**Final Written Determination**

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| **Docket Number:** | **WFD-P-2001-2** |

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| **Tax Type:** | **Kansas Retailers' Sales Tax** |
| **Brief Description:** | **Bad debt adjustment for federal income tax purposes.** |
| **Keywords:** |  |
| **Approval Date:** | **02/09/2001** |

**Body:**

**Office of Administrative Appeals**

February 9, 2001

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RE: Written Final Determination in Request for Informal Conference for Reconsideration of Agency Action, (Taxpayer), Docket Number 00-355

Dear XXXXX:

On May 17, 2000, the Taxpayer timely filed a written request for an Informal Conference with the Kansas Secretary of Revenue (Secretary). This request was in response to a Notice of Denial of Refund of Retailers’ Sales Tax issued by the Kansas Department of Revenue (Department) on March 14, 2000.

Procedural History

On April 20, 1999, the Taxpayer requested a refund from the Department for sales and use tax together with interest incurred on bad debts for the period December 1, 1996 through December 31, 1998. The Taxpayer was a non-recourse assignee of many financing contracts from Kansas retailers. The Taxpayer seeks to “step into the shoes” of the retailers in order to obtain a refund of that part of the tax that was charged off as a bad debt adjustment for federal income tax purposes. On March 14, 2000, the Department sent a letter to the Taxpayer denying its refund request. A timely request for an Informal Conference was made by the Taxpayer on May 17, 2000.

Issue

Can the assignee of a negotiable promissory note or notes or an assignable conditional sales contract, assume the rights, privileges and duties of the original retailer for the purposes of claiming a bad debt credit or refund (pursuant to K.A.R. 92-19-3) for sales tax remitted by the retailer and included in an assigned contract?

Discussion

It is clear from a reading of the Kansas Retailer’s Sales Tax Act and the Kansas Administrative Regulations promulgated by the Department that the answer to this question must be “NO”. There also is no record of the Kansas legislature contemplating or intending for this to occur.

First, the legislature provides the statutory methodology whereby the sales tax is to be paid and collected. Consequently, the Department is limited to what the legislature has provided and cannot enlarge or extend this to other matters, except as it may be authorized to promulgate rules and regulations to administer the act. K.S.A. 79-3602(d) specifically defines “Retailer” as “a person regularly engaged in the business of selling tangible personal property at retail . . . , and selling only to the user or consumer and not for resale.” The Taxpayer is not a retailer and, even if it did hold a Kansas retailer’s certificate of registration, it could not claim to be the retailer in these transactions because it did not sell the property to the consumer. It is not the retailer. Further, the statutory definition of “Persons” provided at K.S.A. 79-3602(a), while broad in the enumeration of those who may qualify to be a retailer, does not include an “assignee” in its list of those who may become a retailer.

Second, the Department has adopted K.A.R. 92-19-3 to provide guidance to retailers. When a retailer makes a non-assignable credit, conditional or installment sale, then the provisions of subsections (a) and (b) apply:

(a) “When a retailer makes credit, conditional, or installment sales, the retailer may pay tax on the total amount of collections made during each reporting period or, if the retailer’s books are regularly kept on an accrual basis, on the total amount of sales accrued for each reporting period. When the retailer adopts one basis of reporting for sales tax purposes, the retailer shall not change from that basis without first obtaining the permission of the director of taxation.”

(b) “If the retailer adopts the accrual basis for reporting taxable sales, the retailer shall account for all periodic adjustments to reported bad debts, including the final adjustment when debts are charged off the retailer’s books for federal income tax purposes. If any portion of the bad debts is recovered after the final adjustment, the retailer shall include the recovery and tax in the next sales tax return.”

These subsections make it clear that when an accrual basis retailer bears the risk of receiving payment in certain types of financing arrangements, then the retailer may adjust the taxable sales report downward for debts charged off the retailer’s books for federal income tax purposes. Conversely, the retailer then has the duty to adjust the report upwards if any portion of the bad debt is subsequently recovered. The retailer is responsible for only that amount of the tax the retailer actually receives from the consumer.

What happens when the retailer seeks to limit the risk of nonpayment by accepting a negotiable note or an assignable conditional sales contract? This is covered by subsection (c):

(c) “When tangible personal property or taxable services are sold on deferred payments and the deferred payments are covered by a negotiable note or notes or an assignable conditional sales contract, the retailer shall remit the tax on the total selling price of the property or service at the time the sale is made and report it in the retailer’s next sales tax return.”

This subsection provides that when a retailer sells property and receives in return a negotiable note or an assignable conditional sales contract, then the retailer must remit the sales tax on the total selling price. Obviously, the retailer by accepting a negotiable note or an assignable contract, has received in exchange for the property something different than what the retailer would have received had the retailer made a credit, conditional, or installment sale as contemplated by subsection (a). The note or assignable contract can be discounted to a third party unrelated to the original retail sale transaction. In this case the retailer must remit the tax on the total selling price. This protects the state from the possible risks associated with the sale of a note or contract to a third party who would have no statutory duty or obligation to remit the sales tax to the state with each payment from the debtor. The retailer when making an assignment without recourse, is also able to avoid any future liability. Since the regulation requires all of the sales tax to be paid, then the retailer is protected from any further liability to the state for not collecting the tax.

The Kansas legislature can change the public policy of this state and allow refunds to be made to third parties holding assignments from Kansas retailers. The decision to grant a windfall to the retailer’s assignees is for the legislature to make, not the Department.

Conclusion

Upon reconsideration of all of the facts and issues underlying the Department’s denial of the Taxpayer’s request for a sales tax refund, it is the final determination of the Secretary that the Department’s denial of the refund claim be sustained.

Sincerely,

DAVID J. HEINEMANN
Secretary’s Designee
cc: David Dunlap
Shirley Sicilian
Richard Cram
Monica Holthaus

**Date Composed: 03/09/2001 Date Modified: 10/09/2001**