**Opinion Letter**

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| **Letter Number:** | **O-2011-013** |

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| **Tax Type:** | **Kansas Retailers' Sales Tax** |
| **Brief Description:** | **Sales of aviation gasoline and jet fuel by a private Fixed-Base Operator on a US government installation** |
| **Keywords:** |  |
| **Approval Date:** | **12/07/2011** |

**Body:**

Office of Policy & Research

December 7, 2011

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RE: Your e-mail received November 10, 2011

Dear XXXX:

I have been asked to respond to your recent e-mail. You work for national aviation fuel distributor. You wrote:

We are going to begin selling Aviation Gasoline (Avgas) & Jet Fuel to a customer, XXXXX, a private Fixed-Base Operator (FBO) located at XXXX in Kansas. Normally, when we sell to an FBO like this we collect a Resale Exemption Certificate in order to exempt the customer Sales Tax up front, passing the liability of collecting and remitting Sales Tax to the customer.
However, XXXX FBO has indicated that they are not actually registered with the State of Kansas as a reseller. They have stated that, since they are located on U.S. Government-owned land, Sales Tax does not apply. He referenced that the U.S. Government cannot compete with private enterprise, and this exempts him from Sales Tax. He indicated he has contacted the State regarding registration for Sales & Use Tax, but since he is such a small organization on U.S. Government land, he was not required to register.
My question/concern is, how can we exempt XXXX FBO the Kansas Sales Tax on Aviation Fuel sales without collecting a form from him? What can we collect in order to support an up-front exemption? Or, is he incorrect in what he is saying, and he should registered with the State, and we should collect Sales Tax until he is registered as such?

Special fuel includes diesel fuel, gasoline, aviation gasoline, and gasohol, among other things. *K.S.A. 79-3401.*Kansas motor fuel tax is imposed on the number of gallons or fractions thereof sold. *K.S.A. 79-3408.*The Kansas motor vehicle fuel tax on special fuel is $.26 per gallon. *K.S.A. 2010 Supp. 79-34,141.*There is no motor vehicle fuel tax on special fuel sold as aviation fuel. *K.S.A. 79-3408(d)(4).*When Kansas motor fuel tax is not charged on sales of aviation fuel, Kansas retailer's sales tax is imposed on the selling price unless the sale is otherwise exempt. *K.S.A. 79-3602(g).*

Notice 09-06, *Sales Tax Base on Motor-fuel Purchases Includes Federal Excise Taxes,* instructs:

When Kansas motor-fuel tax does not apply to fuel such as dyed-diesel fuel or aviation fuel, Kansas sales tax applies to its retail sale unless the purchaser/final consumer provides the retailer with a sales-tax exemption certificate.*See K.S.A. 2009 Supp. 79-3606(a)(Motor fuel is subject to sales tax unless the motor fuel excise tax has been paid.)*Sales tax exemption certificate forms are available for download from our web site: www.ksrevenue.org. The appropriate form should be completed by the consumer and given to the fuel retailer to claim the sales tax exemption. Examples of off-road use of dyed-diesel fuel and aviation fuel whose sale to a final consumer is exempt from Kansas sales tax are: (1) dyed-diesel consumed by farmers in their field work; (2) dyed-diesel consumed by rock crushing equipment in quarry operations; (3) aviation fuel consumed by scheduled airlines; and (4) dyed-diesel stored in a separate tank that powers an interstate motor carrier's refrigeration unit.

When a sale of motor fuel is subject to sales tax, the retailer is required to collect sales tax on the "sales or selling price" of the fuel. This amount includes any Federal fuel excise tax that is imposed on the fuel, even when the fuel and the Federal tax are listed as separate line-item charges on the purchase invoice. *See K.S.A. 2009 Supp. 79-3602(ll)(No deduction from the "sales or selling price" for "taxes imposed on the seller and any other expense of the seller.")*

This discussion shows that while aviation fuel is exempt from Kansas motor fuel tax, aviation fuel sold to private pilots and to businesses is subject to Kansas retailers' sales tax, except for sales of such fuel to scheduled airlines, air freight common carriers, and crop dusters. Kansas dealers who sell aviation fuel to consumers must register with the department and collect retailers' sales tax on their taxable sales of the fuel.

Your company sells aviation fuel to a private Fixed-Base Operator (FBO) that resells the fuel to final consumers. The FBO is located on a Federal military base in Kansas, or at least on land in Kansas owned by the Federal government. The FBO informed you it discussed its tax collection duties with a department associate and was told Kansas law does not required it to collect sales tax on its retail sales of aviation fuel. Such advice is erroneous and cannot be relied on even if it were provided by a department associate during a telephone conversation.

Taxpayers generally are allowed to rely on department advice only if the advice is in writing. If the department advised the FBO in writing that it was not required to register with the department as a retailer, I suspect the letter only discusses the taxability of charges for sales of repair and replacement parts for aircraft and charges for associated installation, repair, and maintenance services. These charges are exempt from sales tax.*See Amended Notice 04-06, Sale Of Aircraft Repair Parts And Services.*The issue of whether sales of aviation fuel are subject to Kansas retailers' sales tax probably was never raised or addressed in the correspondence between the FBO and department. As has been discussed, the FBO's sales of aviation fuel in Kansas are subject to retailers' sales tax even though the FBO's customer charges for aircraft parts and services are exempt.

The belief held by the FBO operator that his sales of aviation fuel are exempt because his operations are located on a military base or other Federal land has no support in Kansas or Federal law. Public Act. No. 819, 54 Statutes 1059, 4 U.S.C., Sec. 13 *et seq.,* known as the "Buck Act," was passed by Congress on October 9, 1940 for the purpose of receding sufficient sovereignty to the States to collect certain taxes. The act is entitled: *"An Act to permit the states to extend their Sales, Use and Income taxes to person residing or carrying on business or to transactions occurring, in Federal areas, and other purposes."*Sec. 105 of the Buck Act specifically authorizes a State to collect its sales and use tax: *". . . in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area."*The State of Kansas has not enacted an law to forgo exercising the authority the Federal government receded to it under the Buck Act.

Army Regulation 60-20 (Air Force Regulation 147-14), Chap. 5, entitled *"Exchange Services Operating Policy,"* Paragraph 5-2(d) does not allow the FBO to obtain the tax exempt status enjoyed by the U.S. government, base and post exchanges, and officers' clubs. The regulation states: *“Concessionaire and other independent contractors are not entitled to claim AAFES immunity from taxation. Concessionaire must collect and remit applicable sales and use taxes as required by state law pursuant to provisions of 4 U.S.C. 105, (The Buck Act). Contractors may be liable for State Sales and Use taxes as provided by state law.”*

The FBO is required to register to collect, report, and remit Kansas retailers' sales tax on its taxable sales of aviation fuel. Department Publication KS-1216, *Kansas Business Tax Application Booklet,*instructs businesses how to register with the department. It can be downloaded from our website: *www.ksrevenue.org.*If the FBO is currently registered for Kansas income tax withholding purposes, it should contact our registration section and ask to be registered for sales tax purposes. Once registered for sales tax purposes, the FBO can issue a resale exemption to your business that contains its department-issued sales tax registration number. This will allow you to exempt your sales of aviation fuel to the Kansas FBO. If the FBO refuses to register with the department as a retailer, your business is required to charge sales tax on all of its sales of aviation fuel to the FBO.

Sincerely,

Thomas E. Hatten
Attorney/Policy & Research

**Date Composed: 12/15/2011 Date Modified: 12/15/2011**