**Opinion Letter**

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| **Letter Number:** | **O-2006-001** |

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| **Tax Type:** | **Kansas Retailers' Sales Tax** |
| **Brief Description:** | **Retail business on a Kansas military base under a long-term AAFES (Army Air Force Exchange Service) concession contract.** |
| **Keywords:** |  |
| **Approval Date:** | **01/18/2006** |

**Body:**

Office of Policy & Research

January 18, 2006

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RE: You letter dated December 6, 2005

Dear XXXX:

Thank you for your recent letter. You operate a retail business on a Kansas military base under a long-term AAFES (Army Air Force Exchange Service) concession contract. You believe that Title 4 USC §107(b) authorizes your business and others like it to forgo collecting Kansas sale tax on on-base retail sales made to military personnel and others. However, a Q & A published on the department's Policy Information Library states that the controlling law requires AAFES concessionaires to collect Kansas sales tax on their on-base sales. You ask the department to review this determination.

K.S.A. 27-101(a), K.S.A. 27-102, and K.S.A 48-201 provide a starting point for a review of the department's ruling. K.S.A. 27-101(a)gives consent to the Federal government to acquire land within Kansas for certain uses:

(a) The consent of the state of Kansas is hereby given in accordance with the provisions of section 8 of Article I of the constitution of the United States, to the acquisition by the United States by purchase, condemnation or otherwise, of any land in the state of Kansas, which may hereafter be required for custom houses, courthouses, post offices, national cemeteries, arsenals, veterans administration hospitals or centers or other military purposes, and to the acquisition of a tract or contiguous tracts of land the total of which does not exceed eighty (80) acres in area for any other purpose of the government of the United States.

K.S.A. 27-102 explains what jurisdiction is ceded to the Federal government on the lands it acquires and what jurisdiction is retained by the State of Kansas:

That exclusive jurisdiction over and within any lands so acquired by the United States shall be, and the same is hereby, ceded to the United States, for all purposes; saving, however, to the state of Kansas the right to serve therein any civil or criminal process issued under the authority of the state, in any action on account of rights acquired, obligations incurred or crimes committed in said state, but outside the boundaries of such land; and saving further to said state the right to tax the property and franchises of any railroad, bridge or other corporations within the boundaries of such lands; but the jurisdiction hereby ceded shall not continue after the United States shall cease to own said lands. *(Underlining added).*

K.S.A 48-201 provides:

The Kansas army and air national guard shall consist of such units as the governor of Kansas may from time to time authorize to be formed, all to be formed and organized in accordance with the laws governing the regular army and regular air force of the United States and the regulations issued by the secretary of defense, the department of the army and the department of the air force of the United States. Wherever the term Kansas state guard is used in this chapter, it shall be understood to consist of such units of the organized militia as the governor of Kansas may from time to time authorize to be formed when the national guard has been ordered or called into federal service. No excise taxes of this state, direct or indirect, other than those on distilled spirits or wine, and motor fuels shall be imposed upon the sale, use, delivery or storage of articles of merchandise to any instrumentality of the armed forces of the United States engaged in resale activities to members of the armed forces, *except those state excise taxes which may be specifically authorized by the various acts of the Congress of the United States*: *Provided,*That any tax collected in contravention of the terms of this act shall be repaid in cash or tax credit by the director of revenue and taxation of the State of Kansas under such rules and regulations as he may adopt. *(Underlining added).*

K.S.A 48-201 instructs that the Kansas cannot require an instrumentality of the armed forces that sells to military personnel to collect Kansas sales tax unless Congress has granted specific authority to do so. As will be discussed, "instrumentalit[ies] of the armed forces" are AAFES base and post exchanges. An AAFES concessionaire is not an instrumentality of the Federal government or the armed forces. See *Texas Comptroller of Public Accounts Hearing No. 9814*, 7805H0281A05 (February 24, 1978). Because it only deals with Federal instrumentalities, K.S.A 48-201 technically does not limit Kansas from requiring on-base AAFES concessionaires to collect its sales tax. However, for purposes of a full discussion of the issues being raise, this letter will *assume* that K.S.A 48-201 requires Congressional authorization before Kansas can require AAFES concessionaires to collect State sales tax.

Any specific Congressional authorization required by K.S.A 48-201 can be found in the Buck Act, Title 4 U.S.C. §§ 105-113. Section 105 is titled: "State, and so forth, taxation affecting Federal areas; sales or use tax " This section provides, in parts relevant here:

No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area. . . . *4 U.S.C. 105(a).*

The underlined grant of jurisdiction satisfies any condition precedent that K.S.A 48-201 establishes before retailers can be required to collect Kansas sales tax on their on-base sales. As has been discussed, K.S.A 48-201 bars the State of Kansas from requiring certain instrumentalities to collect excise tax on sales to military personnel "except those state excise taxes which may be specifically authorized by the various acts of the Congress of the United States." The authorization in 4 U.S.C. §105(a) specifically allows State sales taxes to be collected on on-base retail sales. This authorization applies equally to on-base retailers and off-base retailers who make retail delivers to individuals on base.

