



STATE OF KANSAS

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Attorney General

July 15, 1975

ATTORNEY GENERAL OPINION NO. 75- 294

The Honorable Edward F. Reilly, Jr.
State Senator
430 Delaware
Leavenworth, Kansas 66048

Re: Taxation--Compensating Tax--Imposition of Tax

Synopsis: Under K.S.A. 1974 Supp. 79-3603(p), the developing of film into pictures is a service which is subject to the Kansas sales tax.

When film is developed outside the state of Kansas, and subsequently returned to a Kansas user, that transaction is subject to the Kansas Compensating Tax.

A retailer doing business in the state of Kansas is required to collect the Kansas Compensating Tax from the Kansas user.

* * *

Dear Senator Reilly:

You inquire concerning the applicability of either the Kansas Retailers' Sales Tax Act or the Kansas Compensating Tax Act to transactions by a constituent with the J. C. Penney Film Club in Chicago, Illinois. The individual in question, we are advised, sends exposed film to the Club in Chicago by United States mail, and the developed film is returned directly to him by mail from the Illinois address. The costs of this transaction are placed on his Penney's charge account. The retailer charges and collects Kansas sales tax, or an amount equal thereto, on the amounts so billed, and the individual questions the legality of this charge.

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It is necessary, first, to determine whether this transaction is subject to the Kansas Retailers' Sales Tax Act, K.S.A. 79-3601 *et seq.* It is not altogether clear whether the charges assessed to a person submitting exposed film for development are for the sale of personal property, i.e., the paper, dyes and other substances thereon which comprise the photograph, or whether the charge is for service rendered, i.e., the processing of exposed film. For the purposes of this opinion, we rely upon extant rulings of the Kansas Department of Revenue, that the photographic processing is subject to K.S.A. 1974 Supp. 79-3603(p) which prescribes that there shall be collected and paid a tax as follows:

"a tax at the rate of three percent (3%) upon the gross receipts received from the installation, maintenance, servicing and repairing of tangible personal property not held for sale in the regular course of business, whether or not any tangible personal property is transferred in conjunction therewith, except services rendered in installing property in connection with the original construction of a building or structure, which when installed will become a part of such building or structure"

The question remains, then, whether the transaction occurs in Kansas so as to be subject to the foregoing. In *Montgomery Ward & Co. v. Commission of Revenue and Taxation*, 156 Kan. 408, 133 P.2d 1008 (1943), the court discussed mail-order transactions in which the customer has the right to inspect the goods and to refuse to consummate the sale:

"There are two rules with reference to this general type of sales. One is known as a contract of sale or return, that is, where the sale is made with an option to return. In those cases the title passes to the buyer and the sale is completed upon delivery to the carrier regardless of the fact that the customer has a right to return the merchandise.

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The other is a sale on trial or approval. These are cases where the contract is to purchase certain goods if they prove to be satisfactory when delivered. In these cases the title does not pass until the buyer has expressly or impliedly expressed his approval or acceptance." 156 Kan. at 414.

The court concluded that purchases of goods by mail on trial and approval were consummated in Kansas, where the purchaser was delivered and accepted the goods. We are not advised specifically concerning the terms of the transactions at issue here. We assume, however, that the photographs are not delivered on approval only, and that title thus passes to the buyer when the Illinois processor delivers the photographs to the carrier in Illinois for delivery to the Kansas customer. The sale being consummated in Illinois, the transaction is not subject to the Kansas Retailers' Sales Tax Act.

However, the transaction is subject to the Kansas Compensating Tax. K.S.A. 79-3703 states thus:

"There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using, storing, or consuming within this state any article of tangible personal property. Such tax shall be levied and collected in an amount equal to the consideration paid by the taxpayer multiplied by the rate of three percent (3%). All property purchased or leased within or without this state and subsequently used, stored or consumed in this state shall be subject to the compensating tax if the same property or transaction would have been subject to the Kansas retailers' sales tax had the transaction been wholly within this state."

K.S.A. 79-3702(c) defines the word "use" as

"The exercise within the state by any person of any right or power over

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tangible personal property incident to
the ownership of that property . . ."

Therefore, exercising control over finished photographs falls
within the definition of the word "use."

Finally, under K.S.A. 79-3705a it is provided that the tax levied
pursuant to this act

" . . . shall be paid by the consumer or
user to the retailer and it shall be the
duty of each and every retailer to collect
from the consumer or user, the full amount
of the tax imposed by this act, and such
tax shall be a debt from the consumer or
user to the retailer, when so added to the
original purchase price, and shall be
recoverable at law in the same manner as
other debts. . . ."

Therefore, it is our opinion that in the situation which you
present, the retailer who is doing business in this state pursuant
to K.S.A. 79-3702(h), not only *may* collect the compensating tax
from the consumer, but *must* collect it where the consumer is using
the company's photographic developing services outside this state.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:GFW:kj