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February 9, 2012

Senate Committee on Assessment and Taxation

Testimony in Support of ^{Senate} ~~House~~ Bill 369

Presented by Richard Cram

Senator Les Donovan and Members of the Committee:

The Department of Revenue respectfully submits the following in support of Senate Bill 369:

The Department has always interpreted the statutes providing the homestead refund and food sales tax rebate programs as not making any incarcerated persons eligible for either refund program. Recently, in a small claims division decision of the Court of Tax Appeals, *In re Nemechek*, Docket No. 2011-3799-DTSC (decision issued December 1, 2011), a state prisoner was successful in obtaining a ruling that the prisoner was entitled to a food sales tax rebate, despite the Department's opposition. A copy of this decision is attached. The Department has appealed this decision to the full Court of Tax Appeals, and that appeal is currently pending. At this point, to the Department's knowledge, this is the only food sales tax rebate claim pending from an incarcerated person.

Senate Bill 369 would amend the food sales tax rebate statutes to clarify that incarcerated persons are not eligible for the rebate. It would further bar food sales tax rebate claims from any incarcerated persons filed on or after June 30, 2011.

The Department has not yet received any homestead refund claims from incarcerated persons, but out of an abundance of caution, the Department recommends that the homestead refund statutes also be amended to clarify that the homestead refund is not available to incarcerated persons, and any such refund claims filed on or after June 30, 2011 are barred.

The Department's fiscal note is attached.

BEFORE THE COURT OF TAX APPEALS
STATE OF KANSAS

Small Claims and Expedited Hearings Division

RECEIVED
LEGAL SERVICES
DEC 02 2011

DEPARTMENT OF REVENUE

IN THE MATTER OF THE APPEAL
OF NEMECHEK, FRANCIS FROM
AN ORDER OF THE DIVISION OF
TAXATION

Docket No. 2011-3799-DTSC

NOTIFICATION OF DECISION OF HEARING OFFICER

A Small Claims hearing was held on November 3, 2011, in reference to the above property. Following is the decision of the Hearing Officer assigned:

DECISION OF HEARING OFFICER:

The Claimant requested a food sales tax refund pursuant to K.S.A. 2010 Supp. 79-3635 (a) (1), in the amount of \$90, for tax year 2010. The Kansas Department of Revenue (Department) disallowed the Claimant's request and the Claimant then appealed that determination to the small-claims division of the Court of Tax Appeals. The Department's rationale for denial of the food sales tax refund was cryptic and conclusory. The determination merely stated that "Kansas Administrative procedures do not allow a refundable credit to incarcerated individuals" without citing any authority.

The facts show that the Claimant has been incarcerated at the Lansing penitentiary since March 23, 1977, and will go before the Parole Board in 2017. The Claimant testified that he is 61 years old. The facts also show that while sales tax was not paid on food consumed at the prison's cafeteria or purchased through the commissary, the Taxpayer did pay sales tax on food purchased from vendors outside the penitentiary. The Taxpayer's Kansas Adjusted Gross Income for 2010 amounted to \$1,166.00 as shown on a 2010 K-40 Kansas individual Income Tax return and the Claimant's W-2. The Claimant testified that 25% of his paycheck was paid to the Department of Corrections for his room and board.

Kansas law allows for a refund of certain retailers' sales taxes paid upon food to persons entitled such refund. K.S.A. 79-3632. Pursuant to K.S.A. 2010 Supp. 79-3635 (a) (1), a claimant shall be entitled to a \$90 refund of retailers' sales taxes paid upon food, if each member of the claimant's household had an income of \$17,500 or less. The Department's attorney stated that the amount of the refund is statutorily

defined and is not dependent on the actual amount of food sales tax paid by a claimant, provided that some sales tax was actually paid on food purchases. The food sales tax refund is a refundable credit. K.S.A. 2010 Supp. 79-3635 (a) (2).

"Claimant" is defined as a person who has filed a claim for a refund and was during the entirety of 2010, domiciled in Kansas and was a member of a household. The claimant's 2010 income must be less than or equal to \$35,000. Furthermore, the claimant must have a disability, be over 55 years of age, or have a dependent child under 18 residing in the claimant's homestead. K.S.A. 2010 Supp. 70-3633 (c).

The facts here show that the Claimant's income is under \$35,000 and that he is over 55 years of age. The issue is then whether he is a member of a household and whether or not he can be considered to be domiciled in Kansas.

In K.S.A. 2010 Supp. 70-3633 (b), "household" is defined as a claimant and all other persons for whom a personal exemption is claimed who together occupy a common residence.

