



K A N S A S

JOAN WAGNON, SECRETARY

DEPARTMENT OF REVENUE
POLICY AND RESEARCH

KATHLEEN SEBELIUS, GOVERNOR

March 18, 2005

Stephen P. B. Kranz, Tax Counsel
Council On State Taxation
122 C Street NM, Suite 330
Washington, DC 2001

Senator Angela Z. Monson
2300 North Lincoln Boulevard, Room 428
Oklahoma City, Oklahoma 73105

Commissioner Bruce Johnson
Utah Tax Commission
210 North 1950 West
Salt Lake City, Utah 84134

RE: Public Comment by the
Business Advisory Council

Dear Mr. Kranz:

The purpose of this letter is to respond to the Business Advisory Council's Public Comment to the Kansas Petition for Membership in the Streamlined Sales and Use Tax Agreement. *See Draft Rule 702(E)*. The Public Comment was submitted in your letter of March 3, 2005 to the Co-Chairs of the Streamlined Sales and Use Tax Implementing States. The Public Comment identifies some general concerns the Council has with the States' Petitions for Membership. It cites two specific concerns the Council has with the Kansas Petition. This is the Kansas response to that Public Comment. *See Draft Rule 702(F)*.

The Council's General Concerns.

The Council is concerned that some States may try to comply with the Agreement by adopting new regulations instead of enacting new statutes. The Council believes that most state laws do not authorize state agencies to adopt the kinds of regulations needed for Streamlined compliance. This is not a concern for Kansas. Kansas enacted a host of Streamlined statutes in 2003, which means the department will not have to rely solely on its rulemaking authority to comply with the

Agreement. In addition, any concerns with the department's rulemaking authority were addressed by the enactment of K.S.A. 2004 Supp. 75-5155.

2003 Kansas House Bill No. 2005 revamps many of the definitions, impositions, and tax administration provisions contained in the Kansas sales' tax act. These changes bring Kansas into compliance with the Agreement. *2003 Kan. Session Laws Ch. 147*. New regulations are needed and the department anticipates completing them before October 1, 2005. Even if the rulemaking process is not completed for every needed change by October, the 2003 statutory enactments are the controlling law and trump any outdated regulations. *See Jones v. Kansas State University*, ___ Kan. ___, 106 P.3d 10, 22 (2005).

K.S.A. 79-3618 and K.S.A. 2004 Supp. 75-5155 authorize the department to adopt rules and regulations to administer the new Streamlined statutes. In Kansas, proposed administrative regulations are reviewed by the Kansas Attorney General for legality. While the Attorney General occasionally expressed concern with the scope of the department's rulemaking authority under K.S.A. 79-3618, those concerns were dispelled by K.S.A. 2004 Supp. 75-5155. This new enactment should dispel any concern that the Council has with the scope of the department's rulemaking authority.

The Council expresses concern with the consistency of the States' answers to the Taxability Matrix. Of particular concern are the State responses for sales price, delivery charges, direct mail, medical definitions, and installation charges.

The Kansas statutory definitions of the terms "sales price," "delivery charges," and "direct mail" mirror the Streamlined definitions. *See K.S.A. 2004 Supp. 79-3602 (i), (j), and (ll)*. Installation charges are taxed as part of the selling price at K.S.A. 2004 Supp. 79-3602(II) and as a separate imposition on labor services at K.S.A. 2004 Supp. 79-3603(p). The department will promulgate new regulations which state "set-up services" are the installation services referred to in the definition of "sales or selling price." These regulations will clarify the tax base for appliances and other retail goods that are sold, delivered, and set up at the same time that exempt installation services are being performed under a construction contract. *See K.S.A. 2004 Supp. 79-3603(p)*.

The Streamlined definition of "prescription" is contained in K.S.A. 2004 Supp. 79-3602(bb). The exemption statutes' self-contained definitions of "drug" and "mobility enhancing equipment" are now consistent with the Streamlined definitions. *See K.S.A. 2004 Supp. 79-3606(p) and (r)*. The exemption for insulin is unchanged since it complies with the Streamlined definition. *K.S.A. 2004 Supp. 79-3606(q)*.

You ask: "Does 'NA' [on a Taxability Matrix] mean that an item is exempt or that the defined term is not necessary because the state taxes everything?" Kansas completed the Taxability Matrix with the understanding that "NA" means that the listed item is taxed under the general imposition on sales of tangible personal property. "X," on the other hand, indicates there is a specific statutory imposition for the listed item. On the Kansas Matrix, each "X" is accompanied by at least one statutory citation, while no citations are given for an "NA" response. It is the department's understanding that other States completed the Matrix using this approach.

The Council s' Specific Concerns with the Kansas Petition for Membership.

The Council has two concerns with the Kansas petition. First, the Kansas statute for vendor discounts extends discounts to out-of-state sellers but not to in-state sellers. Second, the reference to "prescription" in K.S.A. 2004 Supp. 79-3606(r) appears to narrow the Agreement's definition by requiring the prescription to be in writing.

