.C.L. Rev. 1142 (1979).

For survey of 1980 tax law, see 59 N.C.L. Rev. 1233 (1981).

For a note on the rejection of the "public purpose" requirement for state tax exemption, see 17 Wake Forest L. Rev. 293 (1981).

## CASE NOTES

**Section Is Unconstitutional.** — Property owned by State is exempt from ad valorem taxation by Art. V, § 2(3) of the Constitution of North Carolina solely by reason of State ownership, and the statute requiring property owned by the State to be held exclusively for a public purpose in order to be exempt from taxation, this section, is unconstitutional. Therefore, the Towns of Chapel Hill and Carrboro and the County of Orange may not assess ad valorem taxes against any property owned by the University of North Carolina, an agency of the State, regardless of the purpose for which the property is held. *In re University of N.C.*, 300 N.C. 563, 268 S.E.2d 472 (1980).

The holdings of cases misapplying the

holding of *Atlantic & N.C.R.R. v. Board of Comm'rs*, 75 N.C. 474 (1876), as mandating a "public purpose" requirement for exemption of state-owned property under the North Carolina Constitution: *Board of Fin. Control v. County of Henderson*, 208 N.C. 569, 181 S.E. 636 (1935); *Town of Benson v. County of Johnston*, 209 N.C. 751, 185 S.E. 6 (1936); *Town of Warrenton v. Warren County*, 215 N.C. 342, 2 S.E.2d 463 (1939); and *City of Winston-Salem v. Forsyth County*, 217 N.C. 704, 9 S.E.2d 381 (1940), must be considered not in keeping with the rationale expressed in the present case and in other opinions of the Court of Appeals. *In re University of N.C.*, 300 N.C. 563, 268 S.E.2d 472 (1980).

## § 105-278.4. Real and personal property used for educational purposes.

## CASE NOTES

**Exemption of Portion of Property.** — Where Wake Forest University granted a corporation an easement to use a football stadium parking lot for employee and visitor parking and general access to the corporation's headquarters building, the Property Tax Commission properly determined that a portion of

the parking lot not regularly used by the corporation is wholly and exclusively used by Wake Forest University for educational purposes and is exempt from ad valorem taxation under subsection (c) of this section. *In re Wake Forest Univ.*, 51 N.C. App. 516, 277 S.E.2d 91, cert. denied, 303 N.C. 544, 281 S.E.2d 391 (1981).

## § 105-278.6. Real and personal property used for charitable purposes.

## CASE NOTES

**Quoted in** *In re Chapel Hill Residential Retirement Center, Inc.*, — N.C. App. —, 299 S.E.2d 782 (1983).

## § 105-278.7. Real and personal property used for educational, scientific, literary, or charitable purposes.

## CASE NOTES

**The concept of charity is not confined to the relief of the needy and destitute.** Aged people require care and attention apart from financial assistance, and the supply of this care and attention is as much a charitable and

benevolent purpose as the relief of their financial wants. *In re Chapel Hill Residential Retirement Center, Inc.*, — N.C. App. —, 299 S.E.2d 782 (1983).

**Property Occupied Gratuitously for Charitable Purpose.** — Where a religious association made a loan to respondent nursing home, with which the association was affiliated, to expand its facilities, the nursing home's payment of an amount equivalent to the interest on the loan and the depreciation on the property did not prevent the nursing home from

occupying the property gratuitously, and the property in question was exempt from ad valorem taxation in that it was being used for a charitable purpose by a charitable institution within the meaning of subsections (f)(4), (a)(2) and (c)(1) of this section. In re Taxable Status of Property, 45 N.C. App. 632, 263 S.E.2d 838 (1980).

#### OPINIONS OF ATTORNEY GENERAL

**Property of a labor union** is not exempt from ad valorem taxation pursuant to this section. See opinion of Attorney General to J.

Bourke Bilisoly, Wake County Tax Attorney, 50 N.C.A.G. 35 (1980).

**§ 105-279:** Repealed by Session Laws 1981, c. 819, s. 2, effective January 1, 1982.

### **§ 105-282.1. Applications for property tax exemption or exclusion.**

(a) Every owner of property claiming exemption or exclusion from property taxes under the provisions of this Subchapter has the burden of establishing that the property is entitled thereto. Except as otherwise provided below, every owner claiming exemption or exclusion hereunder shall annually, during the regular listing period, file an application therefor with the tax supervisor of the county in which the property would be subject to taxes if taxable. For the year 1974, the application may be filed not later than May 31, 1974. If the property covered by the application is located within a municipality, that fact shall be shown on the application. Each such application shall be submitted on a form approved by the Department of Revenue. The forms shall be made available by the tax supervisor.

- (1) The United States government, the State of North Carolina and the counties and municipalities of the State are exempted from the requirement that owners file applications for exemption.
  - (2) Owners of the special classes of property excluded from taxation under G.S. 105-275(5), (13), (15) and (26) or property exempted under G.S. 105-278.2 shall not be required to file applications for the exclusion of such property.
  - (3) After an owner of property entitled to exemption under G.S. 105-277.1, 105-278.3, 105-278.4, 105-278.5, 105-278.6, 105-278.7, or 105-278.8 or exclusion under G.S. 105-275(3), (7) or (12) or G.S. 105-278 has applied for exemption and the exemption has been approved, such owner shall not be required to file applications in subsequent years except in the following circumstances:
    - a. New or additional property is acquired or improvements are added or removed, necessitating a change in the valuation of the property, or
    - b. There is a change in the use of the property or the qualifications or eligibility of the taxpayer necessitating a review of the exemption.
  - (4) Nothing in this section shall be construed to relieve any governmental unit or private owner of the duty of listing for taxation property that is not entitled to exemption.
- (1973, c. 695, s. 8; c. 1252; 1981, c. 54, ss. 2, 3; c. 86, s. 2; c. 915.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendments, it is not set out.

**Effect of Amendments.** — The first 1981 amendment, effective Jan. 1, 1982, inserted "105-277.1" near the beginning of the introductory paragraph of subdivision (3) of subsection (a), and inserted "or the qualifications or eligibility of the taxpayer" in paragraph b of subdivision (3) of subsection (a).

Session Laws 1981, c. 54, s. 7, provides: "The 1981 application by any taxpayer under G.S.

105-309(f) for the exemption provided by G.S. 105-277.1 shall be considered the application required by G.S. 105-282.1(a)(3)."

The second 1981 amendment, effective Jan. 1, 1982, substituted "G.S. 105-275(5), (13), (15) and (26)" for "G.S. 105-275(5), (13) and (15)" in subdivision (2) of subsection (a).

The third 1981 amendment, effective Jan. 1, 1982, inserted "or G.S. 105-278" near the middle of the introductory paragraph of subdivision (3) of subsection (a).

## CASE NOTES

Cited in *In re McElwee*, 304 N.C. 68, 283 S.E.2d 115 (1981).

**§§ 105-282.2 to 105-282.6:** Reserved for future codification purposes.

## ARTICLE 12A.

### *Taxation of Lessees and Users of Tax-Exempt Cropland or Forestland.*

#### **§ 105-282.7. Taxation of lessees and users of tax-exempt cropland or forestland.**

(a) When any cropland or forestland owned by the United States, the State, a county or a municipal corporation is leased, loaned or otherwise made available to and used by a person, as defined in G.S. 105-273(12), in connection with a business conducted for profit, the lessee or user of the property is subject to taxation to the same extent as if the lessee or user owned the property. As used in this section, "forestland" has the same meaning as in G.S. 105-277.2(2), and "cropland" means agricultural land and horticultural land as defined in G.S. 105-277.2(1) and (3) respectively.

(b) This section does not apply to cropland or forestland for which payments in lieu of taxes are made in amounts equivalent to the amount of tax that could otherwise be lawfully assessed.

(c) Taxes levied pursuant to this Article are levied on the privilege of leasing or otherwise using tax-exempt cropland or forestland in connection with a business conducted for profit. The purpose of these taxes is to eliminate the competitive advantage accruing to profit-making enterprises from the use of tax-exempt property. (1981, c. 819, s. 1.)

**Editor's Note.** — Session Laws 1981, c. 819, s. 3, makes this Article effective for taxable years beginning on and after Jan. 1, 1982.

#### **§ 105-282.8. Assessment and collection.**

The taxes levied under this Article shall be assessed to the lessee or user of the exempt property and shall be collected in the same manner and to the extent as if the lessee or user owned the property. The taxes are a debt due from the lessee or user to the taxing unit in which the property is located and are recoverable as other actions to collect a debt. (1981, c. 819, s. 1.)

# ARTICLE 13.

## *Standards for Appraisal and Assessment.*

### § 105-283. Uniform appraisal standards.

**Legal Periodicals.** — For survey of 1978 law on taxation, see 57 N.C.L. Rev. 1142 (1979).  
For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

For article on the need to reform North Carolina property tax law, see 59 N.C.L. Rev. 675 (1981).

#### CASE NOTES

**The actual value of a note, bond, or other evidence of debt** is the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell; it is synonymous with the "market value," or the "true value." In re Alamance Mem. Park, 41 N.C. App. 278, 254 S.E.2d 671 (1979).

**County tax assessment valuation method held not arbitrary.** See In re Wagstaff, 42 N.C. App. 47, 255 S.E.2d 754 (1979).

**Quoted in** In re Land & Mineral Co., 49 N.C. App. 605, 272 S.E.2d 878 (1980); In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

**Cited in** Clinchfield R.R. v. Lynch, 527 F. Supp. 784 (E.D.N.C. 1981).

### § 105-284. Uniform assessment standard.

#### CASE NOTES

**Cited in** Clinchfield R.R. v. Lynch, 527 F. Supp. 784 (E.D.N.C. 1981).

# ARTICLE 14.

## *Time for Listing and Appraising Property for Taxation.*

### § 105-285. Date as of which property is to be listed and appraised.

#### CASE NOTES

**Discriminatory taxation of railroads by State held unlawful.** Clinchfield R.R. v. Lynch, 700 F.2d 126 (4th Cir. 1983).

**Cited in** Clinchfield R.R. v. Lynch, 527 F. Supp. 784 (E.D.N.C. 1981).

### § 105-286. Time for general reappraisal of real property.

#### CASE NOTES

**Applied in** In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

**Stated in** In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

**Cited in** In re Wagstaff, 42 N.C. App. 47, 255 S.E.2d 754 (1979); Clinchfield R.R. v. Lynch, 527 F. Supp. 784 (E.D.N.C. 1981); Clinchfield R.R. v. Lynch, 700 F.2d 126 (4th Cir. 1983).

## ARTICLE 15.

### *Duties of Department and Property Tax Commission as to Assessments.*

#### § 105-288. Functions of Department and Property Tax Commission; oath; expenses.

##### CASE NOTES

**Duty to Weigh and Appraise Evidence.** — The function of the Property Tax Commission is to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts and to appraise conflicting and circumstantial evidence. In re S. Ry., 59 N.C. App. 119, 296 S.E.2d 463, cert.

granted, 307 N.C. 468, 299 S.E.2d 222 (1982).

**Discriminatory taxation of railroads by State held unlawful.** Clinchfield R.R. v. Lynch, 700 F.2d 126 (4th Cir. 1983).

**Cited in** Clinchfield R.R. v. Lynch, 527 F. Supp. 784 (E.D.N.C. 1981).

#### § 105-289. Duties of Department of Revenue.

(d) In exercising general and specific supervision over the valuation and taxation of property, the Department shall provide the following:

- (1) A continuing program of education and training for county and municipal tax officials in the conduct of their duties;
- (2) A program for testing the qualifications of county assessors and other persons engaged in the appraisal of property for the county;
- (3) A certification program for county assessors and other persons engaged in the appraisal of property for the county.

The Department shall promulgate regulations to carry out its duties under this subsection.

(e) In accordance with regulations that may be adopted by it, the Department of Revenue may make available to local tax authorities any information contained in any report to it or to any other State department, or any other information that the Department may have in its possession that may assist local tax authorities in securing complete tax listings, appraising taxable property, collecting taxes, and presenting information in administrative and judicial proceedings involving the listing, appraisal and taxation of property.

- (1) Information furnished to local tax authorities under the provisions of this subsection (e) shall be used only for the purposes hereinabove set forth. Such information shall not be divulged or made public except as required in administrative or judicial proceedings under this Subchapter. Any local tax authority making improper use or disclosure of information obtained under this provision shall be subject to the provisions of G.S. 105-259, including the penalties set forth therein.
- (2) Except as provided in this subsection (e), and except to the Governor and his authorized agent, and except to a district attorney or the

authorized agent of a district attorney of a district in which such information would affect the listing or appraisal of property for taxation, neither the Department nor the Commission shall divulge or make public the reports made to it or to other State departments. (The provisions of this subsection shall not interfere with the publication of appraisals, assessments, or statistics by the Department or decisions made by the Commission, nor shall the provisions of this subsection prevent presentation of such information in any administrative or judicial proceeding involving appraisals, assessments or decisions of the Commission.)

- (3) For the purpose of this subsection, "local tax authorities" shall include county tax supervisors, assistant tax supervisors, members of county boards of commissioners, tax commissions, boards of equalization and review, county tax collectors, and the municipal equivalents of such officials. The Department of Revenue may furnish information to local tax authorities only under the following conditions and subject to the following restrictions:

- a. The local tax authorities must submit their request in writing, giving the name of the taxpayer and any other pertinent identifying information, describing the specific information sought, and stating the reason for seeking the information; and
- b. In responding to the request of local tax authorities, the Department of Revenue shall furnish only the information described in the collector's written request and no other information concerning the taxpayer involved.

(1939, c. 310, s. 202; 1955, c. 1350, s. 10; 1967, c. 1196, s. 3; 1969, c. 7, s. 1; 1971, c. 806, s. 1; 1973, c. 47, s. 2; c. 476, s. 193; 1975, c. 275, s. 9; c. 508, s. 1; 1981, c. 387, ss. 1, 2; 1983, c. 813, s. 1.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amendment, effective July 1, 1981, inserted "collecting taxes" following "appraising taxable

property" near the end of the introductory paragraph of subsection (e), and rewrote subdivision (3) of subsection (e).

The 1983 amendment, effective July 1, 1983, rewrote subdivision (d).

## § 105-290. Appeals to Property Tax Commission.

**Legal Periodicals.** — For article on the need to reform North Carolina property tax law, see 59 N.C.L. Rev. 675 (1981).

## ARTICLE 16.

### *County Listing, Appraisal, and Assessing Officials.*

## § 105-294. County tax supervisor.

(a) Appointment. — Persons occupying the position of county assessor on July 1, 1983, shall continue in office until the first Monday in July, 1983. At its first regular meeting in July, 1983, and every two years or four years thereafter, as appropriate, the board of county commissioners of each county shall appoint a county assessor to serve a term of not less than two nor more than four years; provided, however that no person shall be eligible for initial appointment to a term of more than two years unless such person is deemed

to be qualified as provided in subsection (b) of this section or has been certified by the Department of Revenue as provided in subsection (c) of this section. The board of commissioners may remove the assessor from office during his term for good cause after giving him notice in writing and an opportunity to appear and be heard at a public session of the board. Whenever a vacancy occurs in this office, the board of county commissioners shall appoint a qualified person to serve as county assessor for the period of the unexpired term.

(b) Persons who held the position of tax supervisor on July 1, 1971, and continue to hold the position, and persons who have been certified for appointment as tax supervisor by the Department of Revenue between July 1, 1971, and July 1, 1983, are deemed to be qualified to serve as county assessor. Any other person selected to serve as county assessor must meet the following requirements:

- (1) Be at least 21 years of age as of the date of appointment;
- (2) Hold a high school diploma or certificate of equivalency, or in the alternative, have five years employment experience in a vocation which is reasonably related to the duties of a county assessor;
- (3) Within two years of the date of appointment, achieve a passing score in courses of instruction approved by the Department of Revenue covering the following topics:
  - a. The laws of North Carolina governing the listing, appraisal, and assessment of property for taxation;
  - b. The theory and practice of estimating the fair market value of real property for ad valorem tax purposes;
  - c. The theory and practice of estimating the fair market value of tangible and intangible personal property for ad valorem tax purposes; and
  - d. property assessment administration.
- (4) Upon completion of the required four courses, achieve a passing grade in a comprehensive examination in property tax administration conducted by the Department of Revenue.

(c) Certification. — Persons meeting all the requirements of this section shall be certified by the Department of Revenue. From the date of appointment until the date of certification, persons appointed to serve as county assessor are deemed to be serving in an acting capacity. Any person who fails to qualify within two years after the date of initial appointment shall not be eligible for reappointment until all of the requirements have been met.

(d) In order to retain the position of county assessor, every person serving as county assessor, including those persons deemed to be qualified under the provisions of this act, shall, in each period of 24 months, attend at least 30 hours of instruction in the appraisal or assessment of property as provided in regulations of the Department of Revenue.

(e) The compensation and expenses of the county assessor shall be determined by the board of county commissioners.

(f) Alternative to separate office of county assessor. — Pursuant to Act VI, Section 9 of the North Carolina Constitution, the office of county assessor is hereby declared to be an office that may be held concurrently with any other appointive or elective office except that of member of the board of county commissioners. (1939, c. 310, ss. 400, 401; 1953, c. 970, ss. 1, 2; 1971, c. 806, s. 1; 1973, c. 476, s. 193; 1983, c. 813, s. 2.)

**Effect of Amendments.** — The 1983 amendment, effective July 1, 1983, rewrote subsection (a) and (b), added present subsections (c) and (d), rewrote and redesignated former subsection

(c) as subsection (e), and rewrote and redesignated former subsection (d) as subsection (f).

## § 105-296. Powers and duties of tax supervisor.

(b) Within budgeted appropriations, he or she shall employ listers, appraisers, and clerical assistants necessary to carry out the listing, appraisal, assessing, and billing functions required by law. The assessor may allocate responsibility among such employees by territory, by subject matter, or on any other reasonable basis. Each person employed by the assessor as a real property appraiser or personal property appraiser shall during the first year of employment and at least every other year thereafter attend a course of instruction in his or her respective area of work. At the end of the first year of their employment, such persons shall also achieve a passing score on a comprehensive examination in property tax administration conducted by the Department of Revenue.

(1939, c. 310, ss. 403, 404; 1953, c. 970, s. 3; 1955, c. 1012, s. 1; 1957, c. 202; 1959, c. 740, s. 3; 1963, c. 302; 1971, c. 806, s. 1; 1973, c. 560; 1983, c. 813, s. 3.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amendment, effective July 1, 1983, inserted "or she" and substituted "employ listers, appraisers" for "appoint the list takers and assessors" in the first sentence of subsection (b); substituted "The Assessor" for "He" and substituted "such employees" for "them" in the second sentence of

subsection (b); deleted the former third sentence of subsection (b), relating to holding of the office of list taker and assessor with any other appointive office pursuant to N.C. Const., Art. VI, § 9, and added the last two sentences of subsection (b).

**Legal Periodicals.** — For article on the need to reform North Carolina property tax law, see 59 N.C.L. Rev. 675 (1981).

## § 105-299. Employment of experts.

The board of county commissioners may employ appraisal firms, mapping firms or other persons or firms having expertise in one or more of the duties of the assessor to assist him or her in the performance of such duties. Any person employed by an appraisal firm whose duties include the appraisal of property for the county shall be required to demonstrate that he or she is qualified to carry out such duties by achieving a passing grade on a comprehensive examination in the appraisal of property administered by the Department of Revenue. In the employment of such firms, primary consideration shall be given to the firms registered with the Department of Revenue pursuant to the provisions of G.S. 105-289(i). Contracts for the employment of such firms or persons shall be deemed to be contracts for personal services and shall not be subject to the provisions of Article 8, Chapter 143, of the General Statutes. (1939, c. 310, s. 408; 1971, c. 806, s. 1; 1973, c. 476, s. 193; 1975, c. 508, s. 2; 1983, c. 813, s. 4.)

**Effect of Amendments.** — The 1983 amendment, effective July 1, 1983, substituted "assessor" for "tax supervisor" and inserted "or

her" in the first sentence and added the present second sentence.

## ARTICLE 17:

*Administration of Listing.***§ 105-302. In whose name real property is to be listed.**

(c) For purposes of this Subchapter:

- (1) The owner of the equity of redemption in real property subject to a mortgage or deed of trust shall be considered the owner of the property, and such real property shall be listed in the name of the owner of the equity of redemption.
- (2) Real property owned by a corporation shall be listed in the name of the corporation.
- (3) Real property owned by an unincorporated association shall be listed in the name of the association.
- (4) Real property owned by a partnership shall be listed in the name of the partnership.
- (5) Real property held in connection with a sole proprietorship shall be listed in the name of the owner, and the name and address of the proprietorship shall be noted on the abstract.
- (6) Real property of which a decedent died possessed, if not under the control of an executor or administrator, shall be listed in the names of the heirs or devisees if known, but such property may be listed as property of "the heirs" or "the devisees" of the decedent, without naming them, until they have given the tax supervisor notice of their names and of the division of the estate. It shall be the duty of an executor or administrator having control of real property to list it in his fiduciary capacity, as required by subdivision (c)(7), below, until he is divested of control of the property. However, the right of an administrator or executor of a deceased person to petition for the sale of real property to make assets shall not be considered control of the real property for the purposes of this subdivision.
- (7) Real property, the title to which is held by a trustee, guardian, or other fiduciary, shall be listed by the fiduciary in his fiduciary capacity except as otherwise provided in this section.
- (8) A life tenant or tenant for the life of another shall be considered the owner of real property, and it shall be his duty to list the property for taxation, indicating on the abstract that he is a life tenant or tenant for the life of another named individual.
- (9) Upon request to and with the approval of the tax supervisor, undivided interests in real property owned by tenants in common who are not copartners may be listed by the respective owners in accordance with their respective undivided interests. Otherwise, real property held by tenants in common shall be listed in the names of all the owners.
- (10) Real property owned by husband and wife as tenants by the entirety shall be listed on a single abstract in the names of both tenants, and the nature of their ownership shall be indicated thereon.
- (11) When land is owned by one party and improvements thereon or special rights (such as mineral, timber, quarry, waterpower, or similar rights) therein are owned by another party, the parties shall list their interests separately unless, in accordance with contractual relations between them, both the land and the improvements and special rights are listed in the name of the owner of the land.
- (12) If the person in whose name real property should be listed is unknown, or if title to real property is in dispute, the property shall be listed in the name of the occupant or, if there be no occupant, in the name of "unknown owner." Such a listing shall not affect the validity

of the lien for taxes created by G.S. 105-355. When the name of the owner is later ascertained, the provisions of subsection (b), above, shall apply.