The "instrumentalit[ies] of the armed forces of the United States engaged in resale activities to members of the armed forces" are AAFES base and post exchanges. 4 U.S.C. §107 makes it clear that the Buck Act does not allow States to tax sales made by these exchanges:

(a) The provisions of sections 105 and 106 of this title shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.
(b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship’s stores, or voluntary unincorporated organizations of personnel of any branch of the Armed Forces of the United States, under regulations promulgated by the departmental Secretary having jurisdiction over such branch. *(Underlining added).*

The Army and Air Force regulations that implement 4 U.S.C. §107(b) recognize that the States can lawfully require AAFES concessionaires to collect State sales tax on on-base retail sales made to military personnel. Army Regulation No. 62-20/Air Force Regulation No. 147-14 (1993), which sets forth the Army and Air Force Exchange Service Operating Policy, directs at Paragraph 6-2(a) through (d):

**State, territorial, and local taxes**

a. As an instrumentality of the United States, the AAFES is entitled to the same immunity accorded the US Government from the taxes of States, the District of Columbia, territories and possessions of the United States, the Commonwealth of Puerto Rico, and their political subdivision.
b. Sales by exchanges are immune from State sales and use taxes. Purchases by exchanges are immune from direct State taxation.
c. The immunity of the AAFES from direct state taxation does not extend to indirect taxation, i.e. taxes the legal incidence of which is on the wholesaler, manufacturer, importer, and the like, unless the State by law or regulation has granted an exemption on sales to the United States.
d. Concessionaires and other independent contractors are not entitled to claim AAFES immunity from taxation. Concessionaires must collect and remit applicable sales and uses taxes as required by State law pursuant to the provisions of 4 USC 105. Contractors may be liable for State sales and use taxes as provided by State law. *(Underlining provided)(Copy attached).*

Subsections (a) and (b) provide that sales made by AAFES base and post exchanges are immune from State taxation. This implements 4 U.S.C. §107(a), which is quoted above. Subsection (d) provides that the immunity extended to base and post exchanges under subsections (a) and (b) does not extend to sales made by concessionaires or to independent contractors that contract with AAFES. This implements 4 U.S.C. §107(b), which is also quoted above.

Other states have litigated the issue being discussed here. In *Texas Comptroller of Public Accounts Hearing No. 7299,*7607H0236A12 (April 20, 1976), the Comptroller of Public Accounts discussed the proposition that the State of Texas had ceded it jurisdiction to tax activities on Federal enclaves within its borders:

Contrary to Claimant's contention that once the state has ceded exclusive jurisdiction to the United States without reserving the authority to tax, it cannot later impose any taxes within the federal enclave, the purpose of the Buck Act was "to recede to the State sufficient sovereignty over Federal area within its territorial limits to enable the State to levy and collect taxes named in the act. Otherwise, the act was a futile gesture." David v. Howard, 206 S.W.2d 467, 306 Ky. 149 (1949) See also Attorney General Opinion No. C-674.

An additional purpose of the Buck Act was stated in a 1943 Pennsylvania case: "This section, 106, authorizing state taxation of income received in federal areas was passed for the purpose of correcting anomalous situation which permitted some persons of the same class to escape taxation, and in recognition of the generosity of states which had granted to the federal government exclusive jurisdiction over land within their respective territorial limits, without reserving the right of taxation. Kiker v. City of Philadelphia, 31 A.2d 289, 346 Pa. 624 (1943), cert. Denied 64 S.Ct. 41, 320 U.S. 741, 88 L.Ed. 439. Indeed, in this case the court held that although Pennsylvania ceded jurisdiction over the land in question to the Federal government, it could have reserved to itself the right to tax; however, the court further stated that since the Commonwealth did not expressly reserve to itself this right to tax, the same result was "validly accomplished by recession to the Commonwealth of the right to tax by this section, 106, authorizing state taxation of income received in federal areas." Of course, the case in question here concerned the "income tax" allowed in §106 of the buck Act; but the same logic can be inferred in reference to §105 of the Buck Act allowing collection of Sale and Use Tax, which is the question in the instant situation.

Numerous cases have decided similar issues in favor of state taxation in reference to Sec. 14-110 of the Buck Act: Humble Oil and Refining Co. v. Calvert, 478 S.W.2d (Tex. 1972), cert. Denied 409 U.S. 967, Polar Ice Cream and Creamery Co. v. Andrews, Fl. 1964. 375 U.S. 361, (1964); Bob Bullock v. General Dynamics Corp. 533 S.W.2d 118 (Tex.Civ. App. – Austin 1976, no writ history); Carnegie-Illinois Steel Corp. v. Alderson, 34 S.W.2d 737, 127 W.Vir. 807, Cert Denied 146 U.S. 764 (1945).

*See also Texas Comptroller of Public Accounts Hearing No. 9814*, 7805H0281A05 (February 24, 1978), which held that an AAFES concessionaire was not a instrumentality of the Federal government; *3-D Amusements v. Commissioner of Revenue*, Minnesota Tax Court, No. 5048 (March 24, 1989): "We are aware of no authority, and appellant has not directed use to any, which exempts sales by a concessionaire or independent vendor to individual military personnel."; and *Comptroller of Public Accounts, et al. V. W & W Vending and Food Services of Texas, Inc*., Texas Ct. of Appeals, Twelfth Supreme Judicial, No. 1407; 611 S.W.2d 713 (1981).

This review shows that the Q & A issued by the department is supported by the both the controlling Kansas statutes and the Buck Act. The department did not err in requiring your businesses, and other like it, to collect Kansas sales tax on retail sales to military personnel and others made on military bases in Kansas.

Sincerely,

Thomas E. Hatten
Attorney/Policy & Research

**Date Composed: 01/19/2006 Date Modified: 01/19/2006**