K.S.A. 2010 Supp. 77-201 *Twenty-third*, defines "residence" as the place adopted by a person as the person's place of habitation and to which, whenever the person is absent, the person has the intention of returning. When a person eats in one place and sleeps at another, the place where the person sleeps shall be considered the person's residence. So, even though the Claimant is in prison, there is no controverting evidence that he does anything but sleep in a usual place, which is likely the bunk in his cell. Thus for the period he is incarcerated, his residence is his cell. Despite the unique circumstances surrounding the Claimant's situation, the Claimant is hardly absent from his cell. It would seem that the Claimant has little choice in returning to any other place than the cell that he inhabits. There is no evidence that he has the intent to return anywhere else. The statute does not place qualifications on who can be a person and does not require a voluntary, affirmative adoption of a particular place of habitation. Thus, for purposes of K.S.A. 2010 Supp. 77-201 *Twenty-third*, the Claimant's residence is generally speaking the prison and specifically, his cell, both of which are in the State of Kansas.

Regulations have the force and effect of law. *J.G. Masonry, Inc. v. Department of Revenue*, 235 Kan. 497, 500, 680 P.2d 291 (1984) (citations omitted); *Jones v. The Grain Club*, 227 Kan. 148, 150, 605 P.2d 142, (1980). Therefore, one must also consult the Department's regulations on determining qualifications for food sales tax refunds.

K.A.R. 92-19-200 (a), for purposes of the food sales refund act, further defines "member of a household." However, that provision deals with other members of the household than the claimant himself. The Claimant has appropriately claimed his personal exemption for Kansas Income Tax pursuant to K.S.A. 2010 Supp. 79-

32,121. Subsection (a) (2) refers to a claimant that does not file an individual income tax return. In this case, the Claimant has filed a 2010 individual income tax return. Subsection (a) (3) refers to deceased spouses and is clearly not applicable here. Subsection (b) describes "member of a household" as not including one who the claimant cannot claim as a personal exemption. It is not applicable here. Consequently, K.A.R. 92-19-200 is not dispositive to the ultimate issue in this matter.

Therefore, by having a residence he is considered as being a member of a household. The issue then turns to whether he is domiciled in Kansas. The other regulation that may have applicability here is K.A.R. 92-19-201. Subsection (a) defines "domicile" as a place where a person resides, where the person has an intention to remain, and to which that person intends to return following any absence. As noted above, the Claimant resides in Kansas in the prison. His intentions to remain at the prison and to return there were pretty much made up for him by the sentence handed down to him.

It is reasonable to find that if the Claimant had his druthers, he would reside somewhere else besides the prison; however, the same can be said of an unincarcerated individual that resided in a particular place due to job or family considerations even though he would rather reside in a more desirable place. Yet that person would be considered to be a member of a household and domiciled in that place.

Further on in K.A.R. 92-19-201, subsection (c) states that for purposes of the food sales tax refund program, a claimant shall be domiciled in the state if the claimant resides in this state and maintains the principal home within this state. As noted above, the Claimant does reside in this state. However, the question then becomes whether or not he maintains the principal home within this state.

Words are to be construed according to their approved usage. K.S.A. 2010 Supp. 77-201 *Second*. The Merriam-Webster dictionary defines "maintain" as: "to keep in an existing state" or "preserve from failure or decline" or "to support or provide for." It would be hard to find that the Taxpayer "maintains the principal home under those definitions. However, "maintain" also means "to continue or persevere in." Under that definition the Claimant maintains the home as he continues to live there.

The Department's determination cites "Kansas Administrative procedures" as determinative. Mere procedures are not law and do not carry any weight. Case law, statutory law, and administrative regulatory law, as found in Kansas Administrative Regulations, are what must be considered in arriving at a determination in this matter. No case law directly on point is cited here. Despite the Department's implication in its determination, the statutory and regulatory law

concerning food sales tax refunds do not specifically exclude otherwise qualifying incarcerated individuals from qualifying for food sales refunds.

The Claimant in this matter has the burden of proof to show that he should qualify for the food sales tax refund. *In re Appeal of Ford Motor Credit Co.*, 275 Kan. 857, 69 P.3d 612 (2003). The legislature's sole stated purpose for the food sales tax refund is to provide for a refund to those entitled thereto. K.S.A. 79-3632. There are numerous hurdles for a potential claimant to qualify for the refund and one's penal status is not among those. The facts show that the Claimant is denied a refund solely because he is incarcerated and that he would otherwise qualify for a food sales tax refund. It would be reasonable to assume that the legislature did not intend for prisoners to qualify for the food sales tax refund and to that end the legislature may amend the law or the Department may promulgate regulations to address this issue.

