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ATTORNEY GENERAL OPINION NO. 84- 12

The Honorable Ronald R. Hein
State Senator, Twentieth District
Room 120-S, State Capitol
Topeka, Kansas 66612

Re: Taxation--Kansas Retailers' Sales Tax--Tax
Imposed

Taxation--Kansas Compensating Tax--Imposition
of Tax

Synopsis: The removal of a new or used vehicle from a stock of vehicles (held for resale) by a licensed vehicle dealer, and registration of the vehicle in the dealership name, does not constitute a sale at retail under the provisions of K.S.A. 1983 Supp. 79-3602(e). However, where such registration of a vehicle occurs, compensating tax is due pursuant to the provisions of K.S.A. 79-3703, K.A.R. 92-20-3, and K.A.R. 1983 Supp. 92-19-43. Also, in computing said tax, the dealer may not claim credit for a trade-in allowance given by the dealer in the transaction whereby the dealer acquired the vehicle. Cited herein: K.S.A. 8-136, K.S.A. 1983 Supp. 79-3602, 79-3603, K.S.A. 79-3618, 79-3702, 79-3703, 79-3704, 79-3705a, K.A.R. 92-19-11, 92-19-25, K.A.R. 1983 Supp. 92-19-43, K.A.R. 92-20-3.

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Dear Senator Hein:

You request our opinion as to whether Kansas retailers' sales tax is imposed upon registration of a vehicle, by a licensed

vehicle dealer, under certain circumstances. Specifically, you inquire as to whether the tax is imposed where a dealer "exchanges vehicles," i.e. where the dealer takes a vehicle which is presently registered, places it back into his inventory, and registers another vehicle with the same license plate. Your specific questions are as follows:

"1. When a dealer removes a new or used vehicle from his stock of vehicles (all held for resale) and registers and tags the same in the dealership name, is there a sale at retail?

"2. From whom does the dealer purchase the new vehicle in a retail sale--when he pays no consideration to his dealership?

"3. Why isn't the dealer to be given credit for a trade-in allowance if in fact there is a retail sale under the above given set of facts?"

The above-stated questions must be answered by referring to the pertinent sales tax and compensating use tax statutes and regulations of this state. Subsection (a) of K.S.A. 1983 Supp. 79-3603 levies a "tax at the rate of 3% upon gross receipts received from the sale of tangible personal property at retail" within the state of Kansas. The term "sale" is defined (in part) as including "the exchange of tangible personal property, as well as the sale thereof for money, and every transaction, conditional or otherwise, for a consideration, constituting a sale." K.S.A. 1983 Supp. 79-3602(c). The term "sale at retail" is defined as "all sales made within the state of tangible personal property . . . for use or consumption and not for resale." K.S.A. 1983 Supp. 79-3602(e).

Pursuant to authority granted by K.S.A. 79-3618, the Secretary of Revenue has adopted regulations for administration of the Kansas Retailers' Sales Tax Act. In this regard, two regulations of the Department of Revenue are pertinent to your inquiry. K.A.R. 92-19-11 relates to property purchased for resale, but used by the purchaser, and provides as follows:

"If a wholesaler or retailer takes tangible personal property from a stock of goods to use for personal consumption or for gifts, he shall enter on his books the amount of

the cost of all tangible personal property so removed from stock for his personal consumption or as gifts, and, as the ultimate consumer, shall pay the tax thereon." (Emphasis added.)

K.A.R. 1983 Supp. 92-19-43 relates to vehicles acquired by a vehicle dealer for resale, which vehicles are subsequently registered by the dealer. Said regulation provides as follows:

"(a) The registration of a vehicle by a licensed vehicle dealer pursuant to the provisions of article 1 of chapter 8 of Kansas Statutes Annotated shall constitute the taking of tangible personal property from a stock of goods within the meaning of K.A.R. 92-19-11 and amendments thereto. Except as provided in subsections (b) and (c), sales tax shall be due and payable to the county treasurer at the time the dealer makes application for the registration of the vehicle.

"(b) Notwithstanding the provisions of subsection (a), whenever a vehicle is registered by a licensed vehicle dealer for the purpose of subsequently leasing the vehicle, sales tax shall be collected by the licensed vehicle dealer on each lease payment made by the lessee. At the time of making application for registration, the dealer shall provide the county treasurer with a resale exemption certificate pursuant to K.A.R. 92-19-25.

"(c) Whenever a vehicle which has been registered by a licensed vehicle dealer, and upon which the sales tax has been paid, is sold or is otherwise transferred in a taxable transaction within 15 days from the date the vehicle was registered by the dealer, the taking of the vehicle from a stock of goods and the subsequent transfer shall be deemed to constitute a single transaction for sales tax purposes. Upon the subsequent transfer, the dealer shall collect the sales tax from the ultimate consumer and may apply for credit from the director of taxation for the tax paid by the dealer to the county treasurer." (Emphasis added.)

