**Final Written Determination**

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| **Docket Number:** | **WFD-P-2002-1** |

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| **Tax Type:** | **Kansas Retailers' Sales Tax** |
| **Brief Description:** | **Purchase of materials and equipment for a newly constructed facility; exemption under business and job provisions of K.S.A. 79-3606(c).** |
| **Keywords:** |  |
| **Approval Date:** | **02/25/2002** |

**Body:**

**Office of Administrative Appeals**

February 25, 2002

**Written Final Determination, Docket No. 01-638**

On June 14, 2001, the taxpayer timely filed a written request for an informal conference with the Kansas Secretary of Revenue (Secretary). The taxpayer’s request was in response to the Kansas Department of Revenue’s (Department) May 18, 2001 denial of a sales tax refund request of $11,012.84 for the period January 1997 through October 1997.

A review of this matter indicates that the taxpayer’s refund request relates to the purchase of materials and equipment for their newly constructed facility that it claims to be exempt under the business and job provisions of K.S.A. 79-3606(cc). The Department denied the refund claim for the reason that the taxpayer, a contractor, is considered to be a retail business. A retail business may qualify for the exemption if it locates in a city of 2,500 or less. The taxpayer’s new facility is located in Wichita, a city with a population in excess of 2,500. The Wichita location disqualified the taxpayer from consideration for the exemption as a retail business.

The taxpayer may still qualify for the exemption if it can be considered to be a ‘nonmanufacturing business’. A nonmanufacturing business is defined by K.S.A. 74-50,114(g) to be “any commercial enterprise other than a manufacturing business or a retail business. Clearly the taxpayer is not a manufacturing business. Is the taxpayer a retail business? Subsection (i) defines a retail business to be “(a)ny commercial enterprise primarily engaged in the sale at retail of goods or services taxable under the Kansas retailers’ sales tax act”. In the event less than 50 percent of the taxpayer’s sales are not taxable, then the taxpayer would not be primarily engaged in taxable sales and could not be a ‘retail business’ as defined by Subsection (i). In this event the taxpayer, by default, would be considered a nonmanufacturing business under Subsection (g) because it is a commercial enterprise other than a manufacturing business or a retail business.

The taxpayer’s ability to qualify as a nonmanufacturing business relates directly to the ‘nature of its business’ and whether 50 percent or more of its business is non-taxable so that it would not be considered a retail business. The taxpayer did not seek a project exemption certificate prior to the commencement of its project. The taxpayer requested a refund of the sales tax after the completion of the project.

The key question now is which time period should the Department examine in order to determine the nature of the taxpayer’s business: the 12-month period prior to the refund request or a 12-month period prior to the commencement of the project. The Department will use the following guidelines to determine a taxpayer’s ‘nature of business’ for the purposes of the business and job provisions of K.S.A. 79-3606(cc).

The Department shall determine the ‘nature of business’ of a taxpayer in order to establish whether they are a ‘retail business’ or ‘nonmanufacturing business’ as defined by K.S.A. 74-50,114 by examining a 12-month period prior to the commencement of the project. The 12-month period will be the taxpayer’s previous tax year, not necessarily the 12-month period immediately prior to the commencement of the project. In order to provide consistency of treatment, this same time period will apply both to a taxpayer who requests a project exemption certificate prior to the commencement of a project and to a taxpayer who seeks a refund after the completion of a project. However, in the event that there is a change in the ‘nature of business’ of a taxpayer after the commencement of a project, then the Department will not be precluded from using a more current tax year to determine if the taxpayer qualifies for the exemption.

An examination of the taxpayer’s most recent tax year immediately prior to the commencement of its project indicates that the taxpayer is not primarily engaged in taxable sales and should be considered a nonmanufacturing business under the provisions of K.S.A. 74-50,114. The taxpayer qualifies for the retailers’ sales tax exemption under the business and job provisions of K.S.A. 79-3606(cc). A further review of the refund request indicates that the Department should refund tax in the amount of $10,012.00 together with applicable interest to the taxpayer for the period January 1997 through October 1997.

Upon reconsideration of all of the facts and issues underlying the taxpayer’s request for an informal conference, it is the final determination of the Secretary’s Designee that the taxpayer qualifies for an exemption under the business and job provisions of K.S.A. 79-3606(cc). The Department shall issue a refund of retailers’ sales tax to the taxpayer in the amount of $10,012.00 together with applicable interest for the period January 1997 though October 1997.

Sincerely,

David J. Heinemann
Secretary’s Designee

**Date Composed: 04/17/2002 Date Modified: 04/18/2002**