REFUND GRANTED

Small Claims Hearing Officer: Carl Edwards

Any party to this appeal who is not satisfied with the final decision of the Hearing Officer may appeal this decision to the regular division of the Kansas Court of Tax Appeals. The appeal must be received within 30 days of the mail date using the enclosed form.

CERTIFICATE OF SERVICE

The above and foregoing, Docket No. 2011-3799-DTSC, was served by depositing the same in the United States mail, postage pre-paid, on the 1st day of December, 2011 addressed to the following:

Francis Nemechek
PO Box 2
Number 31327
Lansing, KS 66043

and a copy was placed in capitol complex building mail, addressed to:

General Counsel
Legal Services Bureau
Department of Revenue
DSOB, 915 SW Harrison, 2nd Floor
Topeka, KS 66612

Jenny Deters, KDOR - Division of Taxation Attorney
Ks Dept of Revenue Legal Services Bureau
DSOB 915 SW Harrison 2nd Floor
Topeka KS 66612-1588

COURT OF TAX APPEALS

Small Claims and Expedited Hearings Division
Kansas Court of Tax Appeals

MEMORANDUM

To: Mr. Steve Anderson, Director
Division of Budget

From: Kansas Department of Revenue

Date: 02/06/2012

Subject: Senate Bill 369
Introduced as a Senate Bill

Brief of Bill

2012 Senate Bill 369, as introduced, relates to food sales tax refunds and homestead property tax refunds.

Section 1 of the bill amends K.S.A. 79-3632 to provide that no claim for the food sales tax refund of certain retailers' sales taxes paid upon food filed on or after June 30 2011, shall be paid or allowed for any person confined in any correctional facility, any juvenile correctional facility, any correctional facility of the federal bureau of prisons located in the state of Kansas, or any city or county jail facility in the state of Kansas.

Section 2 of the bill amends K.S.A. 2011 Supp. 79-3633 to provide that for the purpose of this act, "household" shall not include any correctional facility, any juvenile correctional facility, any correctional facility of the federal bureau of prisons located in the state of Kansas, or any city or county jail facility in the state of Kansas. The bill also provides that "claimant" shall not include any person confined in any correctional facility, any juvenile correctional facility, any correctional facility of the federal bureau of prisons located in the state of Kansas, or any city or county jail facility in the state of Kansas.

Section 3 of the bill amends K.S.A. 2011 Supp. 79-4052 to provide that for the purpose of this act, "homestead" shall not include any correctional facility, any juvenile correctional facility, any correctional facility of the federal bureau of prisons located in the state of Kansas, or any city or county jail facility in the state of Kansas. The bill also provides that "claimant" shall not include any person confined in any correctional facility, any juvenile correctional facility, any correctional facility of the federal bureau of prisons located in the state of Kansas, or any city or county jail facility in the state of Kansas.

Section 4 of the bill amends K.S.A. 79-4505 to provide that No claim filed on or after June 30, 2011, in respect of property taxes levied in any year shall be paid or allowed for any person confined in any correctional facility, any juvenile correctional facility, any correctional facility of

the federal bureau of prisons located in the state of Kansas, or any city or county jail facility in the state of Kansas.

The bill shall be effective after its publication in Kansas statute book.

Fiscal Impact

The Department has interpreted the current food sales tax rebate and homestead refund statutes as not applying to incarcerated persons. The small claims division of the Court of Tax Appeals recently awarded a state prisoner a food sales tax rebate claim, despite the Department's opposition. The Department is unaware of any other pending food sales tax rebate claims or homestead refund claims by incarcerated persons. The proposal should eliminate the risk any future claims by incarcerated persons would be successful.

Administrative Impact

None

Administrative Problems and Comments

None.

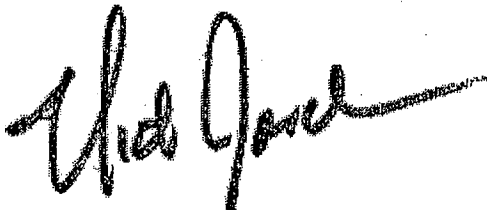
Taxpayer/Customer Impact

None.

Legal Impact

This proposal clarifies the Department's current interpretation that incarcerated persons are not eligible for either the food sales tax rebate or the homestead refund. The proposal would also bar any food sales tax rebate or homestead refund claims filed by incarcerated persons on or after July 1, 2011. In view of the recent decision by the small claims division of the Court of Tax Appeals awarding a state prisoner a food sales tax rebate (that decision is now under appeal), the Department is seeking this proposal.

Approved By:



Nick Jordan
Secretary of Revenue