K.S.A. 79-3703 imposes compensating tax upon using or consuming, within the state of Kansas, any article of tangible personal property (whether purchased within or without the state of Kansas). K.S.A. 79-3702 defines the term "use" as "the exercise within this state by any person of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include processing, or the sale of property in the regular course of business, and except storage as hereinafter defined." Pursuant to K.S.A. 79-3704, any article of tangible personal property, the sale or use of which has already been subjected to a tax equal to or in excess of the compensating tax, is exempt from said tax. K.S.A. 79-3705a provides, in part, that the person using, consuming or storing tangible personal property in this state shall pay the compensating tax where the same is not collected or collectible by the retailer. Finally, under the provisions of K.A.R. 92-20-3, sales tax rules and regulations also apply to compensating tax.

Responding, now, to your first question, it is our opinion that when a dealer removes a new or used vehicle from his stock of vehicles (all held for resale) and registers the same in the dealership name, such action does not constitute a sale at retail under the provisions of K.S.A. 1983 Supp. 79-3602(e), for the reason that a sale cannot occur without the participation of two parties (a seller and a buyer). However, it is necessary to consider whether the registration of such a vehicle constitutes a taxable use under the Kansas Compensating Tax Act.

It is well settled that the Kansas Retailers' Sales Tax Act and the Kansas Compensating Tax Act are complementary and supplemental to one another, and must be construed together. Consumers Cooperative Ass'n v. State, 174 Kan. 461 (1953). Additionally, it is a basic principle of the sales tax act that the tax is borne by the ultimate consumer and that no article should have to carry more than one sales tax. Southwestern Bell Tel. Co. v. State, 168 Kan. 227, 233 (1949). In this regard, it must be recognized that where a motor vehicle dealer acquires a vehicle for resale, no sales tax is imposed on said transaction because the dealer represents that the sale is not for use or consumption, and because the dealer claims a resale exemption (see K.A.R. 92-19-25). However, where a dealer registers and tags the vehicle in the dealership name, it is clear that such action establishes that the vehicle was not acquired for resale, but for use or consumption, since such registration is not required to demonstrate and display the vehicle for purposes of resale. See K.S.A. 8-136. Accordingly, where such registration occurs, it is our opinion that compensating tax is due under the provisions of K.S.A. 79-3703, 79-3705a, K.A.R. 1983 Supp. 92-19-43, K.A.R. 92-19-25 and K.A.R. 92-20-3.

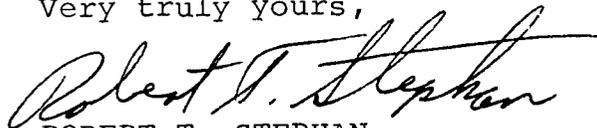
The Honorable Ronald R. Hein
Page Five

In regard to your second question, the taxable event giving rise to imposition of the compensating tax is not the sale of tangible personal property, but the use of such property within the state of Kansas. As stated above, the registration of a vehicle by a motor vehicle dealer establishes such a use, and the tax is imposed upon the consideration paid by the taxpayer for the property. Although a dealer pays no consideration to his dealership when he removes a vehicle from inventory, the vehicle was undoubtedly acquired by the dealer for a consideration (either cash or trade-in allowance), and it is the latter consideration upon which the tax is levied.

Finally, in response to your third question, both the Kansas Retailers' Sales Tax Act and the Kansas Compensating Tax Act permit the deduction of a trade-in allowance from the tax base. See K.S.A. 1983 Supp. 79-3602(h) and K.A.R. 92-20-4. However, in our judgment, these laws and regulations cannot be reasonably interpreted as permitting such a deduction where a dealer is dealing with himself, i.e. where a dealer takes a vehicle which is presently registered, places it back into his inventory, and registers another vehicle with the same license plate.

Additionally, in our judgment, where a dealer is removing (from inventory) a vehicle taken as a trade-in, the dealer may not claim such a deduction based upon any trade-in allowance given by the dealer in the transaction whereby the dealer acquired the vehicle. Presumably, the dealer would have already claimed the deduction in a previous month's report of gross receipts [see K.S.A. 1983 Supp. 79-3602(h)], and in our opinion, the dealer may not claim a second deduction based upon the same trade-in allowance. Further, in our judgment, the allowance of a deduction under the circumstances you describe would violate the basic principle upon which the sales tax and compensating use tax are based, i.e. that the ultimate consumer bears the tax. In our opinion, a licensed vehicle dealer is the ultimate consumer, with respect to a vehicle which is registered by the dealer, and is liable for payment of sales or compensating tax upon registration of a vehicle.

Very truly yours,



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Attorney General of Kansas



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