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ATTORNEY GENERAL OPINION NO. 85- 179

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400 SW 8th, Suite 609
Topeka, Kansas 66603

Re: Taxation -- Kansas Retailers Sales Tax -- Exempt
Sales to Educational Institutions

Synopsis: Regents' institutions are governed by subsections (c) and (d), but not subsection (b), of K.S.A. 79-3606. The sales tax exemption provided in K.S.A. 79-3606(c) does not apply to materials used in extraordinary "repair" of housing facilities at educational institutions, but does include minor items involved in the routine maintenance of such facilities. Cited herein: K.S.A. 79-3606, as amended by L. 1985, Ch. 331, Sec. 1; L. 1967, Ch. 500, Sec. 1; L. 1970, Ch. 389, Sec. 4; L. 1971, Ch. 321, Sec. 3.

* * *

Dear Mr. Kauffman:

As General Counsel to the Kansas Board of Regents, you request our opinion concerning certain provisions of K.S.A. 79-3606, as amended by L. 1985, Ch. 331, Sec. 1. Specifically, you inquire which subsection of that statute applies to institutions governed by the regents, and whether under the applicable subsection(s) a sales tax exemption is provided for materials used in maintaining or making minor repairs to housing facilities operated by such institutions.

K.S.A. 79-3606, as amended, provides in relevant part that the following shall be exempt from the tax imposed by the Kansas Retailers' Sales Tax Act:

"(b) all sales of tangible personal property or service, including the renting and leasing of tangible personal property, purchased directly by the state of Kansas, a political subdivision thereof, other than a school or educational institution, or purchased by a public or private nonprofit hospital or nonprofit blood bank and used exclusively for state, political subdivision, hospital or nonprofit blood bank purposes,

"(c) all sales of tangible personal property or services, including the renting and leasing of tangible personal property, purchased directly by a public or private elementary or secondary school or public or private nonprofit educational institution and used primarily by such school or institution for nonsectarian programs and activities provided or sponsored by such school or institution or in the erection, repair or enlargement of buildings to be used for such purposes. The exemption herein provided shall not apply to erection, construction, repair, enlargement or equipment of buildings used primarily for human habitation;

"(d) all sales of tangible personal property or services purchased by a contractor for the purpose of constructing, equipping, reconstructing, maintaining, repairing, enlarging, furnishing or remodeling facilities for any public or private nonprofit hospital, public or private elementary or secondary school or a public or private nonprofit educational institution, which would be exempt from taxation under the provisions of this act if purchased directly by such hospital, school or

education institution;" (Emphasis added.)

Although the regents' institutions are recognized as independent state agencies, we have no hesitancy in concluding that subsection (b) is inapplicable due to the express language excluding "educational institutions." While this term is not defined in the Kansas Retailers' Sales Tax Act, that term clearly includes regents' institutions. Accordingly, it is the expressed legislative intent that subsection (b) does not apply to sales of tangible personal property or service purchased directly by an educational institution. However, such sales are specifically addressed in subsection (c).

Therefore, regents' institutions are governed by subsection (c) if the materials are purchased directly by the educational institution, or by subsection (d) if the materials are purchased by a contractor for use at an educational institution. The former subsection allows a tax exemption for all sales of tangible personal property or services purchased directly by an educational institution and used primarily by such institution in the repair of buildings used for nonsectarian programs and activities provided or sponsored by such institution. However, subsection (c) is made expressly inapplicable to the "repair" of buildings used primarily for human habitation.

Subsection (d) allows a similar exemption for all sales of tangible personal property or services purchased by a contractor for the purpose of "maintaining" or "repairing" facilities for any educational institution, which would be exempt from taxation if purchased directly by that educational institution. However, a difficulty arises because the subsection which sets forth those sales which are exempt from taxation if purchased directly by an educational institution [subsection (c)] makes no reference to "maintenance," but instead denies an exemption for "repairs" to housing facilities.

In our opinion, the issue is whether the legislature intended that the term "repairs" in subsection (c) would encompass or be synonymous with routine maintenance. If so, sales for the purpose of maintaining a housing facility at an educational institution would be taxable under the Kansas Retailers' Sales Tax Act. The legislative history is of some assistance in resolving this question.

Prior to 1970, K.S.A. 79-3606 expressly denied a tax exemption for materials purchased by an educational institution and used in the "construction, reconstruction, repair, maintenance or remodeling "of buildings used primarily for human habitation." L. 1967, Ch. 500, §1(b)(4). (Emphasis added.) The legislative intent to distinguish between the terms "repair" and "maintenance" was clear, as was the intent that the materials used in either action be denied a tax exemption.

