Subject Taxation
Dept. of Revenue
Copy to Licenses - Liquor
Clubs, Private

STATE OF KANSAS

Office of the Attorney General

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August 26, 1974

Opinion No. 74- 295

James T. McDonald
Secretary of Revenue
State Office Building
Topeka, Kansas 66625

Dear Secretary McDonald:

By letter dated July 9, 1974, and pursuant to K.S.A. 77-422, you submit for our review proposed regulation numbered 14-19-12. An earlier regulation was approved by this office as to form and legality, and as being within the statutory authority provided therefor, but it was subsequently not approved by the State Alcoholic Beverage Control Board of Review. As a result, subsection (c) has been amended, and it is submitted again for review.

As amended, the regulation provides in pertinent part thus:

> "Criteria for determining qualification as a bona fide nonprofit organization or association. The criteria for determining whether an applicant for a class A club license qualifies as a bona fide nonprofit organization or association will be based upon the following factors:
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> * * *
>
> c. Has qualified as an exempt organization under the provisions of K.S.A. 79-32,113 and amendments thereto, or has qualified as exempt organization under the provisions of Section 501 (c) of the Internal Revenue Code of 1954, or in lieu thereof the Director may from competent evidence determine an applicant seeking a class A club license is in truth and in fact a bona fide nonprofit corporation or association."

This proposed regulation is prompted by the 1974 amendment to K.S.A. 41-2601(b)(2), see ch. 196, L. 1974, which now provides in pertinent part as follows:

> "A class A club shall be a premises owned or leased and operated by a corporation, partnership, business trust or association, for the exclusive use of the corporate stockholders, partners, trust beneficiaries or associates (hereinafter referred to as members), their families and invited and accompanied guests, and which is not operated for a profit other than such as would accrue to the entire membership. A corporation, partnership, business trust, or association not operated for a profit, for the purposes of the definition of a class A club shall only include such a corporation, partnership, business trust, or association which has been exempted from the payment of federal income taxes as provided by section 501(c), (7) and (8), internal revenue code of 1954 *or determined to be a bona fide nonprofit organization or association by the director of alcoholic beverage control.*" [Italicized portion added by 1974 amendment.]

K.S.A. 41-2634 was also amended in 1974, to provide the Secretary of Revenue corresponding authority to adopt rules and regulations to implement the amendment:

> "(a) The secretary of revenue may adopt rules and regulations for the administration and enforcement of article 26 of chapter 41 of Kansas Statutes Annotated. Such rules and regulations include the criteria for determining whether an applicant for a license as a private club qualifies as a bona fide nonprofit organization or association, based upon the following standards:
>
> (1) An applicant shall be a bona fide nonprofit organization or association if it is organized and operated exclusively for pleasure, recreation and other nonprofitable purposes and no part of its net earnings inures to the benefit of any of its private shareholders or members; and
>
> (2) An applicant shall be a bona fide nonprofit organization or association if it is a fraternal beneficiary society, order or association which operates under the lodge system, or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and such society, order or association provides for the payment of life, sickness, accident or other benefits to its members or their dependents."

These criteria are precisely identical to the definitions of organizations exempt from federal income taxation under the Internal Revenue Code, 26 U.S.C. § 501(d)(7) and (8).

Heretofore, in order to obtain a class A club license, it was necessary that the organization have been exempted from the payment of federal income tax under these provisions of the Internal Revenue Code. The 1974 amendment to K.S.A. 41-2601(b)(2) purports to add an alternate basis upon which an applicant might qualify for a class A license, i.e., if no federal exemption were obtained, the applicant might still qualify if it were determined by the Director of Alcoholic Beverage Control to be a "bona fide nonprofit organization." However, at the same time, the 1974 amendment to K.S.A. 41-2634 requires the Director to apply criteria based upon precisely those standards which govern exemption from federal income taxation under the Internal Revenue Code.