- (13) Real property, owned under a time-sharing arrangement but managed by a homeowners association or other managing entity, shall be listed in the name of the managing entity. (1939, c. 310, s. 701; 1971, c. 806, s. 1; 1983, c. 785, s. 1.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amendment, effective July 18, 1983, added subdivision

(13) of subsection (c).

**Legal Periodicals.** — For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

### CASE NOTES

**Cited in** *City of Charlotte v. Little McMahan Properties, Inc.*, 52 N.C. App. 464, 279 S.E.2d 104 (1981).

## § 105-304. Place for listing tangible personal property.

### CASE NOTES

**The theory of taxation** is, that the right to tax is derived from the protection afforded to the subject upon which it is imposed. The actual situs and control of the property within this State, and the fact that it enjoys the protection of the laws here, are conditions which subject it to taxation here. In *re Plushbottom & Peabody, Ltd.*, 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

**Business Situs Defined.** — Business situs means a situs acquired for tax purposes by one who has carried on a business in the state more or less permanent in its nature. In *re Plushbottom & Peabody, Ltd.*, 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

#### **Determination of Situs.** —

The situs of personal property for purposes of taxation is ordinarily the domicile of the owner. Where, however, the owner maintains said property in a jurisdiction other than that of his domicile, in the conduct of his business within such jurisdiction, the situs of said property for purposes of taxation is its actual situs, and not that of his domicile. In *re Plushbottom & Peabody, Ltd.*, 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

#### **Generally, Personalty of Corporation, etc.** —

The tax situs of a corporation's tangible personal property within the jurisdiction of the State is at the place of its principal office in North Carolina. In *re Plushbottom & Peabody,*

*Ltd.*, 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

**Subdivision (d)(2) Contemplates Property in Transient Condition.** — Subdivision (d)(2) of this section contemplates a situation in which a corporation has no principal office in this State, and its property is in a transient condition through the state. In *re Plushbottom & Peabody, Ltd.*, 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

**Temporary Absence of Property.** — Subdivision (f)(4) of this section clearly provides that the temporary absence of tangible personal property from the place at which it is normally taxable shall not affect the rule of taxation. In *re Plushbottom & Peabody, Ltd.*, 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

A foreign corporation which was a broker of high fashion jeans acquired a business situs in Mecklenburg County so as to subject its property (piece goods and finished goods) to ad valorem taxation by Mecklenburg County where its only warehouse for assembling and shipping its inventory was located in Mecklenburg County, and the tax situs of such property remained in Mecklenburg County while it was outside North Carolina on the tax date being stitched or laundered. In *re Plushbottom & Peabody, Ltd.*, 51 N.C. App. 285, 276 S.E.2d 505, cert. denied, 303 N.C. 314, 281 S.E.2d 653 (1981).

**§ 105-306. In whose name personal property is to be listed.**

(c) For purposes of this Subchapter:

- (1) The owner of the equity of redemption in personal property subject to a chattel mortgage shall be considered the owner of the property.
- (2) The vendee of personal property under a conditional bill of sale, or under any other sale contract through which title to the property is retained by the vender as security for the payment of the purchase price, shall be considered the owner of the property if he has possession of or the right to use the property.
- (3) Personal property owned by a corporation, partnership, or unincorporated association shall be listed in the name of the corporation, partnership, or unincorporated association.
- (4) Personal property held in connection with a sole proprietorship shall be listed in the name of the owner, and the name and address of the proprietorship shall be noted on the abstract.
- (5) Personal property of which a decedent died possessed, if not under the control of an executor or administrator, shall be listed in the names of the next of kin or legatees if known, but such property may be listed as property of "the next of kin" or "the legatees" of the decedent, without naming them, until they have given the tax supervisor notice of their names and of the division of the estate. It shall be the duty of an executor or administrator having control of personal property to list it in his fiduciary capacity, as required by subdivision (c)(6), below, until he is divested of control of the property.
- (6) Personal property, the title to which is held by a trustee, guardian, or other fiduciary, shall be listed by the fiduciary in his fiduciary capacity except as otherwise provided in this section.
- (7) If personal property is owned by two or more persons who are joint owners, each owner shall list the value of his interest. However, if the joint owners are husband and wife, the property owned jointly shall be listed on a single abstract in the names of both the husband and the wife.
- (8) If the person in whose name personal property should be listed is unknown, or if the ownership of the property is in dispute, the property shall be listed in the name of the person in possession of the property, or if there appears to be no person in possession, in the name of "unknown owner." When the name of the owner is later ascertained, the provisions of subsection (b), above, shall apply.
- (9) Personal property, owned under a time-sharing arrangement but managed by a homeowners association or other managing entity, shall be listed in the name of the managing entity. (1939, c. 310, s. 802; 1971, c. 806, s. 1; 1983, c. 785, s. 2.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amendment, effective July 18, 1983, added subdivision (9) of subsection (c).

**§ 105-309. What the abstract shall contain.**

(f) The following information shall appear on each abstract, or on an information sheet distributed with the abstract. (The abstract or sheet must include the address and telephone number of the tax supervisor below the notice required by this subsection):

### "PROPERTY TAX RELIEF FOR ELDERLY AND PERMANENTLY DISABLED PERSONS."

North Carolina excludes from property taxes the first eight thousand five hundred dollars (\$8,500) in assessed value of certain property owned by North Carolina residents aged 65 or older or totally and permanently disabled whose disposable income does not exceed nine thousand dollars (\$9,000). The exclusion covers real property (or a mobile home) occupied by the owner as his or her permanent residence and/or household personal property used by the owner in connection with his or her permanent residence. Disposable income includes all moneys received other than gifts or inheritances received from a spouse, lineal ancestors, or lineal descendants.

If you received this exclusion in (tax supervisor insert previous year), you do not need to apply again unless you have changed your permanent residence. If you received the exclusion in (tax supervisor insert previous year) and your disposable income in (tax supervisor insert previous year) was above nine thousand dollars (\$9,000), you must notify the tax supervisor. If you received the exclusion in (tax supervisor insert previous year) because you were totally and permanently disabled and you are no longer totally and permanently disabled, you must notify the tax supervisor. If the person receiving the exemption in (tax supervisor insert previous year) has died, the person required by law to list the property must notify the tax supervisor. Failure to make any of the notices required by this paragraph before April 15 will result in penalties and interest.

If you did not receive the exclusion in (tax supervisor insert previous year) but are now eligible, you may obtain a copy of an application from the tax supervisor. It must be filed by April 15."

(g) Any person who fails to give the notice required by G.S. 105-309(f) shall not only be subject to loss of the exemption, but also to the penalties provided by G.S. 105-312, and also if willful to the penalty provided in G.S. 105-310. For the purpose of determining whether a penalty is levied, whenever a taxpayer has received an exemption under G.S. 105-277.1 for one taxable year but the property of taxpayer is not eligible for the exemption the next year, notice given of that fact to the tax supervisor on or before April 15 shall be considered as timely filed. (1939, c. 310, s. 900; 1941, c. 221, s. 1; 1953, c. 970, s. 6; 1955, c. 34; 1971, c. 806, s. 1; 1973, c. 448, s. 2; c. 476, s. 193; 1975, c. 881, s. 3; 1977, c. 666, s. 2; 1979, c. 846, s. 2; 1981, c. 54, ss. 4-6; c. 1052, s. 1.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendments, it is not set out.

**Effect of Amendments.** — The first 1981 amendment, effective Jan. 1, 1982, rewrote subsection (f), and added subsection (g).

Session Laws 1981, c. 54, s. 7, provides: "The 1981 application by any taxpayer under G.S. 105-309(f) for the exemption provided by G.S.

105-277.1 shall be considered the application required by G.S. 105-282.1(a)(3)."

The second 1981 amendment, effective Jan. 1, 1982, substituted "eight thousand five hundred dollars (\$8,500)" for "seven thousand five hundred dollars (\$7,500)" near the beginning of the first paragraph of the form set out in subsection (f).

## § 105-311. Duty to appear for purposes of listing and signing affirmation; use of agents and mail.

### CASE NOTES

This section must be read narrowly because of its incorporation into § 105-312, a

penalty statute. *Winston-Salem Joint Venture v. City of Winston-Salem*, 54 N.C. App. 202, 282

S.E.2d 509 (1981), cert. denied, 304 N.C. 728, 288 S.E.2d 803 (1982).

**Word "when" in the second paragraph of subsection (b) of this section refers to a time,** not a contingency, necessarily requiring receipt as a prerequisite to application of this section. *Winston-Salem Joint Venture v. City of Winston-Salem*, 54 N.C. App. 202, 282 S.E.2d 509 (1981), cert. denied, 304 N.C. 728, 288 S.E.2d 803 (1982).

**Second paragraph of subsection (b) of this section merely creates logical preferences** for determination of timeliness where there has been delivery to the tax supervisor by mail. *Winston-Salem Joint Venture v. City of Winston-Salem*, 54 N.C. App. 202, 282 S.E.2d 509 (1981), cert. denied, 304 N.C. 728, 288 S.E.2d 803 (1982).

**And Applies Only Where Abstract Is Received and Envelope Is Available.** — Second paragraph of subsection (b) of this section applies only where an abstract has actually been received and the envelope is available for scrutiny. *Winston-Salem Joint Venture v. City of Winston-Salem*, 54 N.C. App. 202, 282 S.E.2d 509 (1981), cert. denied, 304 N.C. 728, 288 S.E.2d 803 (1982).

**And Not Where Receipt Is Denied.** — Where property owner alleged he mailed tax listing before deadline, but receipt of the listing was denied by the taxing authority, second paragraph of subsection (b) of this section was not dispositive. *Winston-Salem Joint Venture v. City of Winston-Salem*, 54 N.C. App. 202, 282 S.E.2d 509 (1981), cert. denied, 304 N.C. 728, 288 S.E.2d 803 (1982).

## § 105-312. Discovered property; appraisal; penalty.

(k) **Power to Compromise.** — After a tax receipt computed and prepared as required by subsections (g) and (h), above, has been delivered and charged to the tax collector as prescribed in subsection (j), above, the board of county commissioners, upon the petition of the taxpayer, may compromise, settle, or adjust the county's claim for taxes arising therefrom. The board of commissioners may, by resolution, delegate the authority granted by this subsection to the board of equalization and review, including any board created by resolution pursuant to G.S. 105-322(a) and any special board established by local act.

(l) **Application to Municipal Corporations.** — The provisions of this section shall apply to all cities, towns, and other municipal corporations having the power to tax property. Such governmental units shall designate an appropriate municipal officer to exercise the powers and duties assigned by this section to the tax supervisor, and the powers and duties assigned to the board of county commissioners shall be exercised by the governing body of the unit. When the tax supervisor discovers property having a taxable situs in a municipal corporation, he shall send a copy of the notice of discovery required by subsection (d) to the governing body of the municipality together with such other information as may be necessary to enable the municipality to proceed. The governing board of a municipality may, by resolution, delegate the power to compromise, settle, or adjust tax claims granted by this subsection and by subsection (k) of this section to the county board of equalization and review, including any board created by resolution pursuant to G.S. 105-322(a) and any special board established by local act. (1939, c. 310, s. 1109; 1971, c. 806, s. 1; 1973, c. 476, s. 193; c. 787; 1977, c. 864; 1981, c. 623, ss. 1, 2.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amendment added the second sentence of subsection (k), and added the last sentence of subsection (l).

Session Laws 1981, c. 623, s. 3, provides: "All laws and clauses of laws in conflict with this act, whether public or local, are repealed."

**Legal Periodicals.** — For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

## CASE NOTES

**Applied** in *In re Notice of Attachment & Garnishment Issued by Catawba County Tax Collector*, 59 N.C. App. 332, 296 S.E.2d 499 (1982).

**Quoted** in *Winston-Salem Joint Venture v. City of Winston-Salem*, 54 N.C. App. 202, 282 S.E.2d 509 (1981).

## ARTICLE 19.

*Administration of Real and Personal  
Property Appraisal.*

**§ 105-317. Appraisal of real property; adoption of  
schedules, standards, and rules.**

(a) Whenever any real property is appraised it shall be the duty of the persons making appraisals:

(1) In determining the true value of land, to consider as to each tract, parcel, or lot separately listed at least its advantages and disadvantages as to location; zoning; quality of soil; waterpower; water privileges; mineral, quarry, or other valuable deposits; fertility; adaptability for agricultural, timber-producing, commercial, industrial, or other uses; past income; probable future income; and any other factors that may affect its value except growing crops of a seasonal or annual nature. Acreage or poundage allotments for any farm commodity shall not be listed as a separate element for taxation in the appraisal and assessment of real property for ad valorem taxes, but may be considered as a factor in determining true value.

(2) In determining the true value of a building or other improvement, to consider at least its location; type of construction; age; replacement cost; cost; adaptability for residence, commercial, industrial, or other uses; past income; probable future income; and any other factors that may affect its value.

(3) To appraise partially completed buildings in accordance with the degree of completion on January 1.

(b) In preparation for each revaluation of real property required by G.S. 105-286, it shall be the duty of the tax supervisor to see that:

(1) There be developed and compiled uniform schedules of values, standards, and rules to be used in appraising real property in the county. (The schedules of values, standards, and rules shall be prepared in sufficient detail to enable those making appraisals to adhere to them in appraising the kinds of real property commonly found in the county; they shall be:

- a. Prepared prior to each revaluation required by G.S. 105-286;
- b. In written or printed form; and
- c. Available for public inspection upon request.)

(2) Repealed by Session Laws 1981, c. 678, s. 1.

(3) A separate property record be prepared for each tract, parcel, lot, or group of contiguous lots, which record shall show the information required for compliance with the provisions of G.S. 105-309 insofar as they deal with real property, as well as that required by this section. (The purpose of this subdivision is to require that individual property records be maintained in sufficient detail to enable property owners to ascertain the method, rules, and standards of value by which property is appraised.)

- (4) The property characteristics considered in appraising each lot, parcel, tract, building, structure and improvement, in accordance with the schedules of values, standards, and rules adopted pursuant to subsection (b), be accurately recorded on the appropriate property record.
  - (5) Upon the request of the owner, the board of equalization and review, or the board of county commissioners, any particular lot, parcel, tract, building, structure or improvement be actually visited and observed to verify the accuracy of property characteristics on record for that property.
  - (6) Each lot, parcel, tract, building, structure and improvement be separately appraised by a competent appraiser, either one appointed under the provisions of G.S. 105-296 or one employed under the provisions of G.S. 105-299.
  - (7) Notice is given in writing to the owner that he is entitled to have an actual visitation and observation of his property to verify the accuracy of property characteristics on record for that property.
- (1939, c. 310, s. 501; 1959, c. 704, s. 4; 1967, c. 944; 1971, c. 806, s. 1; 1973, c. 476, s. 193; c. 695, s. 5; 1981, c. 224; c. 678, s. 1.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendments, it is not set out.

**Effect of Amendments.** — The first 1981 amendment, effective July 1, 1981, added the second sentence of subdivision (1) of subsection (a).

The second 1981 amendment deleted subdivision (2) of subsection (b), which read: "Every lot, parcel, tract, building, structure, and improvement being appraised be actually

visited, observed, and appraised by a competent appraiser, either one appointed under the provisions of G.S. 105-296 or one employed under the provisions of G.S. 105-299." The amendment also deleted "(b)(3)" following "subdivision" in the second sentence of subdivision (3) of subsection (b), and added subdivisions (4), (5), (6), and (7).

**Legal Periodicals.** — For article on the need to reform North Carolina property tax law, see 59 N.C.L. Rev. 675 (1981).

## CASE NOTES

**Factors in Subsection (a) Irrelevant to Valuation under § 105-277.2.** — Clear legislative intent under § 105-277.2 is that property be valued on the basis of its ability to produce income in the manner of its present use; all other uses for which the property might be employed, and the many factors enunciated in subsection (a) of this section, are irrelevant and immaterial. In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

**County tax assessment valuation method held not arbitrary.** See In re Wagstaff, 42 N.C. App. 47, 255 S.E.2d 754 (1979).

Where county appraisers considered soil quality and whether the land was cropland, pasture, or woodland, and set varying land values on this basis, and also took into consideration that part of the land was swampland, the potential uses and income of the land were adequately considered. In re Wagstaff, 42 N.C. App. 47, 255 S.E.2d 754 (1979).

**County Tax Assessment Valuation Method Held Arbitrary.** — Where there was no evidence that the county considered the advantages or disadvantages of the location; availability of water; or the nature of the min-

eral, quarry or other valuable deposits, consideration of which, among other facts, is required by this section, and where there was no evidence that any county representative ever visited or observed any portion of the tract in question as required by this section, the county's valuation method was held to be arbitrary. In re Land & Mineral Co., 49 N.C. App. 608, 272 S.E.2d 878 (1980), cert. denied, 302 N.C. 397, 279 S.E.2d 351 (1981).

**Appraisal 27 Months Prior to Effective Date Held Arbitrary.** — Decision to conduct an appraisal in a time of less than two months, and to complete it some 27 months prior to its effective date, does not comport with the realities of the economic world, and is plainly arbitrary under subdivision (a)(3) of this section, which requires that partially completed buildings be appraised "in accordance with the degree of completion on January 1." In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

**Applied in** In re Land & Mineral Co., 49 N.C. App. 529, 272 S.E.2d 6 (1980); In re McElwee, 51 N.C. App. 163, 275 S.E.2d 865 (1981).

**Stated in** In re Odom, 56 N.C. App. 412, 289 S.E.2d 83 (1982).

ARTICLE 20.

*Approval, Preparation, and Disposition of Records.*

**§ 105-321. Disposition of tax records and receipts; order of collection.**

**Local Modification.** — Gaston: 1983, c. 284.

ARTICLE 21.

*Review and Appeals of Listings and Valuations.*

**§ 105-322. County board of equalization and review.**

**Local Modification.** — Buncombe: 1981 (Reg. Sess., 1982), c. 1279; Mecklenburg: 1981, c. 509.

**Legal Periodicals.** — For article on the need to reform North Carolina property tax law, see 59 N.C.L. Rev. 675 (1981).

**§ 105-324. Appeals to Property Tax Commission from listing and valuation decisions of boards of equalization and review and boards of county commissioners.**

**Local Modification.** — Buncombe: 1981 (Reg. Sess., 1982), c. 1279.

CASE NOTES

**Quoted in** In re Certain Tobacco, 52 N.C. App. 299, 278 S.E.2d 575 (1981).

**§ 105-325. Powers of board of county commissioners to change abstracts and tax records after board of equalization and review has adjourned.**

**Local Modification.** — Buncombe: 1981 (Reg. Sess., 1982), c. 1279.

ARTICLE 23.

*Public Service Companies.*

**§ 105-333. Definitions.**

CASE NOTES

**Applied in** In re S. Ry., 59 N.C. App. 119, 296 S.E.2d 463 (1982).

## § 105-335. Appraisal of property of public service companies.

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

### CASE NOTES

**Applied in** *In re S. Ry.*, 59 N.C. App. 119, 296 S.E.2d 463 (1982).

## § 105-336. Methods of appraising certain properties of public service companies.

### CASE NOTES

**"Appraisal" and "Assessment" Are Synonymous.** — For public service companies, the true value of property is its tax value, and "appraisal" and "assessment" are synonymous. *In re S. Ry.*, 59 N.C. App. 119, 296 S.E.2d 463, cert. granted, 307 N.C. 468, 299 S.E.2d 222 (1982).

**Appraisal Methods Discussed and Compared.** — See *In re S. Ry.*, 59 N.C. App. 119, 296 S.E.2d 463, cert. granted, 307 N.C. 468, 299 S.E.2d 222 (1982).

**Choice of Valuation Method Generally.** — A careful reading of the statute reveals that all four approaches to valuation are to be used in establishing the appraised value, but no guidelines are set out establishing the weight to be given any single system of valuation. Rather, based on the judgment of the Ad Valorem Tax Division, the Department may exercise its discretion on valuation. The appraisal must not be arbitrary, must be based on substantial evidence, and must be based on lawful methods of valuation. *In re S. Ry.*, 59 N.C. App. 119, 296 S.E.2d 463, cert. granted, 307 N.C. 468, 299 S.E.2d 222 (1982).

**Any method of appraisal which does not tend to establish market value is an illegal method of valuation for property tax purposes.** *In re S. Ry.*, 59 N.C. App. 119, 296 S.E.2d 463, cert. granted, 307 N.C. 468, 299 S.E.2d 222 (1982).

