

Approved On: _____

Minutes of the House Committee on Taxation. The meeting was called to order by E. C. Rolfs, Chairman, at 9:00 a.m. on January 25, 1988 in room 519 South at the Capitol of the State of Kansas.

The following members were absent (excused):

Representatives Groteweil, Snowbarger and Shore

Committee staff present:

Tom Severn, Legislative Research
Chris Courtright, Legislative Research
Don Hayward, Reviser of Statutes
Millie Foose, Committee Secretary

Secretary Harley Duncan, Department of Revenue, discussed HB-2650 - AN ACT relating to sales taxation; exempting purchases of seed used for certain purposes therefrom. (Attachment 1)

Secretary Duncan then made recommendations for changes in four categories -- Auctioneers, Outdoor Advertising, Telephone Access Charges. and Computer Software. (Attachment 2) He also proposed that the Regulation covering Advertising Agencies be held in abeyance while the Department attempts to develop language which will address situations involving services which would be non-taxable if offered separately when such services are sold along with tangible personal property. Mr. Duncan stated that the existing regulation KAR 92-19-8 on auctioneers would be withdrawn. Outdoor advertising, KAR 92-19-18, will also be withdrawn and will be resubmitted in an amended form. Computer software, KAR 92-19-70, will be withdrawn or modified, and amendments to KSA 79-3603(s) will be proposed. Mr. Duncan also stated with regard to his amendment of 3603(s) that in the case of multiple sales of software programs, the department would not look back and assess tax on original sales if the proposed amendment was adopted. As to advertising agencies, Mr. Duncan agreed that KAR 92-19-80 and 92-19-54 would be modified to provide for split billing to avoid giving different treatment to subcontract work versus blended contract.

HB 2626


Secretary Duncan then discussed K.S.A. 79-3603(p) which provides sales tax exemption for labor services required due to damages caused by various "acts of God". He recommended that the exemption be removed or further defined.

Secretary Duncan said that questions have been raised regarding the taxability of mobile phone, cellular phone, beeper phone, and similar services. He recommends that all doubt be removed by adding a subsection to KSA 79-3603 providing a tax at the rate of 4% upon the gross receipts from these services.

Secretary Duncan said that a recent Court of Appeals decision indicates there is a flaw in the current KSA 79-3604 which is sometimes used to impose the sales tax collection on an entity other than the final retailer where having the final retailer collect the tax could endanger ultimate collection of the tax. He suggested that it be amended to delete the language which states the Director of Taxation must refuse to issue a registration certificate before imposing the duty upon the vendor to a minor, transient, to collect the full amount of sales tax.

The minutes of January 20, 21, and 22 were approved.


There being no further business, the meeting was adjourned.


E. C. Rolfs, Chairman

KANSAS DEPARTMENT OF REVENUE
Office of the Secretary
Robert B. Docking State Office Building
Topeka, Kansas 66612-1588

MEMORANDUM

TO: The Honorable Ed C. Rolfs, Chairman
House Committee on Taxation

FROM: Harley T. Duncan 
Secretary of Revenue

RE: Recommendations on Sales Tax Issues

DATE: January 25, 1988

This memorandum provides the recommendations of the Department of Revenue to "resolve" certain of the sales tax rule, regulation and law issues your Committee has reviewed over the past two weeks.

KAR 92-19-8 - Auctioneers. We would propose that this regulation be withdrawn and that HB 2626 be amended to include within the definition of isolated and occasional sale those sales held by an auctioneer if the articles being sold belong to one principal or one household regardless of the location of the sale. This would deal with most of the "problems" raised by the auctioneers and their representatives without unduly fostering unfair competition with the "Main Street" retailer.

KAR 92-19-?? - Outdoor Advertising. We propose to withdraw this regulation and promulgate another one which clearly exempts the rental of billboards (which are real estate) from the sales tax. The revised regulation will still provide that the sales tax is to be imposed on the sale of labor services to install the advertising on the billboard.

KAR 92-19-19. Telephone Access Charges. If the Committee believes our regulation goes beyond the reach of the Retailers' Sales Tax law, we would ask that KSA 79-3603 be amended to include specifically the "access charges" assessed to the final end user of telephone services. These charges are not discretionary to telephone subscriber and do not depend on the volume of interstate long distance calls made. Any inclusion would need to be limited to those charged to the end user of the telephone service, not those charged among the telephone companies and long distance carriers.

KAR 92-19-70 - Computer Software. Of all the words spoken last week, the most true were that our current law does not necessarily do a good job of taxing any kind of computer software well. A lucid argument for exempting the most common, off-the-shelf program was made. Therefore, we would propose that KSA 79-3603(s) and any other necessary statutes be

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re-written to impose clearly the retail sales tax **and the compensating use tax** on all sales to computer software if the software is designed for, marketed to and/or sold to more than one user. This would include all sales, whether made by outright sale, lease or license to use, and would also include maintenance or update agreements. It would also include software sold or transferred even if no tangible medium were transferred, i.e., if the software were transferred via telecommunication lines rather than tape, disk, diskette or other medium.