In 1970, the legislature amended the statute to state simply that the exemption provided in subsection (c) for erection, repair or enlargement of buildings "shall not apply to buildings used primarily for human habitation." L. 1970, Ch. 389, §4. Under the 1970 statute, the legislative intent was clear that no sales tax exemption be granted to an educational institution for materials used in maintenance or repair or any other action to a structure used primarily for human habitation.

The statute was amended the following year to include the language contained in the current version of the statute. That language, added in 1971, states "That the exemption [provided in subsection (c)] shall not apply to erection, construction, repair, enlargement, or equipment of buildings used primarily for human habitation." L. 1971, Ch. 321, Sec. 3(c). This narrow language demonstrates the legislative intent that the denial of a tax exemption should apply only to sales for certain actions to a structure used primarily for human habitation. It may therefore be inferred that the legislature intended that sales for other actions to housing facilities could be tax exempt.

In our judgment, sales for maintenance to a housing facility of an educational institution are such other actions. The legislative history demonstrates that, had the legislature wished to deny a tax exemption for sales for maintenance, it clearly knew how to do so. We believe the last sentence of K.S.A. 79-3606(c) denies a sales tax exemption to materials used in "repairs" to housing facilities of an educational institution, but allows such an exemption for materials used in "maintenance" of such facilities. The practical problem is in determining whether, in a given situation, the action to be undertaken constitutes "repairs" rather than "maintenance."

Reference to dictionary definitions of "repair" or "maintain" is not particularly helpful. The American Heritage Dictionary (New College Edition, 1976) provides the following:

repair: "to restore to sound condition after damage or injury; fix." p. 1102.

maintain: "to keep in a condition of good repair or efficiency." p. 787.

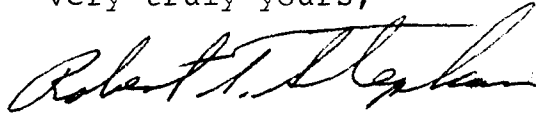
Relevant definitions by the Kansas appellate courts demonstrate the similarity rather than the distinction between the two terms. See e.g., School District v. Robb, 150 Kan. 402, 404-405 (1939) (Recognizing a distinction between the "erection" of public improvements and the "maintenance or repair" of them); State, ex rel. v. City of Pittsburg, 188 Kan. 612, 621 (1961) ("Maintenance" held to be synonymous with "taking proper care of," "repairing," or the like); In Re Tax Appeal of R. & R. Janitor Service, 9 Kan.App.2d 500, 505 (1984) ("Maintaining" is keeping in repair or replacing, and is not synonymous with "cleaning").

Few cases in other jurisdictions have sought to distinguish between "maintenance" and "repair." In In Re Bowden's Will, 143 N.Y.S. 2d 125 (1956), a will authorized trustees to pay for "repairs" to a homestead but did not authorize payment for "maintenance" to the homestead. The court held, without any discussion of its rationale, that the "necessary and reasonable painting and decorating of the premises within and without constitute repairs," while the "putting up and taking down of storm windows and screens, and keeping the grounds in order are not repairs, but rather acts of maintenance" 153 N.Y.S. 2d at 126. In People v. Chicago, B. & Q. R. Co., 107 N.E. 222 (Ill. 1914), a statute required that when a tax was levied for several purposes, the amount for each purpose be separately stated. In holding that a tax levy for "repairs upon, and care, support, and maintenance of the courthouse" met the separate itemization requirement, the court stated "the word 'maintenance' might include ordinary repairs for the building, as it might also include the care of the building." The court thus distinguished between ordinary repairs such as are required every year in a building, and extraordinary repairs on buildings which would require more than the usual annual expense for repairs for ordinary wear in holding that only extraordinary repairs need be separately itemized.

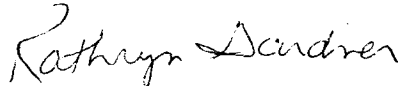
In our judgment, the word "repairs" in the context of the last sentence of K.S.A. 79-3606(c) should be interpreted to mean extraordinary repairs requiring large expenditures and not ordinary repairs essential for the routine maintenance of housing operations. Accordingly, materials used to preserve

the original nature of the housing facility by fixing minor damage resulting from normal wear and tear are tax exempt under K.S.A. 79-3606(c). However, materials used to restore a housing facility to its original form and structure after major or extensive damage to it from a source other than normal wear and tear are not tax exempt.

Very truly yours,



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