**Appraisal Presumed Correct Although Tentative.** — Although the appraisal is called

"tentative," it nevertheless remains in effect unless the Property Tax Commission overturns or otherwise disposes of it. The appraisals are presumed to be correct. This presumption applies, as well, to the good faith of the tax assessors and the validity of their actions. *In re S. Ry.*, 59 N.C. App. 119, 296 S.E.2d 463, cert. granted, 307 N.C. 468, 299 S.E.2d 222 (1982).

**Rebuttal of Presumption of Correctness.** — To rebut the presumption of correctness of an appraisal, the taxpayer must produce competent, material, and substantial evidence that tends to show that: (1) Either the county tax supervisor used an arbitrary method of valuation; or (2) the county tax supervisor used an illegal method of valuation; and (3) the assessment substantially exceeded the true value in money of the property. *In re S. Ry.*, 59 N.C. App. 119, 296 S.E.2d 463, cert. granted, 307 N.C. 468, 299 S.E.2d 222 (1982).

**Actions to Set Aside or Modify Appraisals Generally.** — Since the appraisal, although tentative, remains in existence and is presumed to be correct, any action to set aside or modify it is an appeal which the Commission was created to hear. Such appeal presents the first opportunity for a public service company to challenge an appraisal made by the Ad Valorem Tax Division. It broadens the scope of the hearing of the appeal in § 105-342(d). *In re S. Ry.*, 59 N.C. App. 119, 296 S.E.2d 463, cert. granted, 307 N.C. 468, 299 S.E.2d 222 (1982).

## § 105-338. Allocation of appraised valuation of system property among local taxing units.

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

### CASE NOTES

**Cited in** Clinchfield R.R. v. Lynch, 527 F. Supp. 784 (E.D.N.C. 1981); Clinchfield R.R. v. Lynch, 700 F.2d 126 (4th Cir. 1983).

## § 105-339. Certification of appraised valuations of nonsystem property and locally assigned rolling stock.

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

## § 105-342. Notice, hearing, and appeal.

**Legal Periodicals.** — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For article on the need to reform North Carolina property tax law, see 59 N.C.L. Rev.

675 (1981).

**Cited in** In re S. Ry., 59 N.C. App. 119, 296 S.E.2d 463 (1982); Clinchfield R.R. v. Lynch, 700 F.2d 126 (4th Cir. 1983).

### ARTICLE 24.

#### *Review and Enforcement of Orders.*

## § 105-345. Right of appeal; filing of exceptions.

(a) No party to a proceeding before the Property Tax Commission may appeal from any final order or decision of the Commission unless within 30 days after the entry of such final order or decision the party aggrieved by such decision or order shall file with the Commission notice of appeal and exceptions which shall set forth specifically the ground or grounds on which the aggrieved party considers said decision or order to be unlawful, unjust, unreasonable or unwarranted, and including errors alleged to have been committed by the Commission.

(1979, c. 584, s. 3; 1983, c. 565.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amendment, effective July 1, 1983, deleted "or within such time thereafter as may be fixed by the

Commission, by order made within 30 days" preceding "the party aggrieved by such decision or order" in subsection (a).

**Legal Periodicals.** — For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

## § 105-345.2. Record on appeal; extent of review.

### CASE NOTES

**This section is the controlling judicial review statute** for appeals from the Property Tax Commission. In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

**Review Procedure Equal to That Under Administrative Procedure Act.** — Procedure for judicial review provided by this section is equal to that under the Administrative Procedure Act (Chapter 150A). In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

**"Substantial Prejudice" Defined.** — Substantial prejudice under this section is a substantially higher valuation than one which would have been reached under a legal valuation process. In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

**Appraisal Notice in Violation of Constitutional Provisions and Unlawful.** — Where timing of notice, size, generalities of wording and single publication newspaper of schedule of values used by county in appraising property for ad valorem tax purposes were not reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections, such notice was insufficient to fulfill due process requirement and to bar an attack against the revaluation schedules themselves; hence, Property Tax Commission's action in affirming the procedure employed by county was in violation of constitutional provisions and made upon unlawful proceedings within the meaning of subdivisions (b)(1) and (3) of this section. In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

**Error of Law in Using Comparable Sales in Present Use Valuation.** — Property Tax

Commission committed an error of law as contemplated by this section by upholding the use of sales of similarly used land as a factor upon which a present use valuation was based. In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

**Burden of Overcoming Presumption of Correctness of Ad Valorem Assessments.** — The presumption in this State that ad valorem tax assessments are presumed correct places the burden upon the taxpayer to prove that the assessments are incorrect. In order to overcome this presumption, the taxpayer must produce competent material and substantial evidence that tends to show that: (1) Either the county tax supervisor used an arbitrary method of valuation; or (2) the county tax supervisor used an illegal method of valuation; and (3) the assessment substantially exceeded the true value in money of the property. In re Odom, 56 N.C. App. 412, 289 S.E.2d 83, cert. denied, 305 N.C. 760, 292 S.E.2d 575 (1982).

**Burden of Proving Reasonableness of Valuation.** — When taxpayer has rebutted the presumption of regularity in favor of the county, burden shifts to the county to demonstrate to the Property Tax Commission that the values determined in the revaluation process were not substantially higher than those called for by the statutory formula, and the county must demonstrate the reasonableness of its valuation under subdivision (b)(5) of this section. In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981).

**Applied in** In re Certain Tobacco, 52 N.C. App. 299, 278 S.E.2d 575 (1981); In re Southview Presbyterian Church, — N.C. App. —, 302 S.E.2d 298 (1983).

### ARTICLE 26.

#### *Collection and Foreclosure of Taxes.*

## § 105-349. Appointment, term, qualifications, and bond of tax collectors and deputies.

### CASE NOTES

**Cited in** Town of Scotland Neck v. Western Sur. Co., 46 N.C. App. 124, 264 S.E.2d 917 (1980).

**§ 105-350. General duties of tax collectors.****CASE NOTES**

**Cited** in *Town of Scotland Neck v. Western Sur. Co.*, 46 N.C. App. 124, 264 S.E.2d 917 (1980); *Great S. Media, Inc. v. McDowell*

*County*, 50 N.C. App. 705, 275 S.E.2d 226 (1981).

**§ 105-353. Place for collection of taxes.**

**Local Modification.** — Gaston: 1983, c. 284.

**§ 105-355. Creation of tax lien; date as of which lien attaches.**

**Legal Periodicals.** — For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

**CASE NOTES**

**Cited** in *W.R. Co. v. North Carolina Property Tax Comm'n*, 48 N.C. App. 245, 269 S.E.2d 636 (1980).

**§ 105-356. Priority of tax liens.**

**Legal Periodicals.** — For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

**§ 105-357. Payment of taxes.**

**Local Modification.** — Gaston: 1983, c. 284.

**§ 105-360. Due date; interest for nonpayment of taxes; discounts for prepayment.**

**Local Modification.** — Cabarrus: 1983, c. 823; Lincoln: 1981 (Reg. Sess., 1982), c. 1171; Surry: 1983, c. 241.

## CASE NOTES

**Applied in** *In re Foreclosure of Deed of Trust*, 41 N.C. App. 563, 255 S.E.2d 260 (1979).

**Tax Comm'n**, 48 N.C. App. 245, 269 S.E.2d 636 (1980).

**Cited in** *W.R. Co. v. North Carolina Property*

## § 105-366. Remedies against personal property.

## CASE NOTES

**Constitutionality.** — This section and § 105-368, enabling a city to garnish defendant taxpayer's bank account for taxes due on a bulk sale without prior notice or hearing, do not violate the due process or equal protection rights of the taxpayer as guaranteed by the

Constitutions of the United States and this State. *Town of Hudson v. Martin-Kahill Ford Lincoln Mercury, Inc.*, 54 N.C. App. 272, 283 S.E.2d 417 (1981), cert. denied, 304 N.C. 733, 288 S.E.2d 804 (1982).

## § 105-368. Procedure for attachment and garnishment.

(b) To proceed under this section, the tax collector shall serve or cause to be served upon the taxpayer and the person owing or having in his possession the wages, rents, debts or other property sought to be attached a notice as provided by this subsection. The notice may be personally served by any deputy or employee of the tax collector 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 contain:

- (1) The name of the taxpayer, and if known his Social Security number or federal tax identification number and his address.
- (2) The amount of the taxes, penalties, interest, and costs (including the fees allowed by this section) and the year or years for which the taxes were imposed.
- (3) The name of the taxing unit or units by which the taxes were levied.
- (4) A brief description of the property sought to be attached.
- (5) A copy of the applicable law, that is, G.S. 105-366 and 105-368. Notices concerning two or more taxpayers may be combined if they are to be served upon the same garnishee, but the taxes, penalties, interest, and costs charged against each taxpayer must be set forth separately.

(c) If the garnishee has no defense to offer or no setoff against the taxpayer, he shall within 10 days after service of the notice answer it by sending to the tax collector by registered or certified mail a statement to that effect, and if the amount demanded by the tax collector is then due to the taxpayer or subject to his demand, the garnishee shall remit it to the tax collector with his statement; but if the amount due to the taxpayer or subject to his demand is to mature in the future, the garnishee's statement shall set forth that fact, and the demand shall be paid to the tax collector upon maturity. Any payment by the garnishee under the provisions of this subsection (c) shall completely satisfy any liability therefor on his part to the taxpayer.

(d) If the garnishee has a defense or setoff against the taxpayer, he shall state it in writing under oath, and, within 10 days after service of the garnishment notice, he shall send two copies of his statement to the tax collector by registered or certified mail. If the tax collector admits the defense or setoff, he shall so advise the garnishee in writing within 10 days after receipt of the garnishee's statement, and the attachment or garnishment shall thereupon be discharged to the amount required by the defense or setoff, and any amount attached or garnished which is not affected by the defense or setoff shall be remitted to the tax collector as provided in subsection (c), above.

If the tax collector does not admit the defense or setoff, he shall set forth in writing his objections thereto and 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 the tax collector shall file a copy of the notice of garnishment, a copy of the garnishee's statement, and a copy of the tax collector's objections thereto in the appropriate division of the General Court of Justice of the county in which the garnishee resides or does business, where the issues made shall be tried as in civil actions.

(1939, c. 310, s. 1713; 1951, c. 1141, s. 1; 1955, cc. 1263, 1264; 1957, c. 1414, ss. 2-4; 1969, c. 305; c. 1029, s. 1; 1971, c. 806, s. 1; 1979, c. 103, ss. 3, 4; 1979, 2nd Sess., c. 1085, s. 2; 1981, c. 76, s. 1.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendments, it is not set out.

**Effect of Amendments.** — The 1979, 2nd Sess., amendment, effective October 1, 1980, inserted "or certified" near the beginning of the first sentence in subsection (c) and near the end of the first sentence in subsection (d).

The 1981 amendment rewrote the first two sentences of subsection (b).

Session Laws 1981, c. 76, s. 2, provides that the act is effective upon ratification and applies to all attachments and garnishments commenced on or after that date. The act was ratified March 9, 1981.

### CASE NOTES

**Constitutionality.** — Section 105-366 and this section, enabling a city to garnish defendant taxpayer's bank account for taxes due on a bulk sale without prior notice or hearing, do not violate the due process or equal protection rights of the taxpayer as guaranteed by the Constitutions of the United States and this State. *Town of Hudson v. Martin-Kahill Ford Lincoln Mercury, Inc.*, 54 N.C. App. 272, 283 S.E.2d 417 (1981), cert. denied, 304 N.C. 733, 288 S.E.2d 804 (1982).

**Proper notice under this statute is a prerequisite to a valid attachment.** *City of*

*Durham v. Herndon*, — N.C. App. —, 300 S.E.2d 460 (1983).

Where the notice states the amount of taxes, penalties, interest, and assessments, the requirement of the statute even though the amount stated is not divided specifically into the stated categories and although the notice does not contain the year or years for which the taxes were imposed, this omission is not fatal since giving notice to those whose property is attached, which is the purpose of the statute. *City of Durham v. Herndon*, — N.C. App. —, 300 S.E.2d 460 (1983).

## § 105-369. Advertisement of tax liens on real property for failure to pay taxes.

(a) **Report of unpaid Taxes that are Liens on Real Property.** — On the first Monday in February in each year, each county tax collector and on the second Monday in February in each year, each municipal tax collector shall report to the governing body the total amount of unpaid taxes for the current fiscal year that are liens on real property, and the governing body shall thereupon order the tax collector to advertise such tax liens at one of the times specified in subsection (b), below. For purposes of this section, district taxes collected by county tax collectors shall be regarded as county taxes and district taxes collected by municipal tax collectors shall be regarded as municipal taxes.

(b) **Time for Advertisement.** — The county tax lien advertisement shall begin on the first Monday in March, April, May, or June, and the municipal tax lien advertisement shall begin on the second Monday in any of the four specified months. (If the taxes of two or more taxing units are collected by the same tax collector, lien advertisements for both, or all, may begin on either the first or second Monday of a month in which tax lien advertisements may be begun.) Failure to comply with the provisions of this section shall not affect the validity of the taxes or the tax liens.

(c) **Contents of Advertisement.** — Advertisement of tax liens shall be made by posting at some public place at the courthouse (in the case of county taxes) or city or town hall (in the case of municipal taxes) and by advertisement once each week for four successive weeks in one or more newspapers having general circulation in the taxing unit. The costs of newspaper advertising shall be paid by the taxing unit. (If the taxes of two or more taxing units are collected by the same tax collector, the tax liens of each unit shall be advertised separately unless, under the provisions of a special act or contractual agreement between the taxing units, joint advertisement is permitted.)

The posted notice and newspaper advertisement shall set forth the following information:

- (1) The name of each person to whom is listed real property on which the taxing unit has a lien for unpaid taxes, together with a brief description of each parcel of land to which such a lien has attached and a statement of the principal amount of the taxes constituting a lien against the parcel.
- (2) A statement that the amounts advertised will be increased by interest and costs and that the omission of interest and costs from the amounts advertised will not constitute waiver of the taxing unit's claim for those items.
- (3) In the event the list of tax liens has been divided for purposes of advertisement in more than one newspaper, a statement of the names of all newspapers in which advertisements will appear and the dates on which they will be published.
- (4) A statement that the taxing unit may foreclose the tax liens and sell the real property subject to the liens in satisfaction of its claim for taxes.

(d) **Costs.** — Each parcel of real property advertised pursuant to this section shall be assessed an advertising fee to cover the actual cost of the advertisement. Actual advertising costs per parcel shall be determined by the tax collector on any reasonable basis. Advertising costs assessed pursuant to this subdivision (d) shall be deemed to be taxes.

(e) **Payments during Advertising Period.** — At any time during the advertisement period, any parcel may be withdrawn from the list by payment of the taxes plus interest that has accrued to the time of payment and a proportionate part of the advertising fee to be determined by the tax collector. Thereafter, the tax collector shall delete that parcel from the advertisement, but if he fails to do so he shall not be liable for his failure to make the decision.

(f) **Listing and Advertising in Wrong Name.** — No tax lien shall be void because the real property to which the lien attached was listed or advertised in the name of a person other than the person in whose name the property should have been listed for taxation if the property was in other respects correctly described on the abstract or in the advertisement.

(g) **Wrongful Advertisement.** — Any tax collector or deputy tax collector who shall willfully advertise any tax lien knowing that the property is not subject to taxation or that the taxes advertised have been paid shall be guilty of a misdemeanor and upon conviction shall be fined not more than five hundred dollars (\$500.00) or imprisoned for not more than 30 days, or both, and shall be required to pay the injured party all damages sustained in consequence. (1939, c. 310, s. 1715; 1955, c. 993; 1971, c. 806, s. 1; 1983, c. 808, s. 1.)

**Editor's Note.** — Session Laws 1983, ch. 808, s. 12, provides that the act shall not affect the validity of any tax lien sale held before July 1, 1983.

Session Laws 1983, ch. 808, s. 13, provides: "Anything in this act to the contrary notwithstanding, any person, firm, or corpora-

tion who purchased or took assignment of a tax lien sale certificate before July 1, 1983, pursuant to statutes amended or repealed by this act may initiate a foreclosure action under G.S. 105-374 no earlier than six months after the date of the original lien sale."

**Effect of Amendments.** — The 1983 amend-

ment, effective July 18, 1983, substituted "advertise" for "sell" in the first sentence of subsection (a), rewrote subsection (b), which formerly related to the time for the county tax lien sale, deleted former subsection (c), relating to the place and hour of the sale, deleted former subsection (d), relating to advertisement of the sale, deleted former subsection (e), relating to the contents of the advertisement and notice of the sale, deleted former subsection (f), relating to the manner of conduct of the sale, deleted

subsection (g), relating to costs of the sale, deleted subsection (h), relating to withdrawal of property from the sale list before the tax lien sale upon payment of taxes, interest, and advertising costs, redesignated former subsection (i) as present subsection (f), deleted subsection (j), relating to the validity of acts of de facto officers in proceedings involving title to real property affected by a tax lien sale, deleted subsection (k), relating to proof of sale, and added present subsections (c), (d), (e), and (g).

### CASE NOTES

**Newspaper Must Meet Requirements of Both Subsection (d) and § 1-597.** — In order to qualify to publish notices of tax lien sales a newspaper must meet the "general circulation" requirements of both subsection (d) of this section, and § 1-597. *Great S. Media, Inc. v. McDowell County*, 304 N.C. 427, 284 S.E.2d 457 (1981).

Reading both § 1-597 and subsection (d) of this section together and giving effect to each, in order for a newspaper to qualify to publish notices of tax lien sales it must be a newspaper of general circulation to actual paid subscribers in the taxing unit. *Great S. Media, Inc. v. McDowell County*, 304 N.C. 427, 284 S.E.2d 457 (1981).

The "general circulation" provision in subsection (d) of this section does not conflict with its counterpart in § 1-597. It simply specifies the geographic area, i.e., "the taxing unit" in which there must be a newspaper of general circulation and the times at which publication must be made. *Great S. Media, Inc. v. McDowell County*, 304 N.C. 427, 284 S.E.2d 457 (1981).

**General Circulation to Actual Paid Subscribers in Taxing Unit.** — For a newspaper to be one of general circulation to actual paid subscribers in the taxing unit it must meet a four-pronged test: first, it must have a content that appeals to the public generally; second, it must have more than a de minimis number of actual paid subscribers in the taxing unit; third, its paid subscriber distribution must not be entirely limited geographically to one community, or section, of the taxing unit; and fourth, it must be available to anyone in the taxing unit who wishes to subscribe to it. *Great S. Media, Inc. v. McDowell County*, 304 N.C. 427, 284 S.E.2d 457 (1981).

The term "general circulation," when applied to newspapers, refers not so much to the numerical or geographic distribution of the

newspaper as it does to the contents of the paper itself. The primary consideration is whether the newspaper contains information of general interest. *Great S. Media, Inc. v. McDowell County*, 304 N.C. 427, 284 S.E.2d 457 (1981).

Although courts have focused on content in defining "general circulation," the term is not devoid of quantitative aspects. *Great S. Media, Inc. v. McDowell County*, 304 N.C. 427, 284 S.E.2d 457 (1981).

**More than de Minimis Number of Readers Required.** — In order to satisfy the quantitative considerations inherent in the term "general circulation," a newspaper must enjoy more than a de minimis number of readers in the taxing unit; this number must not be so insignificant that the newspaper simply fails to reach a diverse group of people in the area prescribed. *Great S. Media, Inc. v. McDowell County*, 304 N.C. 427, 284 S.E.2d 457 (1981).

The need for more than a de minimis number of paid subscribers does not mean that those subscribers must be evenly distributed in every city, town or section of the county or taxing unit, nor must publication be in the paper with the widest geographical distribution in the county. Neither § 1-597 nor subsection (d) of this section so require. *Great S. Media, Inc. v. McDowell County*, 304 N.C. 427, 284 S.E.2d 457 (1981).

Whether a given newspaper has a de minimis number of subscribers must always be determined in context. *Great S. Media, Inc. v. McDowell County*, 304 N.C. 427, 284 S.E.2d 457 (1981).

To determine whether more than a de minimis number of readers exists, only actual paid subscribers may be considered. *Great S. Media, Inc. v. McDowell County*, 304 N.C. 427, 284 S.E.2d 457 (1981).

**§§ 105-370 to 105-372:** Repealed by Session Laws 1983, c. 808, ss. 2-4, effective July 18, 1983.

**Editor's Note.** — Session Laws 1983, ch. 808, s. 12, provides that the act shall not affect the validity of any tax lien sale held before July 1, 1983.

Session Laws 1983, ch. 808, s. 13, provides: "Anything in this act to the contrary notwithstanding, any person, firm, or corpora-

tion who purchased or took assignment of a tax lien sale certificate before July 1, 1983, pursuant to statutes amended or repealed by this act may initiate a foreclosure action under G.S. 105-374 no earlier than six months after the date of the original lien sale."

## § 105-373. Settlements.

(a) Annual Settlement of Tax Collector. —

(1) Preliminary Report. — Not later than the third Monday in June, the tax collector shall make a sworn report to the governing body of the taxing unit showing:

- a. A list of the persons owning real property whose taxes remain unpaid and the principal amount due; and
- b. A list of the persons not owning real property whose personal property taxes remain unpaid. (To this list the tax collector shall append his statement under oath that he has made diligent efforts to collect the taxes due from the persons listed out of their personal property and by other means available to him for collection, and he shall report such other information concerning these taxpayers as may be of interest to or required by the governing body, including a report of his efforts to make collection outside the taxing unit under the provisions of G.S. 105-364.) The governing body of the taxing unit may publish this list in any newspaper in the taxing unit. The cost of publishing this list shall be paid by the taxing unit.

