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June 18, 1992

ATTORNEY GENERAL OPINION NO. 92- 79

The Honorable Clyde Graeber
State Representative, Forty-First District
2400 Kingman
Leavenworth, Kansas 66048-4230

Re: Taxation--Kansas Retailers' Sales Tax--1992 H.B.
No. 2892; Tax on Certain Construction Services;
Computation

Synopsis: To the extent connected with the service of
installing or applying tangible personal property
in original construction, profit and overhead
passed on as a cost to the consumer for such
service are properly taxable. Cited herein:
K.S.A. 79-3602, as amended by 1992 H.B. No. 2892;
K.S.A. 79-3603, as amended by 1992 H.B. No. 2892.

* * *

Dear Representative Graeber:

You request our opinion regarding the department of revenue's
statement that profit and overhead are subject to the new
sales tax on original construction labor services. You
question whether this is consistent with legislative intent as
expressed in 1992 House Bill No. 2892.

Section 59(p)(2) of 1992 House Bill No. 2892 amends K.S.A.
79-3603 to provide in part:

"a tax at the rate of 2.5% shall be
imposed upon the gross receipts received
from the service of installing or applying

tangible personal property in connection with the original construction of a building or facility or the construction, reconstruction, restoration, replacement or repair of a bridge or highway."
(Emphasis added).

The term "gross receipts" is defined at K.S.A. 79-3602(h), as amended by 1992 House Bill No. 2892, § 58 as "the total selling price or the amount received as defined in this act" exclusive of refunds or trade-ins. The term "selling price" is defined as "the total cost to the consumer exclusive of discounts allowed and credited, but including freight and transportation charges. . . ." K.S.A. 79-3602(g), as amended by 1992 House Bill No. 2892, § 58.

In construing the terms "gross receipts" and "selling price," the Kansas Court of Appeals has held that a mandatory gratuity, required to be paid by a customer as part of his monthly billing for food and drink, is part of the "total cost to the consumer" for the food and drink and was therefore taxable. The court stated: "[T]he amount taxable is determined by what the consumer was required to pay. Taxability does not depend on whether the vendor derived any benefit from the amount charged." In re Tax Appeal of Newton County Club Co., 12 Kan.App.2d 638, 644 (1988). However, in In re Tax Appeal of Bernie's Excavating Co., 13 Kan.App.2d 476, 480 (1989) the Court of Appeals stated: "The fact that taxable services and non-taxable services are governed by the same contract does not mean that the entire contract price should be taxed. To the contrary, it is inequitable to subject the taxpayer to higher taxes simply because separate contracts were not drawn for the different services." In that case, the Court determined that the charges for the service of excavating, which was not taxable, could be severed from the charges for the service of installation, which was taxable, and the tax was due only on the latter.

Based on these cases and the statutory language, it is clear that the sales tax on original construction labor services is to be based upon the total cost to the consumer for the service of installing or applying tangible personal property in connection with the original construction of a building or facility. The statement issued by the department of revenue recognizes that certain costs are not taxable, including costs associated with services other than installation. To the extent connected with the service of installing or applying tangible personal property in original construction, profit

and overhead passed on as a cost to the consumer for such service are taxable.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Julene L. Miller
Deputy Attorney General

RTS:JLM:jm