Whatever may have been the intent of the proponents of the amendment to K.S.A. 41-2601(b)(2), it is clear, in view of the contemporaneous amendment to K.S.A. 41-2634, that the Legislature did not intend to abandon the distinction between for-profit and nonprofit clubs, and that the status of the latter is to continue to be determined according to the criteria presently governing exemption under the Internal Revenue Code.

A pertinent rule of statutory construction is drawn into question here. Generally speaking, when the Legislature makes some change in an existing statutory enactment, it is assumed that "it was intended to supply some want, to fill some deficiency, to add something to make existing legislation more complete." *State ex rel. Osborn v. Richardson*, 174 Kan. 382, 256 P.2d 135 (1953). As stated in the syllabus to *City of Emporia v. Norton*, 16 Kan. 236 (1876),

> "It will not be imputed to the legislature that it intended to go through the form and time and expense of legislation to accomplish nothing, or to do that already fully and completely done."

Here, however, that which the Legislature intended to take away by the amendment to K.S.A. 41-2601(b)(2), it apparently intended to restore by its amendment to K.S.A. 41-2634. In eliminating the statutory requirement that a class A club license applicant have been exempted from the payment of federal income taxes under 26 U.S.C. § 501(c)(7) or (8), and thus allowing the Director to make an independent determination whether the applicant is a "bona fide nonprofit organization or association," the Legislature explicitly did not intend to allow the Director to make that determination according to any criteria or standards other than

precisely those same statutory standards which are determinable of the right to exemption from federal income tax. The Director is not free to make a determination contrary to the body of federal law built upon 26 U.S.C. § 501 (c)(7) and (8). Inasmuch as the criteria set forth in the 1974 amendment to K.S.A. 41-2634 are precisely those employed in those provisions of the Internal Revenue Code to define exempt organizations thereunder, the body of federal law developed heretofore is persuasive and must be given great weight in the construction and administration of the similar language adopted by the Kansas Legislature in 1974. See *Gideon v. Bo-Mar Homes, Inc.*, 205 Kan. 321, 469 P.2d 272 (1970); *State v. Richardson*, 194 Kan. 471, 399 P.2d 799 (1965).

Moreover, the Secretary of Revenue has no authority to adopt a regulation which would permit the Director of Alcoholic Beverage Control to make a determination of the nonprofit status of an organization or association which is contrary to a determination of the same question by any other division under the authority of the Secretary. If an organization or association is determined to be a bona fide nonprofit organization or association for one purpose by the Department of Revenue, that determination is conclusive upon the Secretary and all those acting under regulations adopted by him for any other purpose. Certainly, the Secretary cannot adopt regulations which would permit a determination of the question in one agency under his authority to be contrary to the determination made by another agency under his authority. Regulations governing Division of Taxation and the Division of Alcoholic Beverage Control are equally under the authority of the Secretary. K.S.A. 79-32,113 states in part thus:

> "(a) A person or organization exempt from federal income taxation under the provisions of the internal revenue code shall also be exempt from the tax imposed by this act in each year in which such person or organization satisfies the requirements of the internal revenue code for exemption from federal income taxation."

If an organization or association is found to be a for-profit entity for the purposes of the Division of Taxation, the Secretary cannot permit the same organization or association to be regarded as a nonprofit entity by any other division of his department in the administration of state laws which turn upon the issue of bona fide nonprofit status.

Paragraph (c) of the proposed regulation is defective in that it appears to contemplate precisely this eventuality. Lacking an exemption from federal income taxation, the regulation permits the Director to proceed nonetheless to make an independent determination "from competent evidence" that the applicant is "in truth

and in fact a bona fide nonprofit corporation or association." On the face of it, the regulation permits the Director to make a determination of nonprofit status contrary to that which governs the taxation of the corporation under K.S.A. 79-32,113. Lastly, it should be pointed out that use of the phrase "competent evidence" is but a superfluity. The determination could obviously not be made on incompetent evidence. Yet, the regulation requires the Director to base the determination of this critical issue upon the basis of nothing more identifiable and specific than "competent evidence."

For the foregoing reasons, we must withhold approval of the proposed regulation no. 14-19-12.

Yours very truly,

Vern Miller

VERN MILLER
Attorney General

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