(2) Insolvents. — Upon receiving the report required by subdivision (a)(1), above the governing body of the taxing unit shall enter upon its minutes the names of persons owing taxes (but who listed no real property) whom it finds to be insolvent, and it shall by resolution designate the list entered in its minutes as the insolvent list to be credited to the tax collector in his settlement.

(3) Settlement for Current Taxes. — On the first Monday of July the tax collector shall make full settlement with the governing body of the taxing unit for all taxes in his hands for collection for the preceding fiscal year. In the settlement the tax collector shall be charged with:

- a. The total amount of all taxes in his hands for collection for the year, including amounts originally charged to him and all amounts subsequently charged on account of discoveries;
- b. All penalties, interest, and costs collected by him in connection with taxes for the current year; and
- c. All other sums collected by him.

The tax collector shall be credited with:

- a. All sums representing taxes for the year deposited by him to the credit of the taxing unit or receipted for by a proper official of the unit;
- b. Releases duly allowed by the governing body;
- c. The principal amount of taxes constituting liens on real property;

- d. The principal amount of taxes included in the insolvent list determined in accordance with subdivision (a)(2), above;
- e. Discounts allowed by law; and
- f. Commissions (if any) lawfully payable to the tax collector as compensation.

The tax collector shall be liable on his bond for both honesty and faithful performance of duty; for any deficiencies; and, in addition, for all criminal penalties provided by law.

The settlement, together with the action of the governing body with respect thereto, shall be entered in full upon the minutes of the governing body.

- (4) **Disposition of Tax Receipts after Settlement.** — Uncollected taxes allowed as credits in the settlement prescribed in subdivision (a)(3), above, whether represented by tax liens held by the taxing unit or included in the list of insolvents, shall, for purposes of collection, be recharged to the tax collector or charged to some other person designated by the governing body of the taxing unit under statutory authority. The person charged with uncollected taxes shall:
  - a. Give bond satisfactory to the governing body;
  - b. Receive the tax receipts and tax records representing the uncollected taxes;
  - c. Have and exercise all powers and duties conferred or imposed by law upon tax collectors; and
  - d. Receive compensation as determined by the governing body.

(1939, c. 310, s. 1719; 1945, c. 635; 1947, c. 484, ss. 3, 4; 1951, c. 300, s. 1; c. 1036, s. 1; 1953, c. 176, s. 2; 1955, c. 908; 1967, c. 705, s. 1; 1971, c. 806, s. 1; 1983, c. 670, s. 22; c. 808, ss. 5-7.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** — Session Laws 1983, ch. 808, s. 12, provides that the act shall not affect the validity of any tax lien sale held before July 1, 1983.

Session Laws 1983, ch. 808, s. 13, provides: "Anything in this act to the contrary notwithstanding, any person, firm, or corporation who purchased or took assignment of a tax lien sale certificate before July 1, 1983, pursuant to statutes amended or repealed by this act may initiate a foreclosure action under G.S.

105-374 no earlier than six months after the date of the original lien sale."

**Effect of Amendments.** — The first 1983 amendment, effective July 1, 1983, added the last two sentences of subdivision (a)(1)b.

The second 1983 amendment, effective July 18, 1983, substituted "Not later than the third Monday in June" for "On the second Monday following the tax lien sale" in the introductory language of subdivision (1) of subsection (a), rewrote clause c of subdivision (3) of subsection (a), and substituted "held by" for "sold to" in the first sentence of subdivision (4) of subsection (a).

## § 105-374. Foreclosure of tax lien by action in nature of action to foreclose a mortgage.

(b) Taxing units may proceed under this section, either on the original tax lien created by G.S. 105-355(a) or on the lien acquired at a tax lien sale held under former G.S. 105-369 before July 1, 1983, with or without a lien sale certificate; and the amount of recovery in either case shall be the same. To this end, it is hereby declared that the original attachment of the tax lien under G.S. 105-355(a) is sufficient to support a tax foreclosure action by a taxing unit, that the issuance of a lien sale certificate to the taxing unit for lien sales held before July 1, 1983, is a matter of convenience in record keeping within the discretion of the governing body of the taxing unit, and that issuance of such certificates is not a prerequisite to perfection of the tax lien.

(c1) **Lienholders Separately Designated.**— The word "lienholder" shall appear immediately after the name of each lienholder (including trustees and beneficiaries in deeds of trust, and holders of judgment liens) whose name appears in the caption of any action instituted under the provisions of this section. Such designation is intended to make clear to the public the capacity of such persons which necessitated their having been made parties to such action. Failure to add such designation to captions shall not constitute grounds for attacking the validity of actions brought under this section, or titles to real property derived from such actions.

(1939, c. 310, s. 1719; 1945, c. 635; 1947, c. 484, ss. 3, 4; 1951, c. 300, s. 1; c. 1036, s. 1; 1953, c. 176, s. 2; 1955, c. 908; 1967, c. 705, s. 1; 1971, c. 806, s. 1; 1973, c. 788, s. 1; 1981, c. 580; 1983, c. 808, s. 8.)

**Only Part of Section Set Out.**— As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.**—

Session Laws 1983, ch. 808, s. 12, provides that the act shall not affect the validity of any tax lien sale held before July 1, 1983.

Session Laws 1983, ch. 808, s. 13, provides: "Anything in this act to the contrary notwithstanding, any person, firm, or corporation who purchased or took assignment of a tax lien sale certificate before July 1, 1983, pursuant to statutes amended or repealed by this act may initiate a foreclosure action under G.S. 105-374 no earlier than six months after the date of the original lien sale."

**Effect of Amendments.**— The 1981 amendment added subsection (c1).

The 1983 amendment, effective July 18, 1983, redesignated the provisions of former subdivision (1) of subsection (b) as present subsection (b), deleted subdivision (2) of subsection (b), relating to foreclosure by holders of tax lien certificates other than taxing units, substituted "former G.S. 105-369 before July 1, 1983" for "G.S. 105-369" in the first sentence of present subsection (b), and substituted "a lien sale certificate to the taxing unit for lien sales held before July 1, 1983" for "tax lien sale certificates to a taxing unit" in the second sentence of subsection (b).

## CASE NOTES

**Construed together, § 160A-233(c) and subsection (i) of this section,** provide for an award of one reasonable attorney's fee, in the court's discretion, in a foreclosure of an assessment lien by action in nature of action to foreclose a mortgage. *Guilford County v. Boyan*, 42 N.C. App. 627, 257 S.E.2d 463 (1979).

**A study of subsection (e) of this section** shows that its benefits apply only to taxing units, not private citizens. *Keener v. Korn*, 46 N.C. App. 214, 264 S.E.2d 829 (1980).

**Award of Attorney's Fee Not Limited by**

**§ 6-21.2.**— The amount of an attorney's fee awarded in a tax foreclosure proceeding under this section is to be determined pursuant to subsection (i) in the discretion of the trial court and is not limited by the provisions of § 6-21.2. *Town of Sylva v. Gibson*, 51 N.C. App. 545, 277 S.E.2d 115, cert. denied and appeal dismissed, 303 N.C. 319, 281 S.E.2d 659 (1981).

**Applied in** *Keener v. Korn*, 46 N.C. App. 214, 264 S.E.2d 829 (1980); *Guilford County v. Boyan*, 49 N.C. App. 430, 272 S.E.2d 6 (1980).

## § 105-375. In rem method of foreclosure.

(b) **Docketing Certificate of Taxes as Judgment.**— In lieu of following the procedure set forth in G.S. 105-374, the governing body of any taxing unit may direct the tax collector to file, no earlier than six months following the advertisement of tax liens, with the clerk of superior court a certificate showing the following: the name of the taxpayer listing real property on which the taxes are a lien, together with the amount of taxes, penalties, interest, and costs that are a lien thereon; the year or years for which the taxes are due; and a description of the property sufficient to permit its identification by parol testimony. The fees for docketing and indexing the certificate shall be payable to the clerk of superior court at the time the taxes are collected or the property is sold.

(c) **Notice Listing Taxpayer and Others.** — The tax collector filing the certificate provided for in subsection (b), above, shall, at least 30 days prior to docketing the judgment, send a registered or certified letter, return receipt requested, to the listing taxpayer at his last known address, and to all lienholders of record who have filed with the office of the tax collector of the taxing unit or units in which the real property subject to his lien is located a request that he be notified of the docketing of a judgment under the procedure set forth in this section, stating that the judgment will be docketed and that execution will be issued thereon in the manner provided by law. A notice stating that the judgment will be docketed and that execution will be issued thereon shall also be mailed by certified or registered mail, return receipt requested, to the current owner of the property (if different from the listing owner) if: (i) a deed or other instrument transferring title to and containing the name of the current owner was recorded in the office of the register of deeds or filed or docketed in the office of the clerk of superior court after January 1 of the first year in which the property was listed in the name of the listing owner, and (ii) the tax collector can obtain the current owner's mailing address through the exercise of due diligence. The request from the lienholder shall be made on a form supplied by the tax collector and shall describe the real property, indicate whose name it is listed in for taxation, and state the name and mailing address of the lienholder. If within 10 days following the mailing of said letters of notice, a return receipt has not been received by the tax collector indicating receipt of the letter, then the tax collector shall have a notice published in a newspaper of general circulation in said county once a week for two consecutive weeks directed to, and naming, all unnotified lienholders and the listing taxpayer that a judgment will be docketed against the listing taxpayer. The notice shall contain the proposed date of such docketing, that execution will issue thereon as provided by law, a brief description of the real property affected, and notice that the lien may be paid off prior to judgment being entered. All costs of mailing and publication shall be added to those set forth in subsection (b).

(i) **Issuance of Execution.** — At any time after six months and before two years from the indexing of the judgment as provided in subsection (b), above, execution shall be issued at the request of the tax collector in the same manner as executions are issued upon other judgments of the superior court, and the real property shall be sold by the sheriff in the same manner as other real property is sold under execution with the following exceptions:

- (1) No debtor's exemption shall be allowed.
- (2) In lieu of personal service of notice on the owner of the property, registered or certified mail notice shall be mailed to the listing owner (and to the current owner if notice was required to be mailed to him pursuant to subsection (c), above) at this [his] last known address at least 30 days prior to the day fixed for the sale.
- (3) The sheriff shall add to the amount of the judgment as costs of the sale any postage expenses incurred by the tax collector and the sheriff in foreclosing under this section.
- (4) In any advertisement or posted notice of sale under execution, the sheriff may (and at the request of the governing body shall) combine the advertisements or notices for properties to be sold under executions against the properties of different taxpayers in favor of the same taxing unit or group of units; however, the property included in each judgment shall be separately described and the name of the listing taxpayer specified in connection with each.

The purchaser at the execution sale shall acquire title to the property in fee simple free and clear of all claims, rights, interests, and liens except the liens of other taxes or special assessments not paid from the purchase price and not included in the judgment.

(1939, c. 310, s. 1720; 1945, c. 646; 1957, cc. 91, 1262; 1971, c. 806, s. 1; 1973, c. 108, s. 52; c. 681, ss. 1, 2; 1983, c. 808, s. 9; c. 855, ss. 1, 2.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** —

Session Laws 1983, ch. 808, s. 12, provides that the act shall not affect the validity of any tax lien sale held before July 1, 1983.

Session Laws 1983, ch. 808, s. 13, provides: "Anything in this act to the contrary notwithstanding, any person, firm, or corporation who purchased or took assignment of a tax lien sale certificate before July 1, 1983, pursuant to statutes amended or repealed by this act may initiate a foreclosure action under G.S. 105-374 no earlier than six months after the date of the original lien sale."

Session Laws 1983, c. 855, s. 3, provides that

the act shall become effective on ratification but shall not apply to foreclosure actions commenced prior to its effective date. The act was ratified July 20, 1983.

**Effect of Amendments.** — The first 1983 amendment, effective July 18, 1983, substituted "advertisement" for "sale" in the first sentence of subsection (b).

The second 1983 amendment inserted the second sentence of subsection (c) and, in subdivision (i)(2), substituted "owner (and to the current owner if notice was required to be mailed to him pursuant to subsection (c), above)" for "taxpayer," substituted "this" for "his" preceding "last" and substituted "30 days" for "one week."

## ARTICLE 27.

### *Refunds and Remedies.*

#### § 105-381. Taxpayer's remedies.

**Local Modification.** — Forsyth: 1983, c. 182; Union: 1981 (Reg. Sess., 1982), c. 1154.

**Legal Periodicals.** — For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

#### CASE NOTES

**Applied** in *Town of Bladenboro v. McKeithan*, 44 N.C. App. 459, 261 S.E.2d 260 (1980).

**Stated** in *Raintree Corp. v. City of Charlotte*, 49 N.C. App. 391, 271 S.E.2d 524 (1980).

## ARTICLE 28.

### *Special Duties to Pay Taxes.*

#### § 105-386. Tax paid by holder of lien; remedy.

#### CASE NOTES

**Cited** in *City of Charlotte v. Little McMahan Properties, Inc.*, 52 N.C. App. 464, 279 S.E.2d 104 (1981).

## ARTICLE 30.

*General Provisions.***§ 105-394. Immaterial irregularities.**

Immaterial irregularities in the listing, appraisal, or assessment of property for taxation or in the levy or collection of the property tax or in any other proceeding or requirement of this Subchapter shall not invalidate the tax imposed upon any property or any process of listing, appraisal, assessment, levy, collection, or any other proceeding under this Subchapter.

The following are examples of immaterial irregularities:

(6) The failure of the collector to advertise any tax lien.

(7) Repealed by Session Laws 1983, c. 808, s. 11 effective July 18, 1983.

(1939, c. 310, s. 1715; 1965, c. 192, ss. 1, 2; 1971, c. 806, s. 1; 1983, c. 808, ss. 10, 11.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** —

Session Laws 1983, ch. 808, s. 12, provides that the act shall not affect the validity of any tax lien sale held before July 1, 1983.

Session Laws 1983, ch. 808, s. 13, provides: "Anything in this act to the contrary notwithstanding, any person, firm, or corporation who purchased or took assignment of a tax lien sale certificate before July 1, 1983, pursuant to statutes amended or repealed by this

act may initiate a foreclosure action under G.S. 105-374 no earlier than six months after the date of the original lien sale."

**Effect of Amendments.** — The 1983 amendment, effective July 18, 1983, rewrote subdivision (6), which formerly read "The failure of the collector to offer any tax lien on real property for sale at the time mentioned in the advertisement or notice of sale" and deleted subdivision (7), which read "The failure of the collector to adjourn the tax lien sale from day to day or any irregularity or informality in the adjournment."

## CASE NOTES

**Purpose.** — This section contains a broad statement that is intended to cover cases where there is no dispute that but for a clerical error, the tax would have been valid. In re Notice of Attachment & Garnishment Issued by Catawba County Tax Collector, 59 N.C. App. 332, 296 S.E.2d 499 (1982), cert. denied, — N.C. —, 299 S.E.2d 645 (1983).

**Section Not to Be Strictly Construed against Taxing Authority.** — Tax statutes are to be strictly construed against the taxing authority; but that is only when the statute is susceptible of two constructions, unlike this

section, which is clear and uncomplicated. In re Notice of Attachment & Garnishment Issued by Catawba County Tax Collector, 59 N.C. App. 332, 296 S.E.2d 499 (1982), cert. denied, — N.C. —, 299 S.E.2d 645 (1983).

**Clerical error by a tax supervisor's office** is an immaterial irregularity under this section so as not to invalidate the tax levied on the property. In re Notice of Attachment & Garnishment Issued by Catawba County Tax Collector, 59 N.C. App. 332, 296 S.E.2d 499 (1982), cert. denied, — N.C. —, 299 S.E.2d 645 (1983).

## SUBCHAPTER V. GASOLINE TAX.

## ARTICLE 36.

*Gasoline Tax.***§ 105-433. Application for license as distributor.**

Any distributor engaged in business on April 1, 1931, shall, within 30 days thereafter, and any other distributor shall, prior to the commencement of doing business, file a duly acknowledged application for a license with the Secretary of Revenue on a form prescribed and furnished by him setting forth the name under which such distributor transacts or intends to transact business within this State, the address of each place of business and a designation of the principal place of business. If such distributor is a firm or association, the application shall set forth the name and address of each person constituting the firm or association, and if a corporation, the names and addresses of the principal officers and such other information as the Secretary of Revenue may require. Each distributor shall at the same time file a bond in such amount, not exceeding forty thousand dollars (\$40,000) in such form and with such surety or sureties as may be required by the Secretary of Revenue, conditioned upon the rendition of the reports and the payment of the tax hereinafter provided for. A distributor who is also required to be bonded under G.S. 105-449.5 as a supplier of special fuels may file a single bond, under either this section or under G.S. 105-449.5, for the combined amount required under these sections but not exceeding eighty thousand dollars (\$80,000) and conditioned upon compliance with the requirements of Article 36 and Article 36A of this Subchapter. Upon approval of the application and bond, the Secretary of Revenue shall issue to the distributor a nonassignable license with a duplicate copy for each place of business of said distributor in this State, which shall be displayed in a conspicuous place at each such place of business and shall continue in force until surrendered or canceled. No distributor shall sell, offer for sale, or use any motor fuels within this State until such license has been issued. Any distributor failing to comply with or violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars (\$100.00), nor more than five thousand dollars (\$5,000), or imprisonment for not more than 24 months, or both. (1927, c. 93, s. 3; 1931, c. 145, s. 24; 1973, c. 476, s. 193; 1983, c. 220, s. 2.)

**Effect of Amendments.**— The 1983 amendment, effective July 1, 1983, substituted "forty thousand dollars (\$40,000)" for "twenty

thousand dollars (\$20,000)" in the third sentence and inserted the present fourth sentence.

**§ 105-434. Gallon tax.**

There is hereby levied and imposed a tax of twelve cents (12¢) per gallon on all motor fuels sold, distributed, or used within this State. The tax hereby imposed and levied shall be collected and paid by the distributor producing, refining, manufacturing, or compounding within this State, or holding in possession within this State motor fuels for the purpose of sale, distribution, or use within the State, and shall be paid by such distributor to the Secretary of Revenue in the manner and at the times hereinafter specified. No county, city, or town, or political subdivision shall levy or collect any tax upon the sale or distribution of motor fuels herein defined. For the purpose of determining the amount of the tax, it shall be the duty of every distributor to transmit to the

Secretary of Revenue not later than the twentieth day of each month, upon forms prescribed and furnished by such Secretary, a report under oath or affirmation showing the quantity of motor fuel sold, distributed, or used by such distributor within this State during the preceding calendar month, and such other information as the said Secretary may require: Provided, that any distributor may, if he elects to do so, use as the measure of the tax levied and assessed against him by this section the gross quantity of motor fuel purchased, produced, refined, manufactured, and/or compounded by such distributor, plus the amount of motor fuel on hand at the beginning of the period when such method of computation is used, less a tare of two percent (2%) on gross monthly receipts of motor fuels not exceeding 150,000 gallons, and less a tare of one and one-half percent (1½%) on gross monthly receipts of such fuel in excess of 150,000 gallons and not exceeding 250,000 gallons, and less a tare of one percent (1%) on gross monthly receipts of such fuels in excess of 250,000 gallons. Provided, that if any licensed distributor who has elected to pay the tax levied herein on the amount of motor fuel purchased, produced, refined, manufactured, or compounded, in lieu of the amount sold, distributed, or used, shall lose any such fuel by reason of fire, lightning, flood, windstorm, wrecking of transportation conveyance, acts of war, or any accidental or providential cause, and such loss is clearly proved to the satisfaction of the Secretary of Revenue, the amount of motor fuel lost shall be excluded from the measure of his tax. Provided, further, that the Secretary of Revenue shall have power under such rules and regulations as he may adopt for the purpose to refund to any nonlicensed distributor the tax on any motor fuel purchased by and delivered to him tax paid that is lost by fire, lightning, flood, windstorm, acts of war, or any accidental or providential cause, after it is delivered to him and before it is sold, but such loss must be clearly proved to the satisfaction of the Secretary. (1927, c. 93, s. 4; 1929, c. 40, s. 1; 1931, c. 145, s. 24; 1941, cc. 16, 146; 1943, c. 113; 1949, c. 1250, s. 13; 1969, c. 600, s. 20; 1973, c. 476, s. 193; 1981, c. 690, s. 1.)

**Effect of Amendments.** — The 1981 amendment, effective July 1, 1981, increased the rate of the tax in the first sentence from nine cents to twelve cents per gallon.

## § 105-435. Tax on fuels not within definition; manner of collection; from whom collected.

(a) Every person who owns or operates over the highways of this State, any motor vehicle propelled by a motor which uses any product not included within the definition of "motor fuels" hereinbefore set out to generate power for the propulsion of said vehicle, shall pay to the Secretary of Revenue, for the use of the highways of this State, a tax of twelve cents (12¢) per gallon on the fuel used in such vehicle upon the highways of this State.

(1941, c. 376, s. 2; 1949, c. 1250, s. 13; 1951, c. 838; 1955, c. 822, s. 2; 1969, c. 600, s. 20; 1973, c. 476, s. 193; 1981, c. 690, s. 1.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amend-

ment, effective July 1, 1981, increased the rate of the tax in subsection (a) from nine cents to twelve cents per gallon.

## CASE NOTES

Cited in *Stam v. State*, 47 N.C. App. 209, 267 S.E.2d 335 (1980).

