**Private Letter Ruling**

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| **Ruling Number:** | **P-2001-098** |

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| **Tax Type:** | **Kansas Retailers' Sales Tax** |
| **Brief Description:** | **Industrial Revenue Bond (IRB) related.** |
| **Keywords:** |  |
| **Approval Date:** | **09/30/2001** |

**Body:**

Office of Policy & Research

August 30, 2001

XXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXX

Dear XXXXXXXXXXX:

The purpose of this letter is to respond to your letter dated August 13, 2001.

In your letter you stated:

XXXXXXXXXXXX, a Kansas corporation (the "Company"), through XXXXXXXXXX President of the Company hereby requests a private letter ruling from the Kansas Department of Revenue pursuant to K.S.A. § 79-3646 and K.A.R. § 92-19-59. This request is with respect to whether there is any obligation by the Company to pay sales tax pursuant to the provisions of the Kansas Retailer Sales Tax Act in connection with the construction of a retail and distribution facility located in XXXXXXXX County, Kansas (the "Facility").

In preparing and submitting this private letter -ruling request, the Company has engaged XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX The Company requests that you address communications and correspondence during the course of your deliberation on this request directly to XXXXXXXXXXX. The Company, however, requests that your private letter ruling be issued directly to the Company, with a copy to XXXXXXXXXXXXX.

Applicable Facts

The Company will build a facility (the "Facility") which will be located in XXXXXXXX, Kansas. The Facility will be located on approximately XXXXXX and include a minimum of XXXXXXXXXXXX square feet of retail space XXXXXXXXXXX square feet of XXXXXXXXXXXXXXspace. Construction is XXXXXXXXXXXXX

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The Company has corresponded with XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

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Applicable Law

K.S.A. § 79-3606 sets forth the sales that are exempt from Kansas sales and use tax. Subsection (d) of this statute provides an exemption from sales tax for 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 political subdivision of the state, the total cost of which is paid from funds of such political subdivision and which would be exempt from taxation under the provisions of this Act if purchased directly by such political subdivision." K.S.A. § 79-3606(d) further provides that the term "funds of a political subdivision' shall mean general tax revenues, the proceeds of any bonds and gifts or grants in aid. K.S.A. § 79-3603(p) provides a sales tax exemption for labor and services used in the original construction of a facility in the State of Kansas.

In Revenue Ruling 19-1996-1 (June 6, 1996) the Kansas Department of Revenue ruled that if tangible personal property is purchased at retail whether by a company, a company's contractor, or a trustee in an IRB arrangement, entirely with the proceeds of a local government IRB issuance, the transaction is exempt from Kansas sales tax under K.S.A. § 79-3606(d). The ruling further stated that if property is purchased at retail in part with the proceeds of an IRB, the transaction is subject to sales tax, but that a refund for the fraction of the property purchased with IRB proceeds would be refunded under K.S.A. § 79-3640. The ruling held that the purchases at issue would be exempt from sales tax because the project would be financed entirely with IRB proceeds.

In the present situation, the construction of the Facility will be paid from the proceeds of XXXXXXXXXXXXXXXXX issued by XXXXXXXX. The Company will contract with XXXXXXXXXXX directly to build the Facility. The XXXXXXXX will not be a party to the construction contract. The XXXXXXXXwill own the facility while the bonds are outstanding, during which time the Company will lease the Facility from the XXXXXXXXXXXX.

K.S.A. 12-1773 states:

Acquisition of property; eminent domain, procedure; sale or lease to developer; use of proceeds of sale of bonds. (a) Any city which has adopted a redevelopment plan in accordance with the provisions of this act may purchase or otherwise acquire real property. Upon a 2/3 vote of the members of the governing body thereof a city may acquire by condemnation any interest in real property, including a fee simple title thereto, which it deems necessary for or in connection with any redevelopment plan of an area located within the redevelopment district. Prior to the exercise of such eminent domain power, the city shall offer to the owner of any property which will be subject to condemnation with respect to any redevelopment project, other than one which includes an auto race track facility, compensation in amount equal to the highest appraised valuation amount determined for property tax purposes by the county appraiser for any of the three most recent years next preceding the year of condemnation, except that, if in the year next preceding the year of condemnation any such property had been damaged or destroyed by fire, flood, tornado, lightning, explosion or other catastrophic event, the amount offered should be equal to the appraised valuation of the property which would have been determined taking into account such damage or destruction unless such property has been restored, renovated or otherwise improved. However no city shall exercise such eminent domain power to acquire real property in a conservation area. Any such city may exercise the power of eminent domain in the manner provided by K.S.A. 26-501 et seq., and amendments thereto. In addition to the compensation or damage amount finally awarded thereunder with respect to any property subject to proceedings thereunder as a result of the construction of an auto race track facility, such city shall provide for the payment of an amount equal to 25% of such compensation or damage amount. In addition to any compensation or damages allowed under the eminent domain procedure act, such city shall also provide for the payment of relocation assistance as provided in K.S.A. 12-1777, and amendments thereto.
(b) Any property acquired by a city under the provisions of this act may be sold or leased to any person, firm or corporation, hereinafter referred to as a developer, in accordance with the redevelopment plan and under such other conditions as may be agreed upon. Such city may use the proceeds of special obligation bonds issued under K.S.A. 12-1774, and amendments thereto, or full faith and credit tax increment bonds issued under K.S.A. 12-1774, and amendments thereto, or any uncommitted funds derived from those sources set forth in paragraph (1) of subsection (a) of K.S.A. 12-1774, and amendments thereto, to implement the redevelopment plan including, without limitation: [emphasis added]

(1) Acquisition of property within the project area;
(2) payment of relocation assistance;
(3) site preparation;
(4) sanitary and storm sewers and lift stations;
(5) drainage conduits, channels and levees;
(6) street grading, paving, graveling, macadamizing, curbing, guttering and surfacing;
(7) street lighting fixtures, connection and facilities;
(8) underground gas, water, heating, and electrical services and connections located within the public right-of-way;
(9) sidewalks and pedestrian underpasses or overpasses;
(10) drives and driveway approaches located within public right-of-way;
(11) water mains and extensions;
(12) plazas and arcades;
(13) parking facilities;
(14) landscaping and plantings; fountains, shelters, benches, sculptures, lighting, decorations and similar amenities; and
(15) all related expenses to redevelop and finance the redevelopment project.
None of the proceeds from the sale of such bonds shall be used for the construction of buildings or other structures to be owned by or to be leased to such developer, except for proceeds of such bonds as may be issued for a redevelopment project which includes an auto race track facility and except for proceeds of such bonds as may be issued for a redevelopment district including some or all of the land and buildings comprising a state mental institution closed pursuant to section 2 of chapter 219 of the 1995 Session Laws of Kansas.

K.S.A. 79-3606(d) states:

[The following shall be exempt from Kansas sales tax], 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 or public hospital authority, 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 or public hospital authority, school or educational institution; and 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 political subdivision of the state, the total cost of which is paid from funds of such political subdivision and which would be exempt from taxation under the provisions of this act if purchased directly by such political subdivision.[emphasis added] Nothing in this subsection or in the provisions of K.S.A. 12-3418 and amendments thereto, shall be deemed to exempt the purchase of any construction machinery, equipment or tools used in the constructing, equipping, reconstructing, maintaining, repairing, enlarging, furnishing or remodeling facilities for any political subdivision of the state. As used in this subsection, K.S.A. 12-3418 and 79-3640, and amendments thereto, "funds of a political subdivision" shall mean general tax revenues, the proceeds of any bonds and gifts or grants-in-aid. Gifts shall not mean funds used for the purpose of constructing, equipping, reconstructing, repairing, enlarging, furnishing or remodeling facilities which are to be leased to the donor. .[emphasis added] When any political subdivision of the state, public or private nonprofit hospital or public hospital authority, public or private elementary or secondary school or public or private nonprofit educational institution shall contract for the purpose of constructing, equipping, reconstructing, maintaining, repairing, enlarging, furnishing or remodeling facilities, it shall obtain from the state and furnish to the contractor an exemption certificate for the project involved, and the contractor may purchase materials for incorporation in such project. The contractor shall furnish the number of such certificate to all suppliers from whom such purchases are made, and such suppliers shall execute invoices covering the same bearing the number of such certificate. Upon completion of the project the contractor shall furnish to the political subdivision, hospital or public hospital authority, school or educational institution concerned a sworn statement, on a form to be provided by the director of taxation, that all purchases so made were entitled to exemption under this subsection. As an alternative to the foregoing procedure, any such contracting entity may apply to the secretary of revenue for agent status for the sole purpose of issuing and furnishing project exemption certificates to contractors pursuant to rules and regulations adopted by the secretary establishing conditions and standards for the granting and maintaining of such status. All invoices shall be held by the contractor for a period of five years and shall be subject to audit by the director of taxation. If any materials purchased under such a certificate are found not to have been incorporated in the building or other project or not to have been returned for credit or the sales or compensating tax otherwise imposed upon such materials which will not be so incorporated in the building or other project reported and paid by such contractor to the director of taxation not later than the 20th day of the month following the close of the month in which it shall be determined that such materials will not be used for the purpose for which such certificate was issued, the political subdivision, hospital or public hospital authority, school or educational institution concerned shall be liable for tax on all materials purchased for the project, and upon payment thereof it may recover the same from the contractor together with reasonable attorney fees. Any contractor or any agent, employee or subcontractor thereof, who shall use or otherwise dispose of any materials purchased under such a certificate for any purpose other than that for which such a certificate is issued without the payment of the sales or compensating tax otherwise imposed upon such materials, shall be guilty of a misdemeanor and, upon conviction therefor, shall be subject to the penalties provided for in subsection (g) of K.S.A. 79-3615, and amendments thereto;

K.S.A. 79-3606(p) states:

[The following shall be subject to Kansas retailers’ sales tax], 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,[emphasis added] the original construction, reconstruction, restoration, remodeling, renovation, repair or replacement of a residence or the construction, reconstruction, restoration, replacement or repair of a bridge or highway.
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, tornado, lightning, explosion or earthquake, but such term, except with regard to a residence, shall not include replacement, remodeling, restoration, renovation or reconstruction under any other circumstances;
(2) "building" shall mean only those enclosures within which individuals customarily are employed, or which are customarily used to house machinery, equipment or other property, and including the land improvements immediately surrounding such building;
(3) "facility" shall mean a mill, plant, refinery, oil or gas well, water well, feedlot or any conveyance, transmission or distribution line of any cooperative, nonprofit, membership corporation organized under or subject to the provisions of K.S.A. 17-4601 et seq., and amendments thereto, or of any municipal or quasi-municipal corporation, including the land improvements immediately surrounding such facility; and
(4) "residence" shall mean only those enclosures within which individuals customarily live;

The Company respectfully requests your office to issue the following rulings:

No sales tax will be imposed on materials purchased by the Company, the
Company's contractor or the bond trustee which are paid from the proceeds of XXXXXXXXXXX bonds;

The Department agrees with this statement. Funds that are proceeds from STAR bonds are deemed to be funds of the political subdivision. Purchases made with these funds are exempt pursuant to K.S.A. 79-3603(d).

No sales tax will be imposed on materials purchased by the Company, the Company's contractor or the bond trustee which are paid from the proceeds of the IRB issuance;

The Department agrees with this statement. Funds that are proceeds from IRB’s are deemed to be funds of the political subdivision. Purchases made with these funds are exempt pursuant to K.S.A. 79-3603(d).

No sales tax will be due on the labor and services provided by Company's contractor on the construction of the Facility.

The Department agrees with this statement. The labor services to construct the facility and related improvements qualify as original construction labor services that exempt from Kansas retailers’ sales tax pursuant to K.S.A. 79-3603(p).

This private letter ruling is based solely on the facts provided in your request. If it is determined that undisclosed facts were material or necessary to make an accurate determination by the department, this ruling is null and void. This private letter ruling will be revoked in the future by operation of law without further department action if there is a change in the statutes, administrative regulations, or case law, or a published revenue ruling, that materially affects this private letter ruling.

Sincerely,

Mark D. Ciardullo
Tax Specialist

MDC

**Date Composed: 09/14/2001 Date Modified: 10/11/2001**