**Private Letter Ruling**

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| **Ruling Number:** | **P-2002-072** |

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| **Tax Type:** | **Kansas Retailers' Sales Tax** |
| **Brief Description:** | **Federal excise tax on dyed diesel, dyed kerosene and aviation fuel when a separate line on invoice subject to Kansas sales tax.** |
| **Keywords:** |  |
| **Approval Date:** | **08/22/2002** |

**Body:**

Office of Policy & Research  
  
  
August 22, 2002

XXXX  
XXXX  
XXXX

RE: Your letter dated July 26, 2002

Dear XXXX:  
  
Thank you for your recent letter. You work for a petroleum retailer. You ask:

Should Kansas sales tax be charged on the Federal excise tax on dyed diesel, dyed kerosene, or aviation fuel when the Federal excise tax is a separate line on the invoice?

The answer is yes. Federal excise taxes charged on fuel is part of the "selling price" for sales tax purposes and, therefore, should be included in the tax base for Kansas sales tax. To understand how this answer was arrived at requires an understanding of the Kansas motor fuel law and the Kansas retailers' sales tax act.  
  
The Kansas fuel tax on special fuel tax rate is currently $.25 per gallon. *K.S.A. 79-34,141.* Special fuel includes diesel fuel, gasoline, aviation gasoline, and gasohol, among other things. *K.S.A. 79-3401.* There is no fuel tax on sales of dyed diesel fuel, which is dyed in accordance with IRS guidelines and is intended to be used only for non-highway purposes. *K.S.A. 79-3408(d)(5).* Similarly, there is no tax on special fuel that is sold as aviation fuel. *K.S.A. 79-3408(d)(4).*It is important to note that Kansas motor fuel tax is imposed on the *number of gallons* or fractions of gallons of fuel sold. *K.S.A. 79-3408.*When Kansas motor fuel tax is not charged, sales tax is imposed on the *selling price* unless the sale is otherwise exempted. *K.S.A. 79-3602(g).*  
  
K.S.A. 79-3606(a) provides:

The following shall be exempt from the tax imposed by this act:  
(a) All sales of motor-vehicle fuel or other articles upon which a sales or excise tax has been paid, not subject to refund, under the laws of this state except cigarettes as defined by K.S.A. 79-3301 and amendments thereto, cereal malt beverages and malt products as defined by K.S.A. 79-3817 and amendments thereto, including wort, liquid malt, malt syrup and malt extract, which is not subject to taxation under the provisions of K.S.A. 79-41a02 and amendments thereto, motor vehicles taxed pursuant to K.S.A. 79-5117, and amendments thereto, tires taxed pursuant to K.S.A. 65-3424d, and amendments thereto, and drycleaning and laundry services taxed pursuant to K.S.A. 2001 Supp. 65-34,150, and amendments thereto; *(emphasis provided)*

The effect of this statute is that Kansas sales tax is imposed on the selling price of motor fuel if the Kansas motor fuel tax has not been charged. On a practical basis, this means that retailers' sales tax must be collected on sales of dyed diesel fuel, unless a sales tax exemption applies. Some of the significant sales tax exemptions that apply to fuels exempt: (1) fuel that is consumed-in-production by farmers; (2) fuel that the interstate common carriers use to power their refrigeration units, and (3) aviation fuel that licensed airlines and carriers use.  
  
Sales tax exemptions are not extended automatically. To claim a sales tax exemption, the purchaser must provide the retailer with a completed exemption certificate that is appropriate for the exemption claim. Exemption certificates are available on our web site, www.ksrevenue.org. These certificates may be downloaded, completed by the purchaser, and given to the fuel dealer to retain as part of its book and records. Retailers must be able to produce these certificates when audited by the department.  
  
The specific question raised in your letter is whether the Federal excise tax should be included in the tax base when retailers' sales tax is charged on fuel. This raises the issue of a tax on a tax, which has been a contentious issue in the United States.  
  
Many taxes that a retailer pays becomes part of the retailer's overhead. When a retailer determines the selling price of a piece of tangible personal property, the selling price is high enough to factor in the taxes that the retailer must pay. These taxes includes property tax, income tax withheld from employee wages, sales taxes paid on purchases, and so forth. These "taxes" are overhead expenses that are routinely included in the selling price of tangible personal property as an expense. There are no legitimate concerns with factoring these hidden taxes into the selling price.  
  
This rational applies where the legal incidence of a Federal tax falls on the retailer rather than the consumer. In such a case, the Federal excise tax is simply part of the retailer's cost of doing business, even when the Federal excise tax is billed to the consumer as a line item. This concept was recognized by the United States Supreme Court in *Gurley v. Rhoden,*421 US 200 (1975)*.* This case considered whether Federal excise taxes on gasoline should be included in the measure of the Mississippi sales tax. The Court held that the Federal excise tax was properly included in the state sales tax base.  
  
In *Gurley*, the taxpayer operated a gasoline distributorship in which the taxpayer purchased gasoline from other states and brought it into Mississippi to sell at is own service stations. Under the definitions set forth in Federal law, taxpayer was a producer for Federal excise tax purposes. Taxpayer would add Federal excise tax of 4 cents per gallon to his pump price. He also added a 9 cent per gallon state excise tax to the pump price. The State of Mississippi computed its 5 per cent sales tax without any deduction for either of the foregoing excise taxes. Taxpayer paid the sales tax under protest and brought suit in state court for a refund. The Mississippi Supreme Court upheld the tax and the U.S. Supreme Court affirmed.  
  
The pivotal issue was where the legal incidence of the Federal excise tax lay. The taxpayer contended that he was merely a collection agent for the Federal government and that the legal incidence of the tax was upon the consumer. The taxpayer argued that the Federal tax and the state sales tax attached simultaneously upon the sale to the consumer and that the Federal tax was not a part of his gross receipts. The taxpayer also contended that since it was merely a collection agent for the Federal government, inclusion of the Federal tax in the sales tax base amounted to a tax on the United States.  
  
The Court held that the legal incidence of the Federal excise tax falls upon the statutory producer. The Court pointed out that by making the producer the sole party from whom the government could enforce collection of the tax, Congress intended to place the legal burden for the tax on the producer. The Court in effect held that payment of the Federal tax by a producer is simply an additional cost of doing business, much like insurance or utility costs. The fact that the producer recovered this tax by passing it on to the consumer as a line item on its billing did not make it a tax on the consumer.  
  
Under the Supreme Court decision in *Gurley v. Rhoden*, supra, the Federal excise tax on gasoline and petroleum products should be included in the tax base for sales tax purposes. This tax does constitute part of the retailer's gross receipts and is part of the total selling price charged to the consumer. Many states include the Federal excise tax on fuel in state sales tax base. See, *People v. Werner, 364 Ill. 594, 5 N.E.2d 238 (1936);* *Martin Oil Service, Inc. v. Dept. of Revenue, 273 N.E.2d 823 (Ill. 1971);* *State v. Thoni Oil Magic Benzol Gas Stations, Inc., 121 Ga. App. 454 , 174 S.E.2d 224 (1970);* *Sun Oil Company v. Gross Income Tax Division, 238 Ind. 111 , 149 N.E.2d 115 (1958).* Gurley v. Rhoden overrules other state court decisions that had held that the Federal excise tax was really a tax on the consumer and hence was not part of a retailer's gross receipts for sales tax purposes. *Standard Oil Co. v. State, 283 Mich. 85 , 276 N.W. 908 (1937);* *Standard Oil Co. of Indiana v. State Tax Commission of North Dakota, 71 N.D. 146 , 209 N.W. 447 , 135 A.L.R. 1481 (1941);Esso Standard Oil Co. v. City of Danville, 45 C.L.O. 358 (Corp. Court of Danville, Va., 1950);* *Socony-Vacuum Oil Co. v. City of New York, 247 App. Div. 163, 287 N.Y.S. 288 Aff'd 272 N.Y. 668, 5 N.E.2d 385;* *Kesbec, Inc. v. Taylor, 253 App. Div. 353, 2 N.Y.S.2d 241;* *Gulf Oil Corp. v. McGoldrich, 256 App. Div. 207, 9 N.Y.S.2d 544;* *Tax Review Board of Philadelphia v. Esso Standard Division of Humble Oil and Refining Co., 424 Pa. 355 , 227 A.2d 657 .*  
  
The Kansas Supreme Court recently came to the same conclusion in the case of *In re the Tax Appeal of Atchison Cablevision, L.P.*, 262 Kan. 223, 936 P.2d 721 (1997), although our court followed a more circuitous route. In *Atchison Cablevision*, the Court recognized that the tax base for sales tax base should include city franchise fees that were imposed on a cable provider and collected as a line-item charge from the consumer. The franchise fees were fees that the cable company was obligated to make to the city regardless of whether the fees were charged to the consumer as a line item or included as a hidden part of the charge for cable television services.  
  
Therefore, Federal fuel excise taxes should be included in the selling price that is subject to sales tax if the legal incidence of the fuel tax is not on the consumer. IRC Section 4081 imposes a Federal excise tax on gasoline of 18.3 cents per gallon, on aviation gasoline of 19.3 cents per gallon, and on diesel fuel of 24.3 cents per gallon. These Federal excise taxes are not taxes on consumers. Accordingly, they are required to be included in the "selling price" that is subject to Kansas sales tax, even when the manufacturer or importer is also the retailer. Sales tax should be charged on these excise taxes even when the Federal excise tax is billed as a separate line item. IRC 4091 imposes a one cent per gallon tax on aviation fuel, the "leaking underground storage tank trust fund tax." This Federal excise tax shall be included in the "selling price" that is subject to Kansas sales tax. Sales tax should be charged on this excise tax even when the Federal excise tax is billed as a separate line item.  
  
I hope that I have adequately explained this area of the law. If you have any additional questions, please call me at 785-296-3081. 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,  
  
  
  
Thomas E. Hatten  
Attorney/Policy & Research

**Date Composed: 08/26/2002 Date Modified: 08/27/2002**