**Opinion Letter**

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| **Letter Number:** | **O-2009-015** |

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| **Tax Type:** | **All** |
| **Brief Description:** | **Difference between private letter rulings and opinion letters.** |
| **Keywords:** |  |
| **Approval Date:** | **03/10/2010** |

**Body:**

Office of Policy & Research

March 10, 2010

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Dear XXXX:

I have been asked to respond to your recent e-mail. You ask the department to distinguish department "opinion letters" from "private letter rulings." This suggests that you want to know when an interpretation of law published by the department is binding on the State of Kansas.

A private letter ruling is issued to a Kansas retailer and instructs the retailer that it is either required to collect sales tax from its customer or that sales tax should not be collected. In the letter to the department that requests a private letter ruling, the retailer is required to identify itself, describe the retail transaction in question in detail, and explain the exemption claims being made by the customer. Private letter rulings should only be issued to a retail business to explain its tax collection duty on a specific transaction. Private letter rulings are not binding on the department because of separation of powers principles and public policy concerns, except to excuse the named retailer from collecting sales tax as directed by the department.

Opinion letters are issued to explain to taxpayers and others how the department construes and applies Kansas tax laws. As with a private letter ruling, the letter requesting the opinion must set forth all relevant facts that underlie the request. While the department strives to issue opinion letters that are consistent with the Kansas tax statutes, nothing in them supersedes, alters, or otherwise changes Kansas case law or any Kansas statute or regulation. Opinion letters are not binding on the department because of separation of powers principles and public policy concerns.

Under separation of powers, it is the job of the judiciary to finally decide what the law is. *Marbury v. Madison,* 5 U.S. (1 Cranch) 136 (1803*)("It is emphatically the province and duty of the judicial department to say what the law is.")* However, constitutional due process requires Executive Branch agencies to explain new legislation in plain language that allows average citizens to determine whether or not their actions comply with the law. *Kansas City Millwright Co. v. Kalb, 221 Kan. 658, 562 P.2d 65 (1977)*.

Separation of powers principles task an executive-branch agency with the duty to construe and explain new legislation by publishing policy directives and interpretive regulations. An administrative agency is the first to construe and apply new legislation, and is allowed to refine its initial construction of the law as the agency gains experience administering and enforcing it.

Kansas courts are granted judicial authority by the Kansas and United States Constitution. Judicial authority includes the duty to finally determine what the law is. A reviewing court is free to accept or reject an agency's construction of legislation, which the agency has published in its policy directives, interpretive regulations, and opinion letters to carry out its Executive Branch duties.

Public policy concerns and separation of powers prevent an agency's construction of a statute from being treated as substantive law that is binding on the government, businesses, or individuals. The drafters of the United States Constitution recognized that any semblance of honest government would be destroyed if agency opinions and policy directives were treated as binding, substantive law. This was alluded to in *Fischbach & Moore, Inc v. State Bd. of Equalization,*117 Cal.App.3d 627, 172 Cal.Rptr. 923, (Cal.App.2.Dist.1981):

The board argues, and we agree, that the state is not estopped from collecting a tax which was due and owing, even though the state's representatives may have previously adopted an incorrect interpretation of the law and advised the public that no taxes would become due on a particular transaction or transactions. *( Market St. Ry. Co. v. Cal. St. Bd. Equal. (1955) 137 Cal.App.2d 87, 100, 103 [290 P.2d 20].)*Under well-settled rules of law state officers and state agencies have no power to estop the state from collecting a validly owed tax. The reasons behind such a rule are deeply imbedded in our governmental structure, which is designed to discourage corrupt collusion between government officers and taxpayers to the prejudice of the state's revenues. We, therefore, reject plaintiffs' argument that the board is estopped from collecting the tax, even though its representatives had previously advised plaintiffs no tax would become due.

The Maryland Tax Court discussed these public policy and separation of powers concerns in terms of improperly empowering Executive Branch employees with legislative authority. The tax court explained.

The law in Maryland is clear that the "State in collecting its taxes acts in a governmental, and not in a proprietary capacity;" Comptroller v. Atlas Industries, 234 Md. 77, 84 (1964[)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=536&FindType=Y&ReferencePositionType=S&SerialNum=1964107086&ReferencePosition=84). The Court, in holding that the State was not estopped from collecting back taxes for the years 1954 to 1961, stated at 84:

"It seems to be universally recognized that, generally, a State cannot be estopped by the acts and conduct of its officers or agents in the performance of the governmental function of collecting taxes legally due. The reason for the rule is obvious: no administrative officer is vested with the power to abrogate the statute law of the State, nor to grant to an individual an exemption from the general operation of the law."