K.S.A. 79-3707, the Kansas vendor discount statute, was first enacted in 1967. It gives the secretary of revenue broad authority to enter into reciprocal agreements with other state revenue departments to secure the collection of Kansas use tax. Because one of the main purposes of the Agreement is to establish a voluntary system for collection of use tax on remote sales for member states, we believe the compensation provisions in the Agreement fit within the parameters of the authority granted to the secretary under K.S.A. 79-3707. In addition, other statutes provide evidence of legislative intent that the secretary have the requisite authority to adopt the Agreement compensation provisions. *Compare K.S.A. 79-3707 with K.S.A. 2004 Supp. 79-3655 and K.S.A. 2004 Supp. 79-3665.*

K.S.A. 2004 Supp. 79-3665(a) provides in relevant part:

The department of revenue is authorized to become a signatory to an agreement with one or more states for the purpose of providing a multi-state, voluntary, streamlined system for sales and use tax collection and administration to simplify and modernize sales and use tax administration in order to substantially reduce the burden of tax compliance for all sellers and for all types of commerce, at such time as the legislature takes further action to bring the state's laws in compliance with the requirements of the agreement. The department of revenue is further authorized to participate in the streamlined sales tax project, identify all changes in this state's sales and use tax laws and rules and regulations that would be required in order to comply with such agreement, take such other actions reasonably required to prepare this state for entry into such agreement.

The grant of authority to "take such other actions reasonably required to prepare this state for entry into such agreement" allows the department to comply with the Agreement by paying in-state and out-of-state retailers during the start-up phase of the SSTP project. There can be little doubt that this grant is broad enough to authorize the department to compensate in-state retailers under the terms of the Agreement.

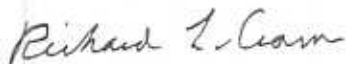
The Council's second concern is the statutory requirement that a prescription order for prosthetic devices or mobility enhancing equipment be "in writing." *K.S.A. 2004 Supp. 79-3606(r)*. It should be noted that there is no like requirement for drug prescriptions. *See K.S.A. 2004 Supp. 79-3606(p)*. The Council acknowledges: "The Department should be able to fix this problem through a regulation."

The term "prescription" is defined at K.S.A. 2004 Supp. 79-3602(bb) as: "an order, formula or recipe issued in any form of oral, written, electronic or other means of transmission by a duly licensed practitioner authorized by the laws of this state." This is the Streamlined definition.

The department construes the prescription requirement in K.S.A. 2004 Supp. 79-3606(r) as being consistent with the Agreement. Therefore, an order for a prosthetic device or mobility enhancing device that is issued by a licensed practitioner meets the exemption requirements regardless of how the order is transmitted. The department intends to address the statutory ambiguity created by K.S.A. 2004 Supp. 79-3606(r) and K.S.A. 2004 Supp. 79-3602(bb) in a notice or regulation.

If you or the Business Advisory Council have any questions concerning this response made pursuant to Draft Rule 702(F), please contact me at the number above.

Very truly yours,



Richard L. Cram

cc: Members, Streamlined Sales Tax Implementing States,
Commissioner Loren L. Chumley, Co-Chair, Conforming States Committee
Richard Finan, Co-Chair, Conforming States Committee
Scott Peterson, Interim Director, Conforming States

CERTIFICATE OF MAILING AND SERVICE

I, Richard L. Cram, certify that on March 18, 2005, I caused to be mailed first class, postage prepaid, an original copy of the Kansas Response to the Public Comment of the Business Advisory Comment to the Kansas Petition for Membership in the Streamlined Sales and Use Tax Agreement to

Stephen P. B. Kranz, Tax Counsel
Council On State Taxation
122 C Street NM, Suite 330
Washington, DC 2001

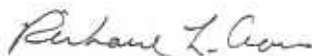
with duplicate copies to:

Senator Angela Z. Monson
2300 North Lincoln Boulevard, Room 428
Oklahoma City, Oklahoma 73105

Commissioner Bruce Johnson
Utah Tax Commission
210 North 1950 West
Salt Lake City, Utah 84134

I, Richard L. Cram, further certify that on March 18, 2005, I caused to be delivered electronically a true and correct copy of the Kansas Response to the Public Comment of the Business Advisory Comment to Conforming States Interim Director, Scott Peterson at his e-mail address, Scott.Peterson@state.sd.us, and to the Co-Chairs of the Conforming States Committee, Commissioner Loren L. Chumley at her e-mail address, loren.chumley@state.tn.us, and to Mr. Richard Finan at his e-mail address, rfinan@calfee.com.

I, Richard L. Cram, further certify that on March 18, 2005, I caused to be delivered electronically a true and correct copy of the Kansas Response to the Public Comment of the Business Advisory Comment to each delegate listed in the Petition for Membership Distribution List, dated February 1, 2005, and thereby to each Streamlined Sales Tax Implementing State. The Petition for Membership Distribution List is attached hereto and incorporated herein.



Richard L. Cram

Petition for Membership Distribution List - February 1, 2005

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