Such a statute would impose the tax on sales of: (a) "canned" software purchased off-the-shelf from a computer store or other outlet; (b) software developed by a software publishing house, accounting firm, consulting firm or other entity if the software is sold to more than user; and (c) maintenance agreements for receipt of software updates. Further, the nature of the sale (i.e., license to use) and the nature of the medium on which the software is contained or transferred would be immaterial, and purchases of such software from out-of-state vendors would be subject to the use tax. Such a statute would not tax sales of software where the software was developed and designed solely for one client. If a firm had a basic software package that it would then "customize" to meet the needs of individual clients, sales tax would apply to the price of the basic software package, but not to the "customized" elements.

KAR 92-19-80 - Advertising Agencies. We would propose that this regulation be held in abeyance while the Department attempts to develop language which will address situations involving services which would be non-taxable if offered separately when such services are sold along with tangible personal property. While language dealing only with advertising agencies can probably be developed rather simply, the difficulty is in reconciling such treatment with similar situations like design engineering services in an automobile, photographers, and artists.

We would propose that other rules be left unaltered.

RELATED ISSUES

SALES TAX EXEMPTION FOR CERTAIN LABOR SERVICES

K.S.A. 79-3603(p) provides a sales tax exemption for labor services required due to damages caused by the various "acts of God". A review of the legislative history of this subsection will reveal that this exemption was added at the last minute due to the fire which destroyed the Grace Cathedral in Topeka. This exemption was intended to apply only when the damage was caused by a single, catastrophic hailstorm, rainstorm, windstorm, etc. However, there is wide abuse of this exemption. Sales tax is often not collected on roof repairs and the like where the primary cause is age and wear, but a storm or other "act of God" contributed to the need for the repair.

Recommendation. Amend K.S.A. 79-3603(p) by removing the exemption for labor services performed due to the various "acts of God" mentioned in the subsection or at least to provide further definition to the term.

TAXABILITY OF CERTAIN COMMUNICATION SERVICES

Recent years have seen a significant expansion in purchases of mobile phone services, cellular phone services, beeper services, and other similar services. Questions regarding the taxability of these services has been raised because the devices are not

specifically mentioned in the law. The department maintains these services are currently taxed under K.S.A. 79-3603(b) and (k) relating to the leasing of property and subscriber radio services.

Recommendation: Remove all doubt by adding a subsection to KSA 79-3603 providing "a tax at the rate of 4% upon the gross receipts from mobile phone services, cellular phone services, beeper services, and other similar services."

REGISTRATION CERTIFICATES

The recent Court of Appeals' decision handed down in Hays Daily News indicates there is a flaw in the current K.S.A. 79-3604. The department has used this statute from time-to-time to impose the sales tax collection on an entity other than the final retailer where having the final retailer collect the tax could endanger ultimate collection of the tax. The instance in which it was used in the case before the Court involved newspaper delivery. Rather than registering each individual carrier (all of which were under 18 years of age), the department attempted to require the paper itself to remit the tax from proceeds remitted to the paper by the carriers.

The Court interpreted KSA 79-3604 to require the department to first refuse to issue a registration certificate before the newspaper publisher could be imposed with the duty to collect the appropriate sales tax on sales of newspapers made to independent contractors. This requirement was imposed even though no carrier had ever attempted to register with the department and the newspaper advised the carriers there was no need to do so. With this decision, many of the multi-level distributor companies currently registered to collect and remit the appropriate sales tax from sales made by their distributors located in Kansas could well cease to collect and remit the tax since the department has not refused to issue a distributor a registration certificate.

Recommendation. Amend K.S.A. 79-3604 deleting the language which states the director of taxation must refuse to issue a registration certificate before imposing the duty upon the vendor to a minor, transient, etc. to collect the full amount of sales tax. The department would still be required to notify the entity of its collection responsibility. It would simply not have to first refuse registration.

(s) a tax at the rate of 4% upon the gross receipts received from the sale of computer software. As used in this subsection, "computer software" means information and directions loaded into a computer which dictate different functions to be performed by the computer. Computer software includes any canned or prewritten program which is held or existing for general or repeated sale, even if the program was developed for a single sale. For purposes of this subsection, computer software does not include any custom computer program which is written or prepared exclusively for a single consumer and includes those services represented by separately stated charges for the modification of existing prewritten programs when the modifications are written or prepared exclusively for a single consumer. Modification to an existing prewritten program to meet a single consumer's needs is custom computer programming only to the extent of the modification, and only to the extent that the actual amount charged for the modification is separately stated on invoices, statements and other billing documents provided to the consumer.