The Court in Atlas at 84-85 cites and quotes from cases from many jurisdictions, and also cites C. J. S., Estoppel, Sec. 138; 19 Am. Jur., Estoppel, Section 166; and 1 Cooley, Taxation, p. 159, to support the universality of the above rule. In two cited cases, Claiborne Sales Co. v. Collector of Revenue, 233 La. 1061, 99 So. 2d 345 (1957), and Michigan Sportservice, Inc. v. Nims, 319 Mich. 561, 30 N.W. 2d 281 (1948), the Supreme Courts of Louisiana and Michigan held that departmental rules and regulations are governed by statute, and they cannot grant exemptions not authorized by the Legislature. The rule of the Atlas case has more recently been followed in Rockower Brothers, Inc. v. Comptroller, 240 Md. 379, 390 (1965), and C. E. Weaver v. Comptroller, 235 Md. 15, 22 (1964) and, citing Atlas, Selinger v. Governor, 266 Md. 431, 434, said:

"The appellants would, but cannot, weave an estoppel from . . . gossamer strands."

The rationale of Atlas is completely consonant with the decision in Comptroller v. American Cyanamid Co., 240 Md. 491 (1965), which held that a rule adopted by the Comptroller was invalid which unlawfully extended the exclusions from taxation under the sales tax act. The holding of the case is stated in the first paragraph of the opinion, at 493:

"But no practice, however generally [sic] or however long it may have prevailed, can override the clear and manifest meaning of a statute."

The Court at p. 505 reiterated the rule:

"There can be no challenge to the proposition that the Comptroller cannot by rule or otherwise make taxable that which the Legislature has excluded or exempted from taxation and cannot exclude or exempt that which the law says is taxable."

American Cyanamid, supra, is just one of a number of cases where the Court has held rules or parts of rules of the Comptroller invalid and void, where in conflict with the law. *See: F.&M. Schaefer v. Comptroller, 255 Md. 211, 218-219 (1969), Comptroller v. Pittsburg-Des Moines Steel Co., 231 Md. 132(1963), Comptroller v. Rockhill, Inc., 205 Md. 226, 234-235 (1954).*
*G. H. & E. M. Grosvenor v. Supervisor of Assessments of Montgomery County*, 197 WL 921 (Md. Tax 1973)

In *Comptroller of the Treasury v. Atlas Gen. Indust.,*234 Md. 77, 84-5, 188 A.2d 86, 90 (1964), the court explained that an agency employee is not authorized to abrogate a tax law or grant a tax exemption:

It seems to be universally recognized that, generally, a State cannot be estopped by the acts and conduct of its officers or agents in the performance of the governmental function of collecting taxes legally due. The reason for the rule is obvious: no administrative officer is vested with the power to abrogate the statute law of the State, nor to grant to an individual an exemption from the general operation of the law. *United States v. Globe Indemnity Co., 94 F.2d 576 (C.A. 2) ; Olson Const Co. v. State Tax Comm., 12 Utah 2d 42, 361 P.2d 1112; Henderson v. Gill, supra; Michigan Sportservice Inc. v. Nims, 319 Mich. 561, 30 N.W.2d 281.*

The Iowa Supreme Court noted this same principle in *S & M Finance Co. v. Iowa State Tax Commission,*162 N.W.2d 505 (Iowa 1969):

The [Iowa State Tax] [C]ommission itself is powerless to adopt rules inconsistent with, or in conflict with, the law to be administered. It may neither impose a tax nor grant an exemption. We take it an employee has no greater power than the commission. *Des Moines and Central Iowa Railway Company v. Iowa State Tax Commission, 253 Iowa, 994, 999, 115 N.W.2d 178, 181, and citations.*

*Fischbach & Moore, Inc, G. H. & E. M. Grosvenor, Atlas Gen.,*and*S & M Finance Co.*are representative cases that explain why separation of powers principles and public policy concerns prohibit revenue policy statements from being treated as binding, substantive law. These cases recognize that, if agency policy statements were treated as substantive law, state government would deteriorate into a system where graft and kickbacks are paid routinely to secure favorable tax rulings. Unless such graft or kickbacks could be proven, these ruling would absolve an individual or business of its responsibility to pay state taxes.