**§ 105-436.1. Taxation of alcohol fuels.**

(a) Sale, distribution, or use of a blend of motor fuel and a minimum of ten percent (10%) anhydrous ethanol is subject to the tax described in G.S. 105-434 except:

- (1) From July 1, 1981, through June 30, 1982, the tax is nine cents (9¢);
- (2) From July 1, 1982, through June 30, 1983, the tax is ten cents (10¢);
- (3) From July 1, 1983, through June 30, 1984, the tax is eleven cents (11¢);
- (4) From July 1, 1985, through June 30, 1992, the tax is seven cents (7¢).

Quarterly refunds and rebates allowed under this Article for the purchase of such a blend shall not exceed the motor fuels tax on that blend reduced by one cent (1¢). Annual refunds and rebates allowed under this Article for the purchase of such a blend shall be at the following rates: for the year ending December 31, 1981, six cents (6¢) per gallon; for the year ending December 31, 1982, eight and one-half cents (8½¢) per gallon; for the year ending December 31, 1983, nine and one-half cents (9½¢) per gallon; for the year ending December 31, 1984, ten and one-half cents (10½¢) per gallon; for the year ending December 31, 1985, eight and one-half cents (8½¢) per gallon; for subsequent years ending December 31, six cents (6¢) per gallon.

(b) Nonanhydrous ethanol is exempt from the tax described in this section and in G.S. 105-434 if that ethanol is not for sale or distribution. (1979, 2nd Sess., c. 1187, s. 1; 1981, c. 690, s. 1; 1983, c. 591, s. 1.)

**Editor's Note.** — Session Laws 1979 (Second Session 1980), c. 1187, s. 6, as amended by Session Laws 1983, c. 591, s. 4, provides: "Sec. 6. This act shall become effective on January 1, 1981, and shall cease to be effective on July 1, 1992."

Session Laws 1983, c. 760, ss. 1 to 3, provide as follows:

Section 1: "Notwithstanding G.S. 105-436.1(a) and G.S. 105-449.16(b) the tax on the blends of alcohol fuels described in those statutes is seven cents (7¢) per gallon from October 1, 1983, through June 30, 1985, if the ethanol used in the blend was produced from agricultural or forestry waste products or by-products."

Section 2: "Notwithstanding G.S. 105-436.1(a) and G.S. 105-449.24 the annual refunds and rebates for the blends described in Section 1 of this act shall be at the following rates: for the year ending December 31, 1983, eight and one-half cents (8½¢); for subsequent years, six cents (6¢)."

Section 3: "The Secretary of Revenue may adopt rules to implement this act. The rules shall provide that if a blend is made from ethanol that qualifies for the partial exemption allowed by this act as well as nonqualifying ethanol, the tax rate stated in this act applies in proportion to the amount of qualifying ethanol used in the blend. The rules shall also provide

that if only part of a blend made from a mixture of qualifying and nonqualifying ethanol is sold in this State, the Secretary may presume that all of that blend sold in this State contained the qualifying ethanol and shall apply the tax rate allowed by this act accordingly."

Session Laws 1983, c. 760, s. 4, provides that the act is effective upon ratification and expires on June 30, 1985. The act was ratified July 14, 1983.

**Effect of Amendments.** — The 1981 amendment, effective July 1, 1981, eliminated former subdivision (1) of subsection (a), providing the tax from January 1, 1981 through June 30, 1981, redesignated former subdivisions (2) through (4) as (1) through (3) of subsection (a), increasing the taxes from six cents to nine cents, seven cents to ten cents and eight cents to eleven cents respectively, and substituted the present last two sentences of subsection (a) for the former last sentence, which read: "No refund or rebate allowed under this Article for the purchase of such a blend shall exceed the motor fuels tax on that blend, reduced by one cent (1¢)."

The 1983 amendment, effective June 23, 1983, added subdivision (a)(4), and at the end of the last sentence of subsection (a) substituted "for the year ending December 31, 1985, eight and one-half cents (8½¢) per gallon; for subsequent years ending December 31, six cents (6¢)

per gallon" for "for subsequent years ending December 31, eleven cents (11¢) per gallon."

### **§ 105-446. Tax rebate on fuels not used in motor vehicles on highways.**

Any person, association, firm or corporation, who shall buy any motor fuels, as defined in this Article, for the purpose of use, and the same is actually used, for other than the operation of a motor vehicle designed and licensed for use upon the highways shall be reimbursed at the rate of nine and one-half cents ( $9\frac{1}{2}\text{¢}$ ) per gallon for the year ending December 31, 1981, and at the rate of eleven cents (11¢) per gallon for subsequent years ending December 31 of the amount of such tax or taxes paid under this Article upon the following conditions and in the following manner:

- (1) On or before April 15, 1968, application for reimbursement as provided in this section on taxes paid under this Article for the period from July 1, 1967, through December 31, 1967, and thereafter on or before April 15 of any subsequent year ending the preceding December 31, application for reimbursement as provided in this section on taxes paid under this Article for the preceding year shall be filed with the Secretary of Revenue. Such application shall be made upon oath or affirmation upon such forms as the Secretary of Revenue shall prescribe, and the Secretary of Revenue is hereby authorized to prescribe different forms of application for the several classes of uses for which said fuels may have been purchased, provided that as to all such applications for reimbursement the applicant shall be required to state whether or not such applicant has filed a North Carolina income tax return with the Secretary of Revenue; provided, however, that said application shall show on its face that the purchase price of the motor fuel therein referred to has been paid by applicant or that the payment of said purchase price has been secured to the seller's satisfaction. Refunds made pursuant to applications filed after April 15th of the year following the year in which the tax was paid shall be subject to the following late filing penalties: Applications filed within 30 days after said date, twenty-five percent (25%); applications filed after 30 days but within six months after said date, fifty percent (50%); but refunds applied for after six months following said date shall be barred.
- (2) The Secretary of Revenue shall have authority to issue rules and regulations as to how claims shall be filed and the information that shall be submitted with said claims and the records required to support said claims.
- (3) If, upon the filing of such application, the Secretary of Revenue shall be satisfied that the same is made in good faith and that the motor fuels upon which said tax refund is requested have been or are to be used exclusively for purposes as set forth in said application and for purposes other than the operation of a motor vehicle designed and licensed for use upon the highway, he shall issue to such applicant a warrant upon the State Treasurer for the tax refund.
- (4) If the Secretary of Revenue shall be satisfied that the applicant for any refund authorized by this section has collected or sought to collect any refund of tax or taxes on fuels used in a motor vehicle designed and licensed for use on the highways, he shall issue to such applicant notice to show cause why such application should not be disallowed, which notice shall state a time and place of hearing upon said notice. If upon such hearing the Secretary shall find as a fact that such applicant has collected or sought to collect any refund on fuels which

have been used in a motor vehicle designed and licensed for use on the highways, he shall disallow the application in its entirety and the applicant shall be required to repay all tax or taxes which have been refunded to him on said application.

- (5) Any applicant for a refund may seek administrative review or appeal from the decision of the Secretary of Revenue under the provisions of G.S. 105-241.2, 105-241.3 and 105-241.4.
- (6) The Secretary of Revenue is hereby authorized and directed, if at any time in his opinion there is reason to doubt the accuracy of the facts set forth in any application for tax refund to refer the matter to any agent of the Department of Revenue, and such person so designated shall make a careful investigation of all the facts and circumstances relating to said application in the use of the motor fuels therein referred to, and shall have a right to have access to the books and records of any retailer or distributor of motor fuel products for the purpose of obtaining the necessary information concerning such matters, and shall make due report thereof to the Secretary of Revenue.
- (7) If any court of last resort shall hold that the provisions for refund herein set out shall render the levying and collecting of the tax hereinbefore provided invalid, it is the intention of the General Assembly that such provisions for refund shall be annulled and the tax shall be levied without any provisions for such refund and that this Article shall be so construed.

Any person making a false application or affidavit for the purpose of securing a refund to which he is not entitled under the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not exceeding five hundred dollars (\$500.00) or imprisoned not exceeding two years, in the discretion of the court. (1931, c. 145, s. 24; c. 304; 1933, c. 211; 1937, c. 111; 1941, c. 15; 1943, c. 123; 1955, c. 1350, s. 24; 1957, c. 1236, s. 1; 1961, cc. 480, 668; 1967, c. 699; 1969, c. 600, s. 20; c. 1298, s. 3; 1973, c. 476, s. 193; c. 1287, s. 14; 1981, c. 690, s. 1.)

**Effect of Amendments.** — The 1981 amendment, effective July 1, 1981, substituted "nine and one-half cents (9½¢) per gallon for the year ending December 31, 1981, and at the rate of

eleven cents (11¢)" for "seven cents (7¢) per gallon for the year ending December 31, 1969, and at the rate of eight cents (8¢)" in the introductory paragraph.

## § 105-446.1. Refunds of taxes paid by counties and municipalities.

The following entities shall be entitled to be reimbursed at the rate of eleven cents (11¢) per gallon of the tax levied by G.S. 105-434 upon filing a statement in writing with the Secretary of Revenue, which statement shall be made upon the oath or affirmation of the chief executive officer of said entity, showing the number of gallons of fuel purchased and used by said entity on which the tax levied by G.S. 105-434 has been paid: the Board of Transportation, counties, municipal corporations, volunteer fire departments, county fire departments, volunteer rescue squads, and "sheltered workshop" organizations recognized and approved by the Department of Human Resources. "Chief executive officer" shall mean the Director of Highways, the mayor, city manager or other municipal officer designated by the governing body of the municipality, the chairman of the board of county commissioners or other county officer designated by the board of county commissioners, or the president or other duly designated officer or agent of a volunteer fire department, county fire department, volunteer rescue squad or "sheltered workshop" organization. All claims

for refunds for tax or taxes for motor fuels under the provisions of this section shall be filed with the Secretary of Revenue on forms to be prescribed by him on or before the last day of January, April, July and October of each year, and shall cover only the motor fuels so used during the quarterly period immediately preceding the month in which such application is filed. Refunds made pursuant to claims filed after the dates above specified shall be subject to the following late filing penalties: claims filed within 30 days after said dates, twenty-five percent (25%); claims filed after 30 days but within six months after said dates, fifty percent (50%); but refunds claimed after six months following said dates shall be barred. (1957, c. 1226; 1969, c. 600, s. 20; c. 1298, s. 4; 1971, c. 1160; 1973, c. 476, s. 193; c. 507, s. 5; c. 1287, s. 14; 1975, c. 845; 1981, c. 690, s. 1; 1981 (Reg. Sess., 1982), c. 1246, ss. 1, 2.)

**Effect of Amendments.** — The 1981 amendment, effective July 1, 1981, increased the rate of the refund provided for in the first sentence from eight cents to eleven cents per gallon.

The 1981 (Reg. Sess., 1982) amendment,

effective July 1, 1983, and applicable to fuel purchased on and after that date, inserted "volunteer rescue squads," in the first sentence and "volunteer rescue squad" in the second sentence.

### § 105-446.3. Refund of taxes paid on motor fuels used in operation of motor buses transporting fare-paying passengers in a city transit system, in operation of a taxicab transporting fare-paying passengers, and in operation of private nonprofit transportation services.

(a) Any person, association, firm or corporation, who shall purchase any motor fuels, as defined in this Article, for the purpose of use, and the same is actually used, in the operation of motor buses transporting fare-paying passengers, in connection with a city transit system or in the operation of a taxicab transporting fare-paying passengers, both as hereinafter defined in subsection (b) of this section, or in the operation, by private nonprofit organizations, of motor vehicles transporting passengers under contract with or at the express designation of units of local government (such transportation above and hereinafter referred to as private nonprofit transportation services) shall be entitled to be reimbursed at the rate of eleven cents (11¢) per gallon of tax levied by this Article upon filing with the Secretary of Revenue an application upon the oath or affirmation of the applicant or his agent showing the number of gallons of motor fuel so purchased and used. All claims for refunds of taxes under the provisions of this section shall be filed with the Secretary of Revenue on forms to be prescribed by him, on or before the last day of January, April, July and October of each year, and shall cover only the motor fuels so used during the quarterly period immediately preceding the month in which such application is filed. Refunds made pursuant to claims filed after the dates above specified shall be subject to the following late filing penalties: claims filed within 30 days after said dates, twenty-five percent (25%); claims filed after 30 days but within six months after said dates, fifty percent (50%); but refunds claimed after six months following said dates shall be barred.

(1971, c. 1221, s. 1; 1973, c. 476, s. 193; c. 1287, s. 14; 1977, 2nd Sess., c. 1215; 1981, c. 690, s. 1.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amend-

ment, effective July 1, 1981, increased the rate of the tax in subsection (a) from eight cents to eleven cents per gallon.

**§ 105-446.3:1. Refund of taxes paid on gasohol.**

(a) Any person, association, firm, or corporation not licensed as a distributor with the North Carolina Department of Revenue who purchases motor fuel and blends it with a minimum of ten percent (10%) anhydrous ethanol and who pays more tax thereon than is required by G.S. 105-436.1 is entitled to reimbursement for the overpayment upon the following conditions and in the following manner:

- (1) All claims for refunds under this section shall be filed with the Secretary of Revenue on forms prescribed by him on or before the last day of January, April, July, and October of each year, covering motor fuel purchased during the quarterly period immediately preceding the month in which the application is filed. In all applications for reimbursement, the applicant shall state whether or not he has filed a North Carolina income tax return with the Secretary of Revenue, and all applications shall be made upon oath or affirmation. Each application shall show on its face that the purchase price has been secured to the seller's satisfaction. Refunds made pursuant to claims filed after the dates specified above are subject to the following late filing penalties: applications filed within 30 days after those dates, twenty-five percent (25%); applications filed after 30 days but within six months, fifty percent (50%); but refunds applied for after six months following those dates are barred.
- (2) The Secretary of Revenue has authority to issue rules as to how claims are filed and the information that is submitted with the claims and the records required to support the claims.
- (3) If, upon the filing of an application, the Secretary of Revenue is satisfied that it is made in good faith and the motor fuel upon which the tax refund is requested has been or is to be used exclusively for purposes set forth in the application, he shall issue to the applicant a warrant upon the State Treasurer for the tax refund.
- (4) If the Secretary of Revenue is satisfied that the applicant for any refund authorized by this section has collected or sought to collect any refund of tax on motor fuel which has not been blended with a minimum of ten percent (10%) anhydrous ethanol, he shall issue to the applicant notice to show cause why the application should not be disallowed. The notice shall state a time and place of hearing upon the notice. If, at the hearing, the Secretary finds as a fact that the applicant has collected or sought to collect any refund on motor fuel not so blended, he shall disallow the application in its entirety and the applicant shall be required to pay all tax which has been refunded to him on the application.
- (5) Any applicant for a refund may seek administrative review or appeal from the decision of the Secretary of Revenue under the provisions of G.S. 105-241.2, G.S. 105-241.3, and G.S. 105-241.4.
- (6) If at any time in the opinion of the Secretary there is reason to doubt the accuracy of the facts set forth in any application for a tax refund, he may refer the matter to any agent of the Department of Revenue, and that agent shall make a careful investigation of all the facts and circumstances relating to the application in the use of the motor fuels therein referred to, and shall have a right to have access to the books and records of any retailer or distributor of motor fuels products for the purpose of obtaining the necessary information concerning such matters, and shall make due report thereof to the Secretary of Revenue.
- (7) If any court of last resort holds that the provisions for refund in this section render the levying and collecting of the tax under this Article

invalid, it is the intention of the General Assembly that these provisions for refund shall be annulled and the tax shall be levied without any provisions for refund and that this Article shall be so construed.

(b) Any person making a false application or affidavit for the purpose of securing a refund to which he is not entitled under the provisions of this section is guilty of a misdemeanor and upon conviction thereof shall be fined not exceeding five hundred dollars (\$500.00) or imprisoned not exceeding two years. (1979, 2nd Sess., c. 1187, s. 2.)

**Editor's Note.** — Session Laws 1979 (Second Session 1980), c. 1187, s. 6, as amended by Session Laws 1983, c. 591, s. 4, provides: "Sec. 6.

This act shall become effective on January 1, 1981, and shall cease to be effective on July 1, 1992."

### § 105-446.5. Refund of taxes paid on motor fuels used by concrete mixing vehicles.

(a) Any person, association, firm, or corporation, who shall purchase motor fuels, as defined in this Article, for the purpose of use, and the same is actually used to load a concrete mixing vehicle, to maintain and transport the concrete mixture until ready for unloading, and to complete the unloading process as distinguished from propelling such vehicle, shall be entitled to reimbursement of the tax levied under this Article. For the year ending December 31, 1981, reimbursement shall be at the rate of thirty-three and one-third percent ( $33\frac{1}{3}\%$ ) of nine and one-half cents ( $9\frac{1}{2}\text{¢}$ ) per gallon. For subsequent years ending December 31 reimbursement shall be at the rate of thirty-three and one-third percent ( $33\frac{1}{3}\%$ ) of eleven cents (11¢) per gallon. Reimbursement shall be made only upon the following conditions and in the following manner:

- (1) On or before April 15, 1981, and on or before April 15 of succeeding years, application for reimbursement for each immediately preceding calendar year shall be filed with the Secretary of Revenue. Such application shall be made upon such forms as the Secretary of Revenue shall prescribe. In all applications for reimbursement, the applicant shall be required to state whether or not such applicant has filed a North Carolina income tax return with the Secretary of Revenue, and all such applications shall be sworn before an officer authorized to administer oaths; provided, however, that said application shall show on its face that the purchase price of the motor fuel therein referred to has been paid by the applicant or that the payment of such purchase price has been secured to the seller's satisfaction. Refunds made pursuant to applications filed after April 15 of the year following the year in which the tax was paid shall be subject to the following late filing penalties: applications filed within 30 days after such date, twenty-five percent (25%); applications filed after 30 days but within six months, fifty percent (50%); but refunds applied for after six months following such date shall be barred.
- (2) The Secretary of Revenue shall have authority to issue rules and regulations as to how claims shall be filed and the information that shall be submitted with said claims and the records required to support said claims.
- (3) If, upon the filing of such application, the Secretary of Revenue shall be satisfied that the same is made in good faith and the motor fuels upon which such tax refund is requested have been or are to be used exclusively for purposes set forth in the application and for purposes other than the propulsion of a motor vehicle upon the public highways, he shall issue to such applicant a warrant upon the State Treasurer for the tax refund.

- (4) If the Secretary of Revenue shall be satisfied that the applicant for any refund authorized by this section has collected or sought to collect any refund of tax or taxes on fuels used for the purpose of propelling a concrete mixer on the highways as distinguished from mixing concrete, he shall issue to such applicant notice to show why such application should not be disallowed, which notice shall state a time and place of hearing upon said notice. If, upon such hearing, the Secretary shall find as a fact that such applicant has collected or sought to collect any refund on fuels which have been used to propel a vehicle on the highways, he shall disallow the application in its entirety and the applicant shall be required to pay all tax or taxes which have been refunded to him on said application.
  - (5) Any applicant for a refund may seek administrative review or appeal from the decision of the Secretary of Revenue under the provisions of G.S. 105-241.2, 105-241.3, and 105-241.4.
  - (6) The Secretary of Revenue shall authorize and direct, if at any time in his opinion there is reason to doubt the accuracy of the facts set forth in any application for tax refund, refer the matter to any agent of the Department of Revenue, and such person so designated shall make a careful investigation of all the facts and circumstances relating to said application in the use of the motor fuels therein referred to, and shall have a right to have access to the books and records of any retailer or distributor of motor fuel products for the purpose of obtaining the necessary information concerning such matters, and shall make due report thereof to the Secretary of Revenue.
  - (7) If any court of last resort shall hold that the provisions for refund herein set out shall render the levying and collecting of the tax hereinbefore provided invalid, it is the intention of the General Assembly that such provisions for refund shall be annulled and the tax shall be levied without any provisions for such refund and that this Article shall be so construed.
- (1979, c. 801, s. 92; 1981, c. 690, s. 1.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amendment, effective July 1, 1981, in subsection (a), substituted, at the end of the present first sentence of the introductory paragraph, "entitled to reimbursement of the tax levied under this

Article" for "reimbursed at the rate of thirty-three and one-third percent (33 1/3%) of eight cents (8¢) per gallon of the tax levied under this Article on all motor fuels used in the operation of the truck and concrete mixer upon the following conditions and in the following manner:" and added the second, third and fourth sentences of the introductory paragraph.

## § 105-446.6. Refund on taxpaid motor fuel transported to another state.

Upon application to the Secretary, any person, association or corporation who purchases motor fuel upon which the tax imposed by this Article has been paid, and who transports the fuel to another state for sale or use in that state may be reimbursed at the rate of eleven cents (11¢) per gallon for the amount of tax paid. As used in this section, to "transport" means to carry motor fuel in a cargo tank, tank car, barge or barrel and does not include carrying fuel in a tank connected with or attached to the engine of a motor vehicle. (1981 (Reg. Sess., 1982), c. 1219, s. 1.)

**Editor's Note.** — Session Laws 1981 (Reg. Sess., 1982), c. 1219, s. 2, provides: "This act shall become effective July 1, 1982, and shall

apply to purchases of motor fuel made on or after that date."

## § 105-449. Exemption of gasoline used in public school transportation; false returns, etc.

(a) Any person, firm or corporation holding a North Carolina State contract for the sale of gasoline to be used in public school transportation in North Carolina shall invoice gasoline so sold and delivered to the county or city boards of education at the prevailing contract price, less the State tax on gasoline. A copy of such invoice showing the board of education to whom the gasoline is delivered, the kind of gasoline sold, the gallons sold, and the contract price per gallon, shall be submitted to the North Carolina Department of Revenue each month, supported with an official purchase order from the board or boards of education, which invoice or invoices and supporting purchase order shall exempt the gasoline purchased by said board or boards of education for use in North Carolina public school transportation from the twelve cents (12¢) tax per gallon State gasoline tax.

