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ATTORNEY GENERAL OPINION NO. 88- 78

The Honorable Richard L. Bond  
State Senator, Eighth District  
9823 Nall  
Overland Park, Kansas 66207

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

Synopsis: K.S.A. 1987 Supp. 79-3603(p) imposes a 4% sales tax on the service of installing certain tangible personal property but exempts such service from the tax if the installation is in connection with the original construction of a building or a facility. The service of installing sewer and water mains in new subdivisions when the mains are part of the infrastructure of the new housing under construction comes within the tax exemption provided in K.S.A. 1987 Supp. 79-3603(p). Whether housing to be constructed in the future will be sufficiently connected with the original construction of a building or facility is a question of fact to be determined at the time of such construction. Cited herein: K.S.A. 1987 Supp. 79-3603(p); K.A.R. 1987 Supp. 92-19-25a(b).

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Dear Senator Bond:

As Senator for the Eighth District you inquire about the imposition of a 4% sales tax on the installation of certain personal property under the provisions of K.S.A. 1987 Supp. 79-3603(p). Specifically you inquire whether the installation of new sewer or water mains in new subdivisions under

construction come within the exception to the 4% retail sales tax. You indicate that these mains are being installed for service to housing under construction or for service to housing to be constructed and relate directly to the infrastructure of the housing and the ability to use the housing. You further state that following the installation, the sewer and water mains will be dedicated to, and become the property of, the appropriate utility which is a municipal or quasi-municipal corporation. K.S.A. 1987 Supp. 79-3603 states in part:

"For the privilege of engaging in the business of selling tangible personal property at retail in this state or rendering or furnishing any of the services taxable under this act, there is hereby levied and there shall be collected and paid a tax as follows:

. . . .

"(p) a tax at the rate of 4% upon the gross receipts received for the service of installing or applying tangible personal property which when installed or applied is not being held for sale in the regular course of business, and whether or not such tangible personal property when installed or applied remains tangible personal property or becomes a part of real estate, except that no tax shall be imposed upon 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 underscored language above indicates that a tax exemption applies to the service of installing tangible personal property "in connection with" the "original construction" of a "building" or "facility." Tax exemption statutes or provisions thereof are construed strictly in favor of imposing the tax and against allowing an exemption for one who does not clearly qualify. Board of Park Comm'rs of City of Wichita v. State, ex rel., Arnold, 212 Kan. 716 (1973); Director of Taxation, Dept. of Revenue v. Kansas Krude Oil

Reclaiming Co., 236 Kan. 450 (1984). In other words, unless specifically exempt, the sale of services enumerated within the sales tax act are presumed to be taxable. See K.A.R. 1987 Supp. 92-19-25a(b).

The determination of whether the above exemption applies depends upon whether the sewer and water mains in question are being installed in connection with the original construction of a building or facility. Subsection (p) of K.S.A. 1987 Supp. 79-3603 defines "original construction" and "building."

"For the purposes of this subsection:  
(1) 'Original construction' shall mean the first or initial construction of a new building or facility. The term 'original construction' shall include the addition of an entire room or floor to any existing building or facility, the completion of any unfinished portion of any existing building or facility and the restoration, reconstruction or replacement of a building or facility damaged or destroyed by fire, flood, windstorm, hailstorm, rainstorm, snowstorm, lightning, explosion or earthquake, but such term shall not include replacement, remodeling, restoration, renovation or reconstruction under any other circumstances.

"(2) 'building' shall mean only those enclosures within which individuals customarily live or are employed, or which are customarily used to house machinery, equipment or other property, and including the land improvements immediately surrounding such building. . . ."

By defining these terms for purpose of this subsection, the legislature clearly intended to remedy any apparent ambiguity. See Kansas City Millwright Co., Inc. v. Kalb, 221 Kan. 658 (1979).

Having defined the statutory terms, we must determine whether the service of installing sewer and water mains is "in connection with" the "original construction" of a "building," as these terms are defined in this subsection. The housing currently under construction clearly comes within both definitions as initial construction and as enclosures within

which individuals customarily live. While no Kansas case interprets "in connection with" as used in this particular statute, we are persuaded by other cases cited in 20A Words and Phrases, In Connection With; In Connection Therewith p. 332, p. 75 (1959 and supplements). Using the same logic that the U.S. Supreme Court used in Danciger v. Cooley, (a case that originated in Kansas regarding the language "in connection with" when construing a federal statute), K.S.A. 79-3603(p) does not state that the exemption applies only to the original construction of the building or facility but rather "in connection with" it. See also Illinois Power Co. v. Mahin, 364 N.E.2d 597, 601 (1977) (for the purpose of interpreting sections of several sales tax statutes the phrase "in connection therewith" means attached or associated therewith.) Thus, in order for the service of installing water and sewer mains to come within the application of the tax exemption, the installation of the mains must be associated with the initial construction of the housing. We conclude it is sufficiently "connected" in that, in accordance with the facts as presented, the mains are part of the infrastructure of the housing under construction.

However, whether the housing you have described as "to be constructed" comes within the exemption depends upon whether the installation of the sewer and water mains are "in connection with" the original construction. We note that the sequence of events are very important when considering the question before us, i.e. when the exemption applies and when the exemption does not apply. The sequence of events changes the light in which you look at the facts; the facts determine whether the exemption applies. Thus, the sequence of events is determinative in any given case.

For example, the installation of utility mains to develop the land rather than as part of the original construction is clearly not exempt from the tax imposed by K.S.A. 1987 Supp. 29-3603(p) because the installation of the mains is not in connection with the original construction of a building. The installation of the mains must have some connection with the original construction of a building, to be in accordance with the terms of the statutory exemption. We are therefore unable to make a determination under the facts as presented whether the housing "to be constructed" is sufficiently associated with the original construction of the building.

In conclusion, it is our opinion that the service of installing sewer and water mains in new subdivisions when the mains are part of the infrastructure of the housing comes

within the exemption in K.S.A. 1987 Supp. 79-3603(p) that requires the service be in connection with the "original construction" of a "building", as defined in that subsection. However, we have insufficient facts to determine whether housing "to be constructed" is sufficiently "connected" to "the original construction of a building" under the facts as presented. Thus we cannot determine whether this service of installing sewer and water mains for housing "to be constructed" is exempt from the tax imposed by the statute.

Very truly yours,

  
ROBERT T. STEPHAN  
Attorney General of Kansas

  
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