If agency policy statements had binding effect, a mid-level agency employee would have the final say about how tax statutes are construed and whether or not a taxpayer lawfully owes taxes imposed by the legislature. In addition, when administrative cases are appealed to the courts, judges would seldom be asked to finally determine what the law is. Instead, judges will be asked to decide what the agency policy statement says the law is. It would waste the state government's limited resources to require administrators and judges to pour over the hundreds of agency policy directives and opinion letters to determine if the agency's statutory construction is consistent from one document to the next. Courts need to decide what the law is, not what an agency has said the law is in its publications.

In addition, state revenue shortfalls have resulted in staffing shortages for administrative agencies and the courts. If an agency opinion were binding, corporate lawyers and accountants would spend months drafting opinion requests with the intention of securing a favorable letter ruling for their client. If an agency issued a favorable opinion that misconstrued the law, the State would be barred from collecting millions of dollars that the corporation lawfully owed, but for the agency's erroneous opinion. Reduced staffing will increase the likelihood that department associates will issue erroneous rulings.

Revenue employees need to be allowed to make mistakes that don't cost state government millions of dollars in revenues. Due process requires agencies to explain the statutes they administer in plain language so that average citizens can determine whether their activities conform to the law. If separation of powers principles are not honored and agency policymaking errors are allowed to bar State governments from collecting taxes that are owed, revenue agencies will be far less likely to draft and publish policy directives that attempt to explain complex tax laws in simple terms. This would result in citizens receiving far less information about how an agency construes and applies tax statutes than they currently receive.

These things show that agency's tax directives and written tax advice cannot bind State government to a legal position the agency takes in a policy directive or letter. To undue this separation of powers requirement by legislation or a court decision would transform State government into an enterprise where tax exemptions are purchased with bribes and kickbacks. If this principle is overturned, the department will be very hesitant to publish any policy directives because of the risk of lost revenue. This would result in far less information being disseminated that explains how the department interprets and applies the Kansas tax laws.

Unlike a consumer who owes sales tax at the time of a purchase, the Kansas sales tax act enlists retail businesses to act as sales tax collectors for the State of Kansas. Acting as the State's tax collector often puts a retailer in the middle of a dispute between a customer, who claims a tax exemption, and the department. When this happens, the retailer often has a firm understanding that sales tax is owed on the purchase. Retailers arrive at their understanding of the law from experience, from department publications or seminars, and from their desire to act as good citizens and collect the correct amount of sales tax for the State. Retailers frequently contact the department by telephone, e-mail, or letter and ask whether or not a transaction is taxable.

Whenever the department informs a retailer that the tax should be collected and the tax is collected, the consumer's remedy is to pay the tax to the retailer and file a refund claim with the department pursuant to K.S.A. 79-3609. This filing initiates an informal review process which will determine whether or not the tax was lawfully owed at the time of purchase. The consumer that paid the tax may appeal the department's final determination to the Kansas Court of Tax Appeals, and from there, if necessary, to the Kansas appellate courts.

This procedure also serves as the remedy for a taxpayer who pay tax on a retail transaction and wishes to contest a policy statement that says the transaction is taxable. In fact, this remedy is available to any consumer who want to contest the legality of any sales tax that it pays and a retailer collects.

K.S.A. 79-3646 was enacted to allow a retailer to secure a written determination about whether or not to collect sales tax on a specific retail transaction. Whenever the department issues a private letter ruling that erroneously informs the retailer not to collect sales tax, the retailer is excused from the consequences of not collecting the tax. The consumer remains liable for the uncollected sales tax despite the erroneous advice given to the retailer.

The answer to your question about the binding nature of department policy statements is that separation of powers principles and public policy considerations prevent the State of Kansas from being bound by advice the department has published that erroneously explains that sales tax is not owed given a specific set of facts. It makes no difference whether the statutes are misconstrued in a policy directive, opinion letter, or private letter ruling. The one exception is that a private letter ruling will protect a retailer from being held liable for tax that went uncollected because the retailer followed the written advice it received from the department in a private letter ruling.

Sincerely,

Thomas E. Hatten

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