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ATTORNEY GENERAL OPINION NO. 90- 17

The Honorable Ben Foster
State Representative, Eighty-Fifth District
State Capitol, Room 156-E
Topeka, Kansas 66612

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

Synopsis: The Kansas Arts Commission, in selling items at retail as part of a fund-raising program, would be a retailer for purposes of the Kansas retailers' sales tax act, and thus would be responsible for collecting and remitting sales tax on such sales. The amount of the tax imposed is based on the total "selling price" or total consideration given in the transaction. Cited herein: K.S.A. 1989 Supp. 12-189; 12-191; K.S.A. 75-2249; 79-3602; 79-3603; 79-3604; 79-3604a; 79-3607; 79-3608; 79-3609; K.A.R. 92-19-16; 92-19-34; 92-19-46; 92-19-47.

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Dear Representative Foster:

You request our opinion regarding applicability of the Kansas retailers' sales tax act to certain transactions proposed by the Kansas Arts Commission. The Commission is preparing to launch a fund-raising campaign to fund purchase of the state capitol dome sculpture pursuant to K.S.A. 75-2249. One of the fund raising efforts proposed involves sales of t-shirts, medallions and scale-models of the dome sculpture. You question whether these sales will be subject to sales tax, which local sales taxes would apply, the responsibility of the Commission for collecting and reporting sales tax and the

amount of sales tax to be charged when a scale-model statuette which retails for \$3,000 is awarded for donations of \$10,000 or more.

The Kansas retailers' sales tax act, K.S.A. 79-3601 et seq., requires collection of a tax at the rate of 4.25% upon "[t]he gross receipts received from the sale of tangible personal property at retail within this state. . . ." K.S.A. 79-3603(a). It is "the duty of each and every retailer in this state to collect from the consumer or user, the full amount of the tax imposed by this act. . . ." K.S.A. 79-3604; 79-3604a. K.S.A. 79-3608 directs retailers engaged in the business of selling tangible personal property in this state to obtain a registration certificate from the director of taxation for each place of business. Retailers are to make returns to the director of taxation pursuant to K.S.A. 79-3607 and are to keep records as directed by K.S.A. 79-3609.

"Retailer" is defined in K.S.A. 79-3602(d) as "a person regularly engaged in the business of selling tangible personal property at retail . . . and selling only to the user or consumer and not for resale." "Tangible personal property" is defined as "corporeal personal property", K.S.A. 79-3602(f), and "sale at retail" means "all sales made within the state . . . for use or consumption and not for resale." K.S.A. 79-3602(e). The proposed sales are of tangible personal property and will be for use or consumption and not for resale. The Department of Revenue has, by administrative regulation, determined that "[a]ny person who makes a sale of property is engaged in the business of selling that property if the property was acquired for the purpose of resale." K.A.R. 92-19-34. See also K.A.R. 92-19-47(c). The Commission would thus be regularly engaged in the business of selling these items. (We are told the Commission expects to offer for sale at least 500 t-shirts, 1,000 medallions and 40 statuettes.)

Although the definition of "retailer" contains the term "person," and the definition of the term "person" does not appear to include the State or state agencies, statutory construction rules require that we interpret statutes in view of their context. J.A. Tobin Constr. Co., Inc. v. Kemp, 239 Kan. 430, 436 (1986). "[A] statute is not to be given an arbitrary construction, according to the strict letter, but one that will advance the sense and meaning fairly deductible from the context." Mahone v. Mahone, 213 Kan. 346, 350 (1973). Other provisions of the act speak to situations in which the State or one of its agencies is a

retailer subject to the act. See K.S.A. 79-3603(e); 79-3606(b)(1). Further, the Kansas Supreme Court has recognized an agency of the State as a retailer for purposes of the act. See State Tax Commission v. Board of Agriculture, 146 Kan. 720, 721 (1937). See also VII Opinions of the Attorney General 1127, 1128 (May 4, 1972).

We therefore believe the Kansas Arts Commission, in selling the items in question, should be considered a retailer for purpose of the Kansas retailers' sales tax act, and thus will be subject to the requirements discussed above.

K.S.A. 1989 Supp. 12-191 provides that all retail sales consummated within a county or city having a retail sales tax shall be subject to such county or city retail sales tax if also subject to the Kansas retailers' sales tax act. This statute further provides that "all retail sales . . . shall be considered to have been consummated at the place [or places] of business of the retailer." These local sales taxes are to be collected by the retailer and remitted to the director of taxation just as the state sales tax is. K.S.A. 1989 Supp. 12-189.

Your final question involves the amount of sales tax to be collected when a statuette which ordinarily retails for \$3,000 is "awarded" to an individual who donates \$10,000 or more to the state capitol dome fund. The amount of sales tax imposed under K.S.A. 79-3601 et seq. is based on the gross receipts received from the sale. K.S.A. 79-3603(a). A "sale" is any "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. 79-3602(c). "Gross receipts" means "the total selling price or the amount received . . . in money, credits, property or other consideration valued in money. . . ." K.S.A. 79-3602(h). "Selling price" is in turn defined as "the total cost to the consumer. . . ." K.S.A. 79-3602(g). The Department of Revenue has further defined "selling price":

"Selling price is the total consideration given in each transaction, whether in the form of money, rights, property, promise or anything of value, or by exchange or barter. The key element in imposing sales tax on a transaction is not based on what a transaction may be called or termed, but on the operation of the transaction. The term selling price includes the following:

"(1) The total monetary value of the consideration of all those things which in fact are, or are promised to be paid by the consumer to a seller in the consummation and complete performance of a retail sale, whether or not the seller receives any benefit from the consideration;

"(2) the total cost to the consumer without any deduction or exclusion for the cost of the property or service sold, labor or service used or expended, materials used, losses, overhead or any other costs or expenses, or profit, regardless of how any contract, invoice or other evidence of the transaction is stated or computed, and whether separately billed or segregated on the same bill; and

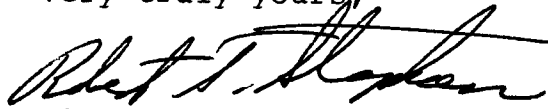
"(3) all transactions in which a person secures for a consideration, the use of tangible personal property or services and includes transactions which may be termed royalties or licenses." K.A.R. 92-19-46(a).

These broad definitions would appear to encompass the transaction in question and if the "award" of a statuette is contingent upon the receipt of \$10,000, sales tax should apparently be based on the \$10,000 amount. The Commission may therefore wish to disassociate the "award" of a statuette from any "donation" of more than \$3,000. Alternatively, the commission may set aside a certain number of statuettes to give at random to one or more, but not all, persons who donate at least \$10,000. This would appear to bring the Commission within the parameters of the K.A.R. 92-19-16 exception from sales tax for gifts.

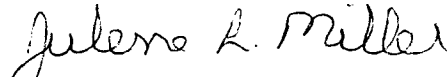
In conclusion, the Kansas Arts Commission, in selling items at retail as part of a fund-raising program, would be a retailer for purposes of the Kansas retailers' sales tax act, and thus would be responsible for collecting and remitting sales tax on

such sales. The amount of the tax imposed is based on the total "selling price" or total consideration given in the transaction.

Very truly yours,



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Julene L. Miller
Deputy Attorney General

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