(b) The Secretary of Revenue of North Carolina is hereby authorized and directed to accept such invoices and supporting purchase orders, duly notarized, in lieu of the twelve cents (12¢) per gallon tax imposed by the laws of North Carolina upon said gasoline: Provided, when any authorized dealer has already paid the State gasoline gallon tax and furnishes the Secretary of Revenue with proper invoices and supporting purchase orders as required in subsection (a) of this section, then such dealer shall be entitled to a refund by the Secretary of Revenue of twelve cents (12¢) per gallon from the gasoline fund for each gallon so sold and delivered to the county and city boards of education for use in public school transportation in school buses, service trucks, and gasoline delivery wagons used only for school purposes.

(c) It is the intent and purpose of this section to relieve gasoline used in the public school system of North Carolina from the twelve cents (12¢) gasoline tax now imposed by the State and thereby to that extent reduce the cost of public school transportation.

(1941, c. 119; 1949, c. 1250, s. 13; 1959, c. 155; 1969, c. 600, s. 20; 1973, c. 476, s. 193; 1981, c. 690, s. 1.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amend-

ment, effective July 1, 1981, substituted "twelve cents (12¢)" for "nine cents (9¢)" in the last sentence in subsection (a), in two places in subsection (b), and in subsection (c).

### § 105-449.01. July 1, 1981, inventory.

Every distributor of gasoline, both at wholesale and at retail, who shall have on hand or in his possession gasoline on which the nine cents (9¢) per gallon State tax has been paid or accrued shall take a true inventory of all such gasoline on hand or in his possession as of 12:01 A.M., July 1, 1981, and shall on or before July 20, 1981, report to the Secretary of Revenue the amount of such gasoline and shall remit to the Secretary an additional tax of three cents (3¢) per gallon. The report required shall be in such form as may be prescribed by the Secretary.

Every distributor of a blend of motor fuel and a minimum of ten percent (10%) anhydrous ethanol, both at wholesale and at retail, who shall have on hand or in his possession such blend of fuel and ethanol on which the five cents (5¢) per gallon State tax has been paid or accrued, shall take a true inventory of all such blend of fuel and ethanol on hand or in his possession as of 12:01 A.M., July 1, 1981, and shall on or before July 20, 1981, report to the Secretary of Revenue the amount of such blend of fuel and ethanol and shall remit to the Secretary an additional tax of three cents (3¢) per gallon. The report required

shall be in such form as may be prescribed by the Secretary. (1969, c. 600, s. 20; 1973, c. 476, s. 193; 1981, c. 690, s. 1.)

**Effect of Amendments.** — The 1981 amendment substituted "nine cents (9¢) per gallon State tax" for "seven cents (7¢) tax per gallon State gasoline tax," substituted "1981" for "1969" in two places, and substituted "gasoline"

for "fuels on hand," "remit" for "pay" and "three cents (3¢)" for "two cents (2¢)," all in the first sentence in the first paragraph, and added the second paragraph.

## ARTICLE 36A.

### *Special Fuels Tax.*

#### § 105-449.2. Definitions.

The following words, terms and phrases as used in this Article are, for the purposes thereof, hereby defined as follows:

- (8) a. "User-seller" shall mean a bulk user or reseller as defined in this subdivision:
- b. "Bulk user" means any person who maintains storage facilities in excess of 100 gallons and stores fuel therein, and who dispenses such fuel into the fuel tanks of, or attached to, motor vehicles owned, leased or operated by him.
- c. "Reseller" means any person who maintains storage facilities in excess of 100 gallons and stores fuel therein, and who sells and/or dispenses such fuel to others into the fuel tanks of, or attached to, motor vehicles.

(1955, c. 822, s. 1; 1965, c. 1120, s. 1; 1973, c. 476, s. 193; c. 1431; 1979, c. 13, s. 1; 1981, c. 105, s. 1.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amendment, effective July 1, 1981, rewrote subdivision (8).

#### § 105-449.5. Supplier to file bond.

A supplier's license shall not be issued until the applicant has filed with the Secretary a bond in the approximate sum of three times the average monthly tax due to be paid by such supplier, but the amount of the bond shall in no case be less than five hundred dollars (\$500.00) nor more than forty thousand dollars (\$40,000). Such bond shall be in such form and with such surety or sureties as may be required by the Secretary, conditioned upon making proper reports and paying the tax provided for in this Article, and otherwise complying with the provisions of this Article. A supplier who is also required to be bonded under G.S. 105-433 as a distributor of motor fuels may file a single bond, under either this section or under G.S. 105-433 for the combined amount required under these sections but not exceeding eighty thousand dollars (\$80,000), and conditioned upon compliance with the requirements of Article 36 and Article 36A of this Subchapter. (1955, c. 822, s. 1; 1973, c. 476, s. 193; 1983, c. 220, s. 3.)

**Effect of Amendments.** — The 1983 amendment, effective July 1, 1983, rewrote this section.

### § 105-449.10. Records and reports required of user-seller or user.

(a) Each user-seller or user licensed under this Article shall keep such records and make such reports to the Secretary as shall be prescribed under regulations promulgated by the Secretary. Such records and reports shall be such as are adequate to show all purchases, sales, deliveries and use of fuel by such seller or user, provided that persons licensed as users shall file such reports quarterly on or before the last day of the month immediately following the end of the quarter.

(b) Each user at the time of rendering such statement, and each user otherwise exempted from filing, shall pay to the Secretary the tax or taxes for the preceding calendar quarter which may be due because of fuel acquired tax-free in any manner whatsoever. The provisions of this section shall not apply to users whose use of diesel fuel is limited to private passenger vehicles and other vehicles licensed under the motor vehicle laws at 6,000 pounds or less, unless such fuel is acquired tax-free. (1955, c. 822, s. 1; 1965, c. 1120, s. 2; 1973, c. 476, s. 193; 1979, c. 13, s. 2; 1979, 2nd Sess., c. 1086, s. 1; 1981, c. 105, s. 2.)

**Effect of Amendments.** — The 1979, 2nd Sess., amendment, effective October 1, 1980, substituted "last day" for "twenty-fifth day" near the end of the second sentence of subsection (a).

The 1981 amendment, effective July 1, 1981, designated the first two sentences of this section as subsection (a), designated the former

third sentence of the section as the second sentence of subsection (b), and added the first sentence of subsection (b). The amendment also substituted "provisions" for "provision" near the beginning of the second sentence of subsection (b), and added "unless such fuel is acquired tax-free" at the end of the second sentence of subsection (b).

### § 105-449.16. Levy of tax; purposes; special provisions for gasohol and nonanhydrous ethanol.

(a) A tax at the rate of twelve cents (12¢) per gallon is hereby imposed upon all fuel sold or delivered by any supplier to any licensed user-seller, or used by any such supplier in any motor vehicle owned, leased or operated by him, or delivered by such supplier directly into the fuel supply tank of a motor vehicle, or imported by a user-seller into, or acquired tax free by a user-seller or user in this State for resale or use for the propulsion of a motor vehicle. For the purpose of this section, "imported" shall not include fuels brought into this State in the usual tank or receptacle connected with the engine of a motor vehicle. The primary purposes of this levy and this Article are to provide a more efficient and effective method of collecting the tax now imposed and collected pursuant to G.S. 105-435, by providing for the collection of said tax from the supplier instead of the user. The tax herein provided for is levied for the same purposes as the tax provided for in G.S. 105-435. It is not intended that the tax collected pursuant to this Article shall be in addition to that provided in G.S. 105-435, but the payment of the tax as provided by this Article shall be deemed conclusively to constitute a compliance with the provisions of G.S. 105-435. The twelve cents (12¢) per gallon tax, hereinabove provided for, shall be subject to the provisions of section 13 of Chapter 1250 of the Session Laws of 1949, relating to G.S. 105-435, in that one cent (1¢) out of every said twelve cents (12¢) tax per gallon shall be applied exclusively to the payment of the principal of and the interest on the two hundred million dollars (\$200,000,000) State of North Carolina Secondary Road Bonds therein provided for and as further provided in said Chapter 1250 of the Session Laws of 1949.

(b) Sale, distribution, or use of a blend of gasoline or fuel and a minimum of ten percent (10%) anhydrous ethanol, which is not subject to taxation under Article 36 of this Subchapter is subject to the tax described in subsection (a) of this section except:

- (1) From July 1, 1981, through June 30, 1982, the tax is nine cents (9¢);
- (2) From July 1, 1982, through June 30, 1983, the tax is ten cents (10¢);
- (3) From July 1, 1983, through June 30, 1984, the tax is eleven cents (11¢);
- (4) From July 1, 1985, through June 30, 1992, the tax is seven cents (7¢).

(c) Nonanhydrous ethanol is exempt from the tax described in this section if that ethanol not for sale or distribution. (1955, c. 822, s. 1; 1969, c. 600, s. 21; 1979, 2nd Sess., c. 1187, s. 3; 1981, c. 690, s. 2; 1983, c. 591, s. 2.)

**Editor's Note.** — Session Laws 1979 (Second Session 1980), c. 1187, s. 6, as amended by Session Laws 1983, c. 591, s. 4, provides: "Sec. 6. This act shall become effective on January 1, 1981, and shall cease to be effective on July 1, 1992."

Session Laws 1983, c. 760, ss. 1 and 3, provide: "Notwithstanding G.S. 105-436.1(a) and G.S. 105-449.16(b) the tax on the blends of alcohol fuels described in those statutes is seven cents (7¢) per gallon from October 1, 1983, through June 30, 1985, if the ethanol used in the blend was produced from agricultural or forestry waste products or by-products."

Section 3: "The Secretary of Revenue may adopt rules to implement this act. The rules shall provide that if a blend is made from ethanol that qualifies for the partial exemption allowed by this act as well as nonqualifying ethanol, the tax rate stated in this act applies in proportion to the amount of qualifying ethanol used in the blend. The rules shall also provide that if only part of a blend made from a mixture of qualifying and nonqualifying ethanol is sold in this State, the Secretary may presume that

all of that blend sold in this State contained the qualifying ethanol and shall apply the tax rate allowed by this act accordingly."

Session Laws 1983, c. 760, s. 4, provides that the act is effective upon ratification and expires on June 30, 1985. The act was ratified July 14, 1983.

**Effect of Amendments.** — The 1979, 2nd Sess., amendment, designated the former provisions of this section as subsection (a) and added subsections (b) and (c).

The 1981 amendment, effective July 1, 1981, substituted "twelve cents (12¢)" for "nine cents (9¢)" in the first sentence and in two places in the last sentence of subsection (a). In subsection (b), the amendment deleted former subdivision (1), relating to the tax from January 1, 1981 through June 30, 1981, redesignated former subdivisions (2) through (4) as (1) through (3) and increased the taxes in those subdivisions from six cents to nine cents, seven cents to ten cents, and eight cents to eleven cents, respectively.

The 1983 amendment, effective June 23, 1983, added subdivision (b)(4).

## § 105-449.19. Tax reports; computation and payment of tax.

On or before the twenty-fifth day of each calendar month, each supplier of liquid fuel shall render to the Secretary a statement on forms prepared and furnished by the Secretary, which shall show the quantity of fuel on hand on the first and last days of the preceding calendar month, the quantity received during the month and the quantity sold to user-sellers; and each supplier of fuels which are not liquid shall keep such records and make such reports of inventory as the Secretary shall by regulation prescribe in order to show accurately the quantity of such fuel used by such supplier or sold to user-sellers and pay a tax thereon which as calculated by the Secretary, would be equivalent to the twelve cents (12¢) per gallon tax levied on liquid fuels. Each such supplier shall at the time of rendering such report pay to the Secretary the tax or taxes herein levied during the preceding calendar month. (1955, c. 822, s. 1; 1969, c. 600, s. 21; 1973, c. 476, s. 193; 1981, c. 690, s. 2.)

**Effect of Amendments.** — The 1981 amendment, effective July 1, 1981, substituted

"twelve cents (12¢)" for "nine cents (9¢)" near the end of the first sentence.

### § 105-449.21. Report of purchases and payment of tax by user-seller.

On or before the last day of the month immediately following the end of the quarter, each user-seller not otherwise licensed as a supplier shall render to the Secretary a statement on forms furnished by the Secretary which shall be signed by the user-seller. The statement shall show the quantity of fuel on hand at the beginning of the quarter, quantity on hand at the end of the quarter, the quantity sold or used and each and every purchase made by the user-seller during the preceding calendar quarter. Each purchase shall be specifically noted on the statement and the statement shall show the name and address of the supplier and the quantity and date of each purchase. Each user-seller at the time of rendering such statement shall pay to the Secretary the tax or taxes for the preceding calendar quarter which may be due because of fuel imported or acquired tax-free in any manner whatsoever. (1955, c. 822, s. 1; 1967, c. 1110, s. 14; 1973, c. 476, s. 193; 1981, c. 105, s. 3.)

**Effect of Amendments.** — The 1981 amendment, effective July 1, 1981, substituted "last day of the month immediately following the end of the quarter" for "twenty-fifth day of each calendar month" near the beginning of the first sentence, substituted "quarter" for "month" in

three places in the second sentence and near the middle of the fourth sentence, and substituted "at the time of rendering such statement shall pay" for "shall at the time of rendering such statement pay" near the beginning of the fourth sentence.

### § 105-449.22. Leased motor vehicles.

(a) Except as provided in this section, the lessee of a motor vehicle, and not the lessor of the motor vehicle, is the "user," "user-seller," or "supplier," as the case may be, for the purposes of this Article.

(b) A lessor of a motor vehicle who gives written notice, by filing a report or otherwise, to the secretary that the lessor desires to be taxed as a user, user-seller or supplier may be treated by the secretary as a user, user-seller, or supplier with respect to a motor vehicle leased to another by him as well as fuel consumed by the leased motor vehicle when the lessor supplies or pays for the fuel consumed by the motor vehicle or makes rental or other charges calculated to include the cost of the fuel. A lessee may exclude from reports made pursuant to this Article a motor vehicle of which he is the lessee if that motor vehicle is leased from a lessor who is a user, user-seller, or supplier pursuant to this section.

(c) Subsections (a) and (b) govern the primary liability of lessors and lessees of motor vehicles under this Article. Both the lessor and lessee, however, are jointly and severally liable for compliance with this Article. (1955, c. 822, s. 1; 1983, c. 29, s. 1.)

**Effect of Amendments.** — The 1983 amendment, effective July 1, 1983 and applicable to

taxable periods beginning on and after that date, rewrote this section.

### § 105-449.24. Exemptions, rebates and refunds.

The provisions of G.S. 105-439, 105-446.1, 105-446.3, 105-446.3:1, 105-446.5 and 105-449 relating to exemption from, and rebates and refunds of tax levied on gasoline shall also apply to the taxes levied by this Article on special fuels. Quarterly refunds and rebates allowed under this Article for the purchase of a blend of gasoline or fuel and a minimum of ten percent (10%) anhydrous ethanol shall not exceed the motor fuels tax on that blend reduced by one cent (1¢). Annual refunds and rebates allowed under this Article for the purchase

of such a blend shall be at the following rates: for the year ending December 31, 1981, six cents (6¢) per gallon; for the year ending December 31, 1982, eight and one-half cents (8½¢) per gallon; for the year ending December 31, 1983, nine and one-half cents (9½¢) per gallon; for the year ending December 31, 1984, ten and one-half cents (10½¢) per gallon; for the year ending December 31, 1985, eight and one-half cents (8½¢) per gallon; for subsequent years ending December 31, six cents (6¢) per gallon. (1967, c. 1110, s. 15; 1971, c. 1221, s. 2; 1979, c. 801, s. 93; 1979, 2nd Sess., c. 1187, ss. 4, 5; 1981, c. 690, s. 2; 1983, c. 591, s. 3.)

**Editor's Note.** — Session Laws 1979 (Second Session 1980), c. 1187, s. 6, as amended by Session Laws 1983, c. 591, s. 4, provides: "Sec. 6. This act shall become effective on January 1, 1981, and shall cease to be effective on July 1, 1992."

Session Laws 1983, c. 760, ss. 2 and 3, provide: Section 2." Notwithstanding G.S. 105-436.1(a) and G.S. 105-449.24 the annual refunds and rebates for the blends described in Section 1 of this act shall be at the following rates: for the year ending December 31, 1983, eight and one-half cents (8½¢); for subsequent years, six cents (6¢)."

Section 3: "The Secretary of Revenue may adopt rules to implement this act. The rules shall provide that if a blend is made from ethanol that qualifies for the partial exemption allowed by this act as well as nonqualifying ethanol, the tax rate stated in this act applies in proportion to the amount of qualifying ethanol used in the blend. The rules shall also provide that if only part of a blend made from a mixture of qualifying and nonqualifying ethanol is sold in this State, the Secretary may presume that all of that blend sold in this State contained the qualifying ethanol and shall apply the tax rate allowed by this act accordingly."

Session Laws 1983, c. 760, s. 4, provides that the act is effective upon ratification and expires on June 30, 1985. The act was ratified July 14, 1983.

**Effect of Amendments.** — The 1979, 2nd Sess., amendment, effective January 1, 1981, inserted the reference to § 105-446.3:1 in the first sentence and added the former second sentence.

The 1981 amendment, effective July 1, 1981, substituted the present second and third sentences for the former second sentence, which read: "No refund or rebate allowed under this Article for the purchase of a blend of gasoline or fuel and a minimum of ten percent (10%) anhydrous ethanol shall exceed the special fuels tax on that blend, reduced by one cent (1¢)."

The 1983 amendment, effective June 23, 1983, substituted "for the year ending December 31, 1985, eight and one-half cents (8½¢) per gallon; for subsequent years ending December 31, six cents (6¢) per gallon" for "for subsequent years ending December 31, eleven cents (11¢) per gallon." at the end of the last sentence.

**§ 105-449.28:** Repealed by Session Laws 1981, c. 105, s. 4, effective July 1, 1982.

## **§ 105-449.30. Refund for nonhighway use.**

Any person who shall purchase fuel and pay the tax thereon pursuant to this Article and use the same for purposes other than to propel vehicles operated or intended to be operated on the highway irrespective of whether originally purchased for such nonhighway use or not, shall, upon making application therefor as herein provided, be reimbursed at the rate of nine and one-half cents (9½¢) per gallon for the year ending December 31, 1981, and at the rate of eleven cents (11¢) per gallon for subsequent years ending December 31. Such refund shall be paid only to persons who secure refund permits and otherwise comply insofar as practicable with the provisions of G.S. 105-446, relating to refunds, as modified by regulations of the Secretary. (1955, c. 822, s. 1; 1963, c. 1169, s. 5; 1969, c. 600, s. 21; 1973, c. 476, s. 193; 1981, c. 690, s. 2.)

**Effect of Amendments.** — The 1981 amendment, effective July 1, 1981, substituted, near

the middle of the section, "nine and one-half cents (9½¢) per gallon for the year ending

December 31, 1981, and the rate of eleven cents (11¢) for "seven cents (7¢) per gallon for the year ending December 31, 1969, and at the rate of eight cents (8¢)."

### § 105-449.31. Refund on taxpaid fuel transported to another state.

Upon application to the Secretary, any person, association or corporation who purchases special fuel upon which the tax imposed by this Article has been paid, and who transports the fuel to another state for sale or use in that state may be reimbursed at the rate of eleven cents (11¢) per gallon for the amount of tax paid. As used in this section, to "transport" means to carry special fuel in a cargo tank, tank car, barge or barrel and does not include carrying fuel in a tank connected with or attached to the engine of a motor vehicle. (1955, c. 822, s. 1; 1973, c. 476, s. 193; 1981 (Reg. Sess., 1982), c. 1206.)

**Effect of Amendments.** — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982 and applicable to purchases of special fuel made on or after that date, rewrote this section to the extent that a detailed comparison is not here practical.

### § 105-449.36. July 1, 1981, inventory.

Every supplier of special fuels and every user-seller who is a retail distributor of special fuels who shall have on hand or in his possession special fuels on which the nine cents (9¢) tax has been paid or accrued shall take a true inventory of all such special fuels on hand or in his possession as of 12:01 A.M., July 1, 1981, and shall on or before July 20, 1981, report to the Secretary of Revenue the amount of such fuels and shall remit to the Secretary an additional tax of three cents (3¢) per gallon. The report required shall be in such form as may be prescribed by the Secretary. (1955, c. 822, s. 1; 1969, c. 600, s. 21; 1973, c. 476, s. 193; 1981, c. 690, s. 2.)

**Effect of Amendments.** — The 1981 amendment, in the first sentence, substituted "nine cents (9¢)" for "seven cents (7¢)," "1981" for "1969" in two places, deleted "on hand" following "such fuels" and substituted "remit" for "pay" and "three cents (3¢)" for "two cents (2¢)" near the end of the sentence.

## ARTICLE 36B.

### *Tax on Carriers Using Fuel Purchased outside State.*

### § 105-449.37. Definitions; tax liability.

(a) As used in this Article unless the context clearly requires otherwise:

- (1) "Motor carrier" means every person, firm, or corporation who operates or causes to be operated on any highway in this State a passenger vehicle with seating capacity for more than 20 passengers, a road tractor, a tractor truck, or a truck with more than two axles. The term does not include the United States, the State or its political subdivisions, operators of special mobile equipment as defined in G.S. 20-4.01(44), or nonprofit religious, educational, charitable or benevolent organizations;
- (2) "Operations" means operations of all vehicles described in subdivision (1), whether loaded or empty and whether or not operated for compensation; and

(3) "Secretary" means the Secretary of Revenue.

(b) A motor carrier who operates on one or more days of a quarter is liable for the tax imposed by this Article for that quarter and is entitled to the credits allowed for that quarter. (1955, c. 823, s. 1; 1973, c. 476, s. 193; 1983, c. 713, s. 55.)

**Effect of Amendments.** — The 1983 amendment, effective Jan. 1, 1984, rewrote this section.

### § 105-449.38. Tax levied.

A road tax for the privilege of using the streets and highways of this State is hereby imposed upon every motor carrier on the amount of gasoline or other motor fuel used by such motor carrier in its operations within this State. The tax shall be at the rate of nine cents (9¢) per gallon with respect to fuel used prior to July 1, 1981, and at the rate of twelve cents (12¢) per gallon with respect to fuel used on or after July 1, 1981. Except as credit for certain taxes as hereinafter provided for in this Article, taxes imposed on motor carriers by this Article are in addition to any taxes imposed on such carriers by any other provisions of law. The tax herein levied is for the same purposes as the tax imposed under the provisions of G.S. 105-434. (1955, c. 823, s. 2; 1969, c. 600, s. 22; 1981, c. 690, s. 3.)

**Effect of Amendments.** — The 1981 amendment, effective July 1, 1981, deleted "which tax shall be equivalent to nine cents (9¢) per gallon

calculated" following "motor carrier" in the first sentence and added the second sentence.

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

Every motor carrier subject to the tax hereby imposed shall be entitled to a credit on such tax equivalent to twelve cents (12¢) per gallon on all gasoline or other motor fuels purchased on or after July 1, 1981, by such carrier in this State for use in its operations either within or without this State and upon which gasoline or other motor fuels the tax imposed by the laws of this State has been paid by such carrier. Carriers who have on hand inventory as of 12:01 A.M., July 1, 1981, on which the nine cents (9¢) tax has been paid shall take credit for nine cents (9¢) per gallon on all such gasoline and other motor fuels when filing the report required under G.S. 105-449.45. Evidence of the payment of such tax in such form as may be required by, or is satisfactory to, the Secretary shall be furnished by each such carrier claiming the credit herein allowed. When the amount of the credit herein provided to which any motor carrier is entitled for any quarter exceeds the amount of the tax for which such carrier is liable for the same quarter, such excess may under regulations of the Secretary be allowed as a credit on the tax for which such carrier would be otherwise liable for another quarter or quarters; or upon application within 180 days from the end of any quarter, duly verified and presented, in accordance with regulations promulgated by the Secretary and supported by such evidence as may be satisfactory to the Secretary, such excess may be refunded to said motor carrier.

Unless the Secretary of Revenue exercises his discretion as hereinafter provided, or as provided in G.S. 105-449.40, he shall allow such refund only after an audit of the applicant's records. However, he may, in his sole discretion, make refunds without prior audit or without having been furnished a bond pursuant to G.S. 105-449.40 if the motor carrier has complied with the provisions of this Subchapter and rules and regulations promulgated thereunder for

a period of one full prior registration year. (1955, c. 823, s. 3; 1969, c. 600, s. 22; c. 1098; 1973, c. 476, s. 193; 1979, 2nd Sess., c. 1098; 1981, c. 690, s. 3.)

**Effect of Amendments.** — The 1979, 2nd Sess., amendment, effective July 1, 1980, rewrote the second paragraph, which formerly read: "The Secretary shall not allow such refund except after an audit of the applicant's records and shall audit the records of an applicant at least once a year."

The 1981 amendment, effective July 1, 1981, substituted "twelve cents (12¢)" for "nine cents

(9¢)," "1981" for "1969" and "its" for "their" preceding "operations" in the first sentence of the first paragraph, substituted "on hand inventory" for "inventory on hand," "1981" for "1969," "nine cents (9¢)" for "seven cents (7¢)" in two places and "the" for "tax" preceding "report" in the second sentence of the first paragraph.

## § 105-449.42. Payment of tax.

For the purposes of making payment of taxes pursuant to this Article and making reports pursuant to this Article, the year is divided into four quarters of three consecutive months each, and the first quarter shall consist of the months of January, February and March. The tax herein imposed shall be paid by each motor carrier to the Secretary on or before the last day of the month immediately following the quarter with respect to which tax liability hereunder accrues and shall be calculated upon the amount of gasoline or other motor fuel used in its operations within this State by each such carrier during the quarter ending with the last day of the preceding month. (1955, c. 823, s. 6; 1973, c. 476, s. 193; 1979, 2nd Sess., c. 1086, s. 2; 1983, c. 29, s. 2.)

**Effect of Amendments.** — The 1979, 2nd Sess., amendment, effective October 1, 1980, substituted "last day" for "twentieth day" near the middle of the second sentence.

The 1983 amendment, effective July 1, 1983, and applicable to taxable periods beginning on and after that date, deleted the former last sen-

tence, which read "A lessee of a motor vehicle, and not the lessor thereof, shall make such reports and be liable for and pay such taxes as may become due under this Article with respect to all operations by a lessee pursuant to any lease of a motor vehicle."

## § 105-449.42A. Leased motor vehicles.

(a) Except as provided in this section, the lessee of a motor vehicle, and not the lessor of the motor vehicle, is a "motor carrier" for the purposes of this Article.

(b) A lessor of a motor vehicle who gives written notice, by filing a report or otherwise, to the secretary that the lessor desires to be taxed as a motor carrier may be treated by the secretary as a motor carrier with respect to a motor vehicle leased to another by him as well as motor fuel consumed by the leased motor vehicle when the lessor supplies or pays for the motor fuel consumed by the motor vehicle or makes rental or other charges calculated to include the cost of the fuel. A lessee motor carrier may exclude from reports made pursuant to this Article a motor vehicle of which he is the lessee if that motor vehicle is leased from a lessor who is a motor carrier pursuant to this section.

(c) Subsections (a) and (b) govern the primary liability of lessors and lessees of motor vehicles under this Article. Both the lessor and lessee, however, are jointly and severally liable for compliance with this Article. (1983, c. 29, s. 3.)

**Editor's Note.** — Session Laws 1983, c. 29, s. 4, makes this section effective July 1, 1983, and

applicable to taxable periods beginning on and after that date.

**§ 105-449.43. Taxes and fees to be paid to Highway Fund.**

All taxes and fees collected under this Article shall be paid to the State Highway Fund. (1955, c. 823, s. 7; 1981 (Reg. Sess., 1982), c. 1211, s. 3.)

**Effect of Amendments.** — The 1981 (Reg. Sess., 1982) amendment rewrote this section, which formerly read: "All taxes collected pursuant to the provisions of this Article shall be paid into the State Highway and Public Works Fund."

**§ 105-449.45. Reports of carriers.**

Except as provided in G.S. 105-449.49, every motor carrier subject to the tax imposed by this Article shall on or before the last day of April, July, October and January of every year make to the Secretary such reports of its operations during the quarter of the year ending the last day of the preceding month as the Secretary may require and such other reports from time to time as the Secretary may deem necessary. When any person required to file a report as provided by this Article fails to file such report within the time prescribed by this Article, he shall be subject to a penalty of not more than fifty dollars (\$50.00) for the first failure, and not more than one hundred dollars (\$100.00) for any subsequent failure, and any penalty pursuant to this section shall be assessed and collected by the Secretary in the same manner as is provided in this Article with respect to any tax deficiency, and shall be subject to all other applicable provisions relating to the assessment and collection of taxes pursuant to this Article. However, motor carriers are not required to make any reports with respect to vehicles used exclusively in intrastate operations in this State except as the Secretary may specifically from time to time require, but this is not to be construed to eliminate the requirements as to registration and identification markers with respect to all such vehicles as provided in G.S. 105-449.47. (1955, c. 823, s. 9; 1973, c. 476, s. 193; 1979, 2nd Sess., c. 1086, s. 2; 1981 (Reg. Sess., 1982), c. 1254, s. 2.)

**Effect of Amendments.** — The 1979, 2nd Sess., amendment, effective October 1, 1980, substituted "last day" for "twentieth day" preceding "of April" near the beginning of the first sentence.

The 1981 (Reg. Sess., 1982) amendment, effective Jan. 1, 1983, added "Except as provided in G.S. 105-449.49," at the beginning of the section.

**§ 105-449.47. Registration of vehicles.**

A motor carrier may not operate or cause to be operated in this State any vehicle listed in the definition of motor carrier unless the motor carrier has registered the vehicle for purposes of the tax imposed by this Article with the Commissioner of Motor Vehicles or the Secretary, as appropriate. All vehicles required to be registered under this section that are registered in this State under G.S. 20-87 or G.S. 20-88 shall be registered with the Commissioner of Motor Vehicles pursuant to G.S. 20-88.01 for the purposes of the tax imposed by this Article. All other vehicles required to be registered under this section shall be registered with the Secretary.

Upon application and payment of a fee of ten dollars (\$10.00), the Secretary shall issue a registration card and identification marker for a vehicle. The registration card shall be carried in the vehicle for which it was issued when the vehicle is in this State. The identification marker shall be clearly displayed at all times and shall be affixed to the vehicle for which it was issued in the place and manner designated by the Secretary. Every identification marker issued shall bear a number that corresponds to the number on the registration

card issued for the same vehicle. Registration cards and identification markers required by this section shall be issued on a calendar year basis. The Secretary may renew registration cards and identification markers without issuing new cards and markers. All identification markers issued by the Secretary remain the property of the State. (1955, c. 823, s. 11; 1973, c. 746, s. 193; 1983, c. 713, s. 56.)

**Effect of Amendments.** — The 1983 amendment, effective Jan. 1, 1984, rewrote this section.

### § 105-449.48. Fees paid to Highway Fund.

All fees collected under this Article shall be paid to the Highway Fund. (1955, c. 823, s. 12; 1973, c. 476, s. 193; 1983, c. 713, s. 57.)

**Effect of Amendments.** — The 1983 amendment, effective Jan. 1, 1984, rewrote this section, which read "For issuing each registration card, a fee of one dollar (\$1.00) shall be paid to the Secretary and no registration card shall be

issued unless the applicant pays such fee upon making application for the registration card. Such fees shall be paid into the State Highway and Public Works Fund."

### § 105-449.49. Temporary permits.

Upon application to the Secretary and payment of a fee of twenty-five dollars (\$25.00), a motor carrier may obtain a temporary permit authorizing the carrier to operate a vehicle in the State without registering the vehicle in accordance with G.S. 105-449.47 for not more than 20 days. A motor carrier to whom a temporary permit has been issued may elect not to report its operation of the vehicle during the 20-day period, as otherwise required by G.S. 105-449.45. A motor carrier who files a report for a quarter in which the carrier paid a temporary permit fee may claim a credit for the amount of the fee. A motor carrier whose operations are exclusively intrastate may obtain a refund of the fee by filing a report for the quarter in which the fee was paid. (1955, c. 823, s. 13; 1973, c. 476, s. 193; 1979, c. 11; 1981 (Reg. Sess., 1982), c. 1254, s. 1; 1983, c. 713, s. 58.)

**Effect of Amendments.** — The 1981 (Reg. Sess., 1982) amendment, effective Jan. 1, 1983, rewrote this section, which formerly read in its entirety: "In an emergency, the Secretary, by letter or telegram, may authorize a vehicle to be operated without a registration card or identification marker for not more than 20 days."

The 1983 amendment, effective Jan. 1, 1984, substituted "registering the vehicle in accordance with G.S. 105-449.47" for "a registration card and identification marker."

### § 105-449.51. Violations declared to be misdemeanors.

Any person who operates or causes to be operated on a highway in this State a motor vehicle that does not carry a registration card as required by this Article, does not properly display an identification marker as required by this Article, or is not registered in accordance with this Article is guilty of a misdemeanor and, upon conviction thereof, shall be fined no less than ten dollars (\$10.00) nor more than two hundred dollars (\$200.00). Each day's operation in violation of any provision of this section shall constitute a separate offense. (1955, c. 823, s. 15; 1973, c. 476, s. 193; 1983, c. 713, s. 59.)

**Effect of Amendments.** — The 1983 amendment, effective Jan. 1, 1984, in the first sentence, substituted the language beginning "as required by this Article" and ending "is guilty" for "that this Article requires it to carry, or any motor vehicle that does not display in such manner as is prescribed by the Secretary the identification marker that this Article requires

to be displayed, shall be guilty," substituted "shall be fined no less than" for "shall be punished by a fine of not less than," substituted "a" for "any" preceding "highway in this State" and preceding "motor vehicle that does not carry" and substituted "a" for "the" preceding "registration card."

## § 105-449.52. Violators to pay penalty and furnish bond.

When any person is discovered in this State operating a vehicle in violation of the provisions of this Article, it shall be unlawful for anyone thereafter to operate said vehicle on the streets or highways of this State, except to remove it from the street or highway for purposes of parking or storing said vehicle, until he shall pay to the Department of Revenue a penalty of seventy-five dollars (\$75.00). Such penalty may be paid to an agent of the Division of Motor Vehicles. All penalties received by the Department of Revenue under this section shall be paid into the Highway Fund. Any person denying his liability for such penalty may pay the same under protest. He may apply to the Department of Revenue for a hearing, and said hearing shall be granted before a duly designated employee or agent of the Department within 30 days after receipt of the request for such hearing. If after said hearing the Department determines that the person was not liable for the penalty, the amount collected shall be refunded to him. If after said hearing the Department determines that the person was liable for said penalty, the person paying the penalty may bring an action in the Superior Court of Wake County against the Secretary of Revenue for refund of the penalty. No restraining order or injunction shall issue from any court of the State to restrain or enjoin the collection of the penalty or to permit the operation of said vehicle without payment of the penalty prescribed herein.

In addition, the Secretary may, if he deems it desirable or necessary to secure compliance with the provisions of this Article, require the furnishing of a bond to the Secretary in the amount of two hundred dollars (\$200.00), in such form and with such surety or sureties as he may prescribe, conditioned on registering or making an application for registration in accordance with this Article within 10 days and conditioned on the payment of any taxes found to be due pursuant to this Article. In cases where the Secretary shall require such bond, it shall be unlawful for anyone thereafter to operate said vehicle on the streets or highways of this State, except to remove it from the street or highway for purposes of parking or storing said vehicle, unless and until said bond is furnished.

Whenever the Secretary is required to exercise his discretion under the provisions of this section, such discretion may be exercised by him or by a duly designated agent or employee of the Division of Motor Vehicles or the Department of Revenue. (1955, c. 823, s. 16; 1957, c. 948; 1973, c. 476, s. 193; 1975, c. 716, s. 5; 1981, c. 690, s. 18; 1983, c. 713, s. 60.)

**Effect of Amendments.** — The 1981 amendment, effective July 1, 1981, substituted "seventy-five dollars (\$75.00)" for "twenty-five dollars (\$25.00)" at the end of the first sentence of the first paragraph.

The 1983 amendment, effective Jan. 1, 1984,

substituted "registering or making an application for registration in accordance with this Article" for "a proper registration card and identification marker being applied for" in the first sentence of the second paragraph.

## SUBCHAPTER VIII. LOCAL GOVERNMENT SALES AND USE TAX.

### ARTICLE 39.

#### *Local Government Sales and Use Tax.*

#### **§ 105-465. County election as to adoption of local sales and use tax.**

The board of elections of any county, upon the written request of the board of county commissioners thereof, or upon receipt of a petition signed by qualified voters of the county equal in number to at least fifteen percent (15%) of the total number of votes cast in the county, at the last preceding election for the office of Governor, shall call a special election for the purpose of submitting to the voters of the county the question of whether a one percent (1%) sales and use tax as hereinafter provided will be levied.

The special election shall be held under the same rules and regulations applicable to the election of members of the General Assembly. No new registration of voters shall be required. All qualified voters in the county who are properly registered not later than 21 days (excluding Saturdays and Sundays) prior to the election shall be entitled to vote at said election. The county board of elections shall give at least 20 days' public notice prior to the closing of the registration books for the special election.

The county board of election shall prepare ballots for the special election which shall contain the words, "FOR the one percent (1%) local sales and use tax only on those items presently covered by the three percent (3%) sales and use tax," and the words, "AGAINST the one percent (1%) local sales and use tax only on those items presently covered by the three percent (3%) sales and use tax," with appropriate squares so that each voter may designate his vote by his cross (X) mark.

The county board of elections shall fix the date of the special election; provided, however, that the special election shall not be held on the date of any biennial election for county officers, nor within 60 days thereof, nor within one year from the date of the last preceding special election under this section. (1971, c. 77, s. 2; 1981, c. 560, s. 2.)

**Effect of Amendments.** — The 1981 amendment, effective with respect to elections held on and after Sept. 1, 1981, deleted "except that no

absentee ballots may be used" from the end of the first sentence of the second paragraph.

#### **§ 105-467. Sales tax imposed; limited to items on which the State now imposes a three percent sales tax.**

**Legal Periodicals.** — For survey of 1978 law on taxation, see 57 N.C.L. Rev. 1142 (1979).

#### **§ 105-468. Use tax imposed; limited to items upon which the State now imposes a three percent use tax.**

The use tax which may be imposed under this Article shall be at the rate of one percent (1%) of the cost price of each item or article of tangible personal property when the same is not sold but used, consumed or stored for use or consumption in the taxing county, except that no tax shall be imposed upon

such tangible personal property when, if the property were subject to the use tax imposed by G.S. 105-164.6, such property would be taxed by the State of North Carolina at a rate less than three percent (3%).

Every retailer engaged in business in this State and in the taxing county and required to collect the use tax levied by G.S. 105-164.6 shall also collect the one percent (1%) use tax when such property is to be used, consumed or stored in the taxing county, said one percent (1%) use tax to be collected concurrently with the State's use tax; but no retailer not required to collect the use tax levied by G.S. 105-164.6 shall be required to collect the one percent (1%) use tax. The use tax contemplated by this section shall be levied against the purchaser, and his liability for such use tax shall be extinguished only upon his payment of the use tax to the retailer, where the retailer is required to collect the tax, or to the Secretary of Revenue, or to the taxing county, as appropriate, where the retailer is not required to collect the tax.

Where a local sales or use tax has been paid with respect to said tangible personal property by the purchaser thereof, either in another taxing county within the State, or in a taxing jurisdiction outside the State where the purpose of the tax is similar in purpose and intent to the tax which may be imposed pursuant to this Article, said tax may be credited against the tax imposed under this section by a taxing county upon the same property. If the amount of sales or use tax so paid is less than the amount of the use tax due the taxing county under this section, the purchaser shall pay to the Secretary of Revenue or to the taxing county, as appropriate, an amount equal to the difference between the amount so paid in the other taxing county or jurisdiction and the amount due in the taxing county hereunder. The Secretary of Revenue or the taxing county, as appropriate, may require such proof of payment in another taxing county or jurisdiction as is deemed to be necessary and proper. The use tax levied hereunder shall not be subject to credit for payment of any State sales or use tax not imposed for the benefit and use of counties and municipalities. No credit shall be given under this section for sales or use taxes paid in a taxing jurisdiction outside this State if that taxing jurisdiction does not grant similar credit for sales taxes paid under this Article. (1971, c. 77, s. 2; 1973, c. 476, s. 193; 1979, 2nd Sess., c. 1100, s. 2.)

**Effect of Amendments.** — The 1979, 2nd Sess., amendment, effective July 1, 1981, added the last sentence of the third paragraph.

## § 105-472. Disposition and distribution of taxes collected.

With respect to the counties in which he shall collect and administer the tax, the Secretary of Revenue shall, on a quarterly basis, distribute to each taxing county and to the municipalities therein the net proceeds of the tax collected in that county under this Article which amount shall be determined by deducting taxes refunded, the cost to the State of collecting and administering the tax in the taxing county and such other deductions as may be properly charged to the taxing county, from the gross amount of the tax remitted to the Secretary of Revenue from the taxing county. The Secretary shall determine the cost of collection and administration, and that amount shall be retained by the State before distribution of the net proceeds of the tax. For the purposes of this Article, "municipalities" shall mean "incorporated cities and towns."

The board of county commissioners shall, in the resolution levying the tax, determine that the net proceeds of the tax shall be distributed in one of the following methods and thereafter said proceeds shall be distributed in accordance therewith:

- (1) The amount distributable to a taxing county and to the municipalities therein from the net proceeds of the tax collected therein shall be determined upon the following basis: The net proceeds of the tax collected in a taxing county shall be distributed to that taxing county and to the municipalities therein upon a per capita basis according to the total population of the taxing county, plus the total population of the municipalities therein; provided, however, that "total population" of a municipality lying within more than one county shall be only that part of its population which lives within the taxing county. For this purpose, the Secretary of Revenue shall determine a per capita figure by dividing the net proceeds of the tax collected under this Article for the preceding quarter within a taxing county by the total population of that taxing county plus the total population of all municipalities therein according to the most recent annual estimates of population as certified to the Secretary of Revenue by the State Budget Officer. The per capita figure thus derived shall be multiplied by the population of the taxing county and each respective municipality therein according to the most recent annual estimates of population as certified to the Secretary of Revenue by the State Budget Officer, and each respective product shall be the amount to be distributed to each taxing county and to each municipality therein. The State Budget Officer shall annually cause to be prepared and shall certify to the Secretary of Revenue such reasonably accurate population estimates of all counties and municipalities in the State as may be practicably developed; or
- (2) The net proceeds of the tax collected in a taxing county shall be divided between the county and the municipalities therein in proportion to the total amount of ad valorem taxes levied by each on property having a tax situs in the taxing county during the fiscal year next preceding such distribution. For purposes of this section, the amount of the ad valorem taxes levied by such county or municipality shall include any ad valorem taxes levied by such county or municipality in behalf of a taxing district or districts and collected by the county or municipality. In computing the amount of tax proceeds to be distributed to any county or municipality, the amount of any ad valorem taxes levied but not substantially collected shall be ignored. Each county and municipality receiving a distributable share of the sales and use tax levied under this Article shall in turn immediately share the proceeds with any district or districts in behalf of which the county or municipality levied ad valorem taxes in the proportion that the district levy bears to the total levy of the county or municipality. Any county or municipality which fails to provide the Department of Revenue with information concerning ad valorem taxes levied by that county or municipality adequate to permit a timely determination of the appropriate share of that county or municipality of tax proceeds collected under this Article may be excluded by the Secretary from each quarterly distribution with respect to which such information was not provided in a timely manner, and such tax proceeds shall then be distributed only to the governmental unit or units whose information was provided in a timely manner. For the purpose of computing the distribution of the tax under this subsection to any county and the municipalities located therein for any quarter with respect to which the property valuation of a public service company is the subject of an appeal pursuant to the provisions of the Machinery Act, or to applicable provisions of federal law, and the Department of Revenue is restrained by operation of law or by a court of competent jurisdiction from certifying such valuation to the county and the municipalities

therein, the Department shall use the last property valuation of such public service company which has been so certified in order to determine the ad valorem tax levies applicable to such public service company in the county and the municipalities therein.

Where local use taxes, levied pursuant to this Article, or to any other local sales tax act, which cannot be identified as being attributable to any particular taxing county are collected and remitted to the Secretary, he shall apportion said taxes to the taxing counties in the same proportion that the local sales and use taxes collected each month in a taxing county bears to the total local sales and use taxes collected in all taxing counties each month during the quarter for which a distribution is to be made, and the total net proceeds shall then be distributed as above provided.

The board of county commissioners in each taxing county shall, by resolution adopted during the month of April of each year, determine which of the two foregoing methods of distribution shall be in effect in the county during the next succeeding fiscal year. In order for such resolution to be effective, a certified copy thereof must be delivered to the Secretary of Revenue at his office in Raleigh within 15 calendar days after its adoption. If the board fails to adopt any resolution or if it fails to adopt a method of distribution not then in effect in the county, or if a certified copy of the resolution is not timely delivered to the Secretary, the method of distribution then in effect in the county shall continue in effect for the following fiscal year. The method of distribution in effect on the first of July of each fiscal year shall apply to every distribution made during that fiscal year. (1971, c. 77, s. 2; 1973, c. 476, s. 193; c. 752; 1979, c. 12, s. 1; 1979, 2nd Sess., c. 1134, s. 49; 1981, c. 4, s. 2.)

**Local Modification.** — Burke: 1983, c. 273.

**Effect of Amendments.** — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "State Budget Officer" for "Director of the North Carolina Department of Administration" in three places in subdivision (1).

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

The 1981 amendment, effective July 1, 1981, added the last sentence of subdivision (2).

## § 105-473. Repeal of levy.

(a) The board of elections of any county, upon the written request of the board of county commissioners thereof, or upon receipt of a petition signed by qualified voters of the county equal in number to at least fifteen percent (15%) of the total number of votes cast in the county at the last preceding election for the office of Governor, shall call a special election for the purpose of submitting to the voters of the county the question of whether the levy of a one percent (1%) sales and use tax theretofore levied should be repealed.

The special election shall be held under the same rules and regulations applicable to the election of members of the General Assembly. No new registration of voters shall be required. All qualified voters in the county who are properly registered not later than 21 days (excluding Saturdays and Sundays) prior to the election shall be entitled to vote at said election. The county board of elections shall give at least 20 days' public notice prior to the closing of the registration books for the special election.

The county board of elections shall prepare ballots for the special election which shall contain the words "FOR repeal of the one percent (1%) local sales and use tax levy," and the words "AGAINST repeal of the one percent (1%) local sales and use tax levy," with appropriate squares so that each voter may designate his vote by his cross (X) mark.

The county board of elections shall fix the date of the special election; provided, however, that the special election shall not be held on the day of any

biennial election for county officers, nor within 60 days thereof, nor within one year from the date of the last preceding special election held under this section. (1971, c. 77, s. 2; 1973, c. 476, s. 193; 1981, c. 560, s. 2.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1981 amendment, effective with respect to elections held on

and after Sept. 1, 1981, deleted "except that no absentee ballots may be used" from the end of the first sentence of the second paragraph of subsection (a).

## § 105-474. Definitions; construction of Article; remedies and penalties.

**Legal Periodicals.** — For survey of 1978 law on taxation, see 57 N.C.L. Rev. 1142 (1979).

§ 105-475 to 105-479: Reserved for future codification purposes.

### ARTICLE 40.

#### *Supplemental Local Government Sales and Use Taxes.*

## § 105-480. Short title.

This Article shall be known as the Supplemental Local Government Sales and Use Tax Act. (1983, c. 908, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 908, s. 45, makes this Article effective upon ratification. The act was ratified July 21, 1983.

## § 105-481. Purpose and intent.

It is the purpose of this Article to afford the counties and cities of this State an opportunity to obtain an added source of revenue with which to meet their growing financial needs, and to reduce their reliance on other revenues, such as the property tax, by providing all counties of the State that are subject to this Article with authority to levy one-half percent ( $\frac{1}{2}\%$ ) sales and use taxes. (1983, c. 908, s. 1.)

## § 105-482. Limitations.

This Article applies only to counties that levy one percent (1%) sales and use taxes under Article 39 of this Chapter or under Chapter 1096 of the 1967 Session Laws and do not levy one-half percent ( $\frac{1}{2}\%$ ) local sales and use taxes under Article 41 of this Chapter. (1983, c. 908, s. 1.)

## § 105-483. Levy and collection of additional taxes.

Any county subject to this Article may levy one-half percent ( $\frac{1}{2}\%$ ) local sales and use taxes in addition to any other State and local sales and use taxes levied pursuant to law. Except as provided in this Article, the adoption, levy, collection, distribution, administration, and repeal of these additional taxes shall be in accordance with Article 39 of this Chapter. In applying the provisions of

Article 39 of this Chapter to this Article, references to "this Article" mean Article 40 of Chapter 105. All taxes levied pursuant to this Article shall be collected by the Secretary and may not be collected by a taxing county. The exemption for building materials in G.S. 105-468.1 does not apply to taxes levied under this Article. (1983, c. 908, s. 1.)

### § 105-484. Form of ballot.

(a) The form of the question to be presented on a ballot for a special election concerning the additional taxes authorized by this Article shall be: "FOR additional one-half percent ( $\frac{1}{2}\%$ ) local sales and use taxes" or "AGAINST additional one-half percent ( $\frac{1}{2}\%$ ) local sales and use taxes."

(b) The form of the question to be presented on a ballot for a special election concerning the repeal of any additional taxes levied pursuant to this Article shall be: "FOR repeal of the additional one-half percent ( $\frac{1}{2}\%$ ) local sales and use taxes" or "AGAINST repeal of the additional one-half percent ( $\frac{1}{2}\%$ ) local sales and use taxes." (1983, c. 908, s. 1.)

### § 105-485. Retail collection bracket.

The following bracket applies to collections by retailers in a county that levies additional sales and use taxes under this Article:

- (1) No amount on sales of less than 10¢;
- (2) 1¢ on sales of 10¢ to 25¢;
- (3) 2¢ on sales of 26¢ to 53¢;
- (4) 3¢ on sales of 54¢ to 75¢;
- (5) 4¢ on sales of 76¢ to 95¢;
- (6) 5¢ on sales of 96¢ to \$1.22; and
- (7) Sales of over \$1.22 — straight four and one-half percent ( $4\frac{1}{2}\%$ ) with major fractions governing. (1983, c. 908, s. 1.)

### § 105-486. Distribution and use of additional taxes.

The Secretary shall, on a quarterly basis, distribute the net proceeds of the additional one-half percent ( $\frac{1}{2}\%$ ) sales and use taxes levied under this Article to the taxing counties on a per capita basis according to the most recent annual population estimates certified to the Secretary by the State Budget Officer. The amount distributed to a taxing county shall then be divided among the county and its municipalities in accordance with the method by which the one percent (1%) sales and use taxes levied in that county pursuant to Article 39 of this Chapter or Chapter 1096 of the 1967 Session Laws are distributed. If any taxes levied under this Article by a county have not been collected in that county for a full quarter because of the levy or repeal of the taxes, the Secretary shall distribute a pro rata share to that county for that quarter based on the number of months the taxes were collected in that county during the quarter. (1983, c. 908, s. 1.)

### § 105-487. Use of additional tax revenue by counties and municipalities.

(a) Except as provided in subsection (c), forty percent (40%) of the revenue received by a county from additional one-half percent ( $\frac{1}{2}\%$ ) sales and use taxes levied under this Article during the first five fiscal years in which the additional taxes are in effect in the county and thirty percent (30%) of the revenue received by a county from these taxes in the second five fiscal years in which the taxes are in effect in the county may be used by the county only for public school capital outlay purposes or to retire any indebtedness incurred by the county for these purposes.

(b) Except as provided in subsection (c), forty percent (40%) of the revenue received by a municipality from additional one-half percent ( $\frac{1}{2}\%$ ) sales and use taxes levied under this Article during the first five fiscal years in which the additional taxes are in effect in the municipality and thirty percent (30%) of the revenue received by a municipality from these taxes in the second five fiscal years in which the taxes are in effect in the municipality may be used by the municipality only for water and sewage capital outlay purposes or to retire any indebtedness incurred by the municipality for these purposes.

(c) The Local Government Commission may, upon petition by a county or municipality, authorize a county or municipality to use part or all its tax revenue, otherwise required by subsection (a) or (b) to be used for public schools or water and sewage capital needs, for any lawful purpose. The petition shall be in the form prescribed by the Local Government Commission and shall demonstrate that the county or municipality can provide for its public school or water and sewage capital needs without restricting the use of part or all of the designated amount of the additional one-half percent ( $\frac{1}{2}\%$ ) sales and use tax revenue for these purposes.

In making its decision, the Local Government Commission may consider information from sources other than the petition. The Commission shall issue a written decision on each petition stating the findings of the Commission concerning the public school or water and sewage capital needs of the petitioning county or municipality and the percentage of revenue otherwise restricted by subsection (a) or (b) that may be used by the petitioning county or municipality for any lawful purpose.

Decisions of the Commission allowing counties or municipalities to use a percentage of their tax revenue that would otherwise be restricted under subsection (a) or (b) for any lawful purpose are final and shall continue in effect until the restrictions imposed by those subsections expire. A county or municipality whose petition is denied, in whole or in part, by the Commission may subsequently submit a new petition to the Commission.

(d) For purposes of determining the number of fiscal years in which one-half percent ( $\frac{1}{2}\%$ ) sales and use taxes levied under this Article have been in effect in a county or municipality, these taxes are considered to be in effect only from the effective date of the levy of these taxes and are considered to be in effect for a full fiscal year during the first year in which these taxes were in effect, regardless of the number of months in that year in which the taxes were actually in effect.

(e) A county or municipality may expend part or all of the revenue restricted for public school or water and sewage capital needs pursuant to subsections (a) and (b) in the fiscal year in which the revenue is received, or the county or municipality may place part or all of this revenue in a capital reserve fund and shall specifically identify this revenue in accordance with Chapter 159 of the General Statutes. (1983, c. 908, s. 1.)

## ARTICLE 41.

### *Alternative Local Government Sales and Use Taxes.*

#### § 105-488. Short title.

This Article shall be known as the "Alternative Local Government Sales and Use Tax Act." (1983, c. 908, s. 1.)

**Editor's Note.** — Session Laws 1983, c. 908, s. 45, makes this Article effective upon ratification. The act was ratified July 21, 1983.

**§ 105-489. Limitations.**

This Article applies only to counties that do not levy one percent (1%) sales and use taxes under Article 39 of this Chapter or under Chapter 1096 of the 1967 Session Laws. (1983, c. 908, s. 1.)

**§ 105-490. Levy and collection of taxes.**

Any county subject to this Article may levy one-half percent ( $\frac{1}{2}\%$ ) local sales and use taxes pursuant to the procedures established in G.S. 105-465 and G.S. 105-466 for the levy of one percent (1%) sales and use taxes authorized by Article 39 of this Chapter. Except as provided in this Article, the provisions of Article 39 of this Chapter apply to any one-half percent ( $\frac{1}{2}\%$ ) local sales and use taxes levied under this Article. In applying the provisions of Article 39 of this Chapter to this Article, references to "this Article" mean Article 41 of Chapter 105. All taxes levied pursuant to this Article shall be collected by the Secretary and may not be collected by a taxing county. The exemption for building materials in G.S. 105-468.1 does not apply to taxes levied under this Article. (1983, c. 908, s. 1.)

**§ 105-491. Form of ballot.**

(a) The form of the question to be presented on a ballot for a special election concerning the taxes authorized by this Article shall be: "FOR one-half percent ( $\frac{1}{2}\%$ ) local sales and use taxes" or "AGAINST one-half percent ( $\frac{1}{2}\%$ ) local sales and use taxes."

(b) The form of the question to be presented on a ballot for a special election concerning the repeal of any taxes levied pursuant to this Article shall be: "FOR repeal of the one-half percent ( $\frac{1}{2}\%$ ) local sales and use taxes" or "AGAINST repeal of the one-half percent ( $\frac{1}{2}\%$ ) local sales and use taxes." (1983, c. 908, s. 1.)

**§ 105-492. Retail collection bracket.**

The following bracket applies to collections by retailers in a county that levies sales and use taxes under this Article:

- (1) No amount on sales of less than 10¢;
- (2) 1¢ on sales of 10¢ to 30¢;
- (3) 2¢ on sales of 31¢ to 65¢;
- (4) 3¢ on sales of 66¢ to 95¢;
- (5) 4¢ on sales of 96¢ to \$1.28; and
- (6) Sales of over \$1.28 — straight three and one-half percent ( $3\frac{1}{2}\%$ ) with major fractions governing. (1983, c. 908, s. 1.)

**§ 105-493. Distribution and use of taxes.**

The Secretary shall, on a quarterly basis, distribute the net proceeds of any one-half percent ( $\frac{1}{2}\%$ ) sales and use taxes levied under this Article in accordance with G.S. 105-486. For purposes of the distribution under G.S. 105-486, a county that levies one-half percent ( $\frac{1}{2}\%$ ) sales and use taxes under this Article is considered a taxing county under that section. To make the distribution required by G.S. 105-486 and this section, the Secretary shall add the net proceeds of local sales and use taxes levied under Article 40 of this Chapter and under this Article, and shall then distribute this amount to the taxing counties on a per capita basis as provided in G.S. 105-486. The amount distributed to a county that levies one-half percent ( $\frac{1}{2}\%$ ) sales and use taxes under this Article shall be divided among the county and its municipalities on either a per capita or an ad valorem tax basis, as designated by the board of county commis-

sioners in a resolution adopted pursuant to G.S. 105-472. If any taxes levied under this Article by a county have not been collected in that county for a full quarter because of the levy or repeal of the taxes, the Secretary shall distribute a pro rata share to that county for that quarter based on the number of months the taxes were collected in that county during the quarter. (1983, c. 908, s. 1.)

## § 105-494. Use of additional tax revenue by counties and municipalities.

Sales and use tax revenue received by a county or municipality from one-half (½%) sales and use taxes levied under this Article are subject to the restrictions imposed by G.S. 105-487 on revenue received by counties and municipalities from one-half percent (½%) sales and use taxes levied under that Article. (1983, c. 908, s. 1.)

**Chapter 105A.****Setoff Debt Collection Act.****Article 1.****In General.**

Sec.

105A-2. Definitions.

**ARTICLE 1.***In General.***§ 105A-1. Purposes.****CASE NOTES**

Cited in Appeal of Willett, 306 N.C. 617, 295  
S.E.2d 469 (1982).

**§ 105A-2. Definitions.**

As used in this Article:

(1) "Claimant agency" means and includes:

- a. The State Education Assistance Authority as enabled by Article 23 of Chapter 116 of the General Statutes;
- b. The North Carolina Department of Human Resources when in the exercise of its authority to collect health profession student loans made pursuant to G.S. 131-121;
- c. The North Carolina Department of Human Resources when in the performance of its duties under the Medical Assistance Program enabled by Chapter 108, Article 2, Part 5, and any county operating the same Program at the local level, when and only to the extent such a county is in the performance of Medical Assistance Program collection functions;
- d. The North Carolina Department of Human Resources when in the performance of its duties under the Child Support Enforcement Program (as enabled by Chapter 110, Article 9) to obtain indemnification for the State for past public assistance paid and any county operating the same Program at the local level, when and only to the extent such a county is engaged in the performance of those same program duties;
- e. The University of North Carolina, including its constituent institutions as specified by G.S. 116-2(4);
- f. The North Carolina Memorial Hospital in the conduct of its financial affairs and operations pursuant to G.S. 116-37;
- g. The Board of Governors of the University of North Carolina and the State Board of Education through the College Scholarship Loan Committee when in the performance of its duties of administering the Scholarship Loan Fund for Prospective College Teachers enabled by Chapter 116, Article 5;
- h. The Office of the North Carolina Attorney General on behalf of any State agency when the claim has been reduced to a judgment;

- i. The State Board of Education through community colleges, technical institutes, and industrial education centers as enabled by Chapter 115D in the conduct of their financial affairs and operations;
- j. Broughton Hospital, Cherry Hospital, Dorothea Dix Hospital, John Umstead Hospital, Caswell School at Kinston, Murdoch School, O'Berry School, Western Carolina Center, Black Mountain Alcoholic Rehabilitation Center, Butner Alcoholic Rehabilitation Center, Walter B. Jones Alcoholic Rehabilitation Center, School for the Deaf at Morganton, North Carolina Sanatorium at McCain, Western Carolina Sanatorium at Black Mountain, Eastern North Carolina Sanatorium at Wilson, and Gravelly Sanatorium at Chapel Hill under Chapter 143, Article 7; Governor Morehead School under Chapter 115, Article 40; Central North Carolina School for the Deaf under Chapter 115, Article 41; Wright School for Treatment and Education of Emotionally Disturbed Children under Chapter 122, Article 12A; the Lenox Baker Children's Hospital under Chapter 131, Article 14; and these same institutions by any other names by which they may be known in the future;
- k. The North Carolina Department of Revenue;
- l. The Administrative Office of the Courts;
- m. The Division of Forest Resources of the Department of Natural Resources and Community Development;
- n. The Administrator of the Teachers' and State Employees' Comprehensive Major Medical Plan, established in Article 3 of General Statutes Chapter 135.

(1979, c. 801, s. 94; 1981, c. 724; 1983, c. 922, s. 21.11.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Editor's Note.** — Section 131-121, referred to in paragraph (1)b of this section, was repealed by Session Laws 1981 (Reg. Sess. 1982), c. 1388, s. 1, effective July 1, 1982. Chapter 108, Article 2, Part 5, referred to in paragraph (1)c, was repealed by Session Laws 1981, c. 275, s. 1, effective October 1, 1981. Chapter

115, Article 40, referred to in paragraph (1)j, was repealed by Session Laws 1981, c. 423, s. 1, effective July 1, 1981.

**Effect of Amendments.** — The 1981 amendment, effective July 1, 1981, and applicable to refunds due on and after Jan. 1, 1982, added paragraph m of subdivision (1).

The 1983 amendment, effective July 22, 1983, deleted "and" at the end of subdivision (1)k and added subdivision (1)n.

## § 105A-8. Hearing procedure.

(a) If a claimant agency receives written application of the debtor's intention to contest the claim upon which the intended setoff is based, it shall grant a hearing to determine whether the claim is valid which shall be conducted according to procedures prescribed by Article 3 of G.S. Chapter 105A. The provisions of said Article 3 shall not apply to The University of North Carolina or its constituent or affiliated boards, agencies, or institutions, which shall conduct hearings according to administrative procedures deemed lawful by the Attorney General. Additionally, it shall be determined at the hearing whether the claimed sum asserted as due and owing is correct, and if not, an adjustment to the claim shall be made.

(1979, c. 801, s. 94; 1983, c. 419.)

**Only Part of Section Set Out.** — As the rest of the section was not affected by the amendment, it is not set out.

**Effect of Amendments.** — The 1983 amendment, effective June 2, 1983, substituted the present first and second sentences of subsection

(a) for a former first sentence which read: "If a claimant agency receives written application of the debtor's intention to contest at hearing the claim upon which the intended setoff is based,

it shall grant a hearing according to procedures established under Chapter 105A, the Administrative Procedure Act, to determine whether the claim is valid."

CASE NOTES

**A constituent member of the University of North Carolina is not specifically exempted from the hearing procedures of the Setoff Debt Collection Act. In re Willett, 56**

N.C. App. 584, 289 S.E.2d 576, cert. withdrawn as improvidently granted, 306 N.C. 617, 295 S.E.2d 469 (1982).

1983 CUMULATIVE SUPPLEMENT

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

*November 1, 1983*

I, Rufus L. Edmisten, Attorney General of North Carolina, do hereby certify that the foregoing 1983 Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

Rufus L. Edmisten  
*Attorney General of North Carolina*

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