**Private Letter Ruling**

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| **Ruling Number:** | **P-2008-001** |

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| **Tax Type:** | **Kansas Retailers' Sales Tax** |
| **Brief Description:** | **Sales of meals and drinks in a company cafeteria.** |
| **Keywords:** |  |
| **Approval Date:** | **01/02/2008** |

**Body:**

Office of Policy & Research

January 2, 2008

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XXXX

RE: Your letter dated December 3, 2007

Dear XXXX:

Thank you for your recent letter. You have a corporate client that is located in a small Kansas town. Its employees design and construct windmill farms. The company operates a cafeteria that sells meals to employees. The cafeteria is not open to the public. Your client wishes to pay tax on its food purchases rather than collecting tax on its sales of meals and drinks to employees.

You note in your letter that the language in K.A.R 92-19-21(b) appears to requires sales tax to be collected from any employee that is charged for drinks or a meal. If the regulation in fact requires this, it would conflict with the imposition statute, K.S.A. 79-3603(d). The statute requires sales tax to be collected on meal sales only if the enterprise in question regularly sells meals and drinks to the public.

This apparent conflict can be seen by comparing K.A.R. 92-19-21(b) with K.S.A. 79-3603(d). K.A.R. 92-19-21 reads:

**Meals or drinks.**(a) Each boardinghouse shall pay the tax on their purchases of food and other supplies. When a boardinghouse serves meals only to persons regularly boarding there and not to the public, sales of these meals are not taxable. However, if a boardinghouse holds itself out as ready and willing to serve meals to the public, the sale of each meal shall be taxable.
(b) When meals are furnished by employers to employees and a charge is made, the employer must remit the tax on the price of the sales. When meals are finished by employers to employees at no charge, the furnishing of meals does not constitute a sale and is not taxable.
(c) When a private or public elementary or secondary school, or a public or private nonprofit educational institution operates its lunch room, cafeteria, or dining room for the purpose of providing meals for its respective students or teachers, the school or institution shall not be considered to be engaged in the business of regularly selling meals or drinks to the public and shall not collect or remit tax on these sales.
When a public or private elementary or secondary school or a public or private nonprofit educational institution makes its cafeteria, lunch room, or dining room available for use by the general public, the school or institution shall be considered to be in the business of conducting a place in which meals or drinks are regularly sold to the public, and shall collect and remit the sales tax. A caterer or concessionaire operating a cafeteria, lunch or dining room on the premises of any public or private elementary or secondary school or public or private nonprofit educational institution shall collect and remit sales tax.
(d) When a public or private nonprofit hospital operates a lunch room, cafeteria, or dining room for the exclusive purpose of providing meals for its respective employees and staff the hospital shall not be considered to be engaged in conducting a place where meals or drinks are regularly sold to the public and shall not collect and remit tax on these sales.
When a public or private nonprofit hospital makes its cafeteria, lunch room, or dining room available for use by the general public, the hospital shall be considered to be in the business of conducting a place where meals or drinks are regularly sold to the public and shall collect and remit the sales tax. Caterers or concessionaires operating cafeterias, lunch, or dining rooms on the premises of any public or private nonprofit hospital shall collect and remit sales tax.
(e) The sale of a meal or other tangible personal property, consumed or not, while on a railway train or a dining car operated in or through Kansas, is deemed a sale at retail. Gross receipts from the sale of meals or other tangible personal property are taxable if the meals or tangible personal property are ordered within the boundaries of Kansas. (Authorized by K.S.A. 79-3618; implementing K.S.A. 1985 Supp. 79-3602, 79-3603 as amended by L. 1986, Ch. 386, Sec. 1; effective, E-70-33, July 1, 1970; effective, E-71-8, Jan. 1, 1971; effective Jan. 1, 1972; amended May 1, 1975; amended May 1, 1987.) *(Underlining added).*

K.S.A. 79-3603(d) imposes Kansas sales tax on:

the gross receipts from the sale of meals or drinks furnished at any private club, drinking establishment, catered event, restaurant, eating house, dining car, hotel, drugstore or other place where meals or drinks are regularly sold to the public. . . . *(Underlining added).*

The history at the end of K.A.R 92-19-21 reflects that it implements K.S.A. 79-3603(d). If these two laws conflict, the statute will prevail since a department regulations cannot supplant a Kansas tax statute. *In re Appeal of Chief Industries, Inc., 255 Kan. 640, 850 P.2d 278 (1994).* However, if the regulation can be read in harmony with the statute, there is no problem. Here, K.A.R 92-19-21(b) must be read in harmony with the statute since any other construction would make the regulation itself internally inconsistent.

Subsection (b) provides that sales tax should be collected on sales to employees. However, two other subsections --- (c) and (d) --- allow sales to be made to employees without tax if the facility in question does not regularly makes sales to the public. In the case of schools, subsection (c) allows sales to employees (teachers) to go untaxed if the cafeteria is not open to the public. Subsection (d) allows sales to employees (hospital staff) to go untaxed if the facility in question is not open to the public. The authors of the regulation did not intend subsection (b) conflict with either the statute being implemented or with subsections (c) and (d). Thus, subsection (b) should be read as applying only to facilities where meals or drinks are regularly sold to the public.

K.A.R. 92-19-21(b) appears to be fashioned from an earlier regulation that took effect on January 1, 1966. That regulation provided, in parts relevant here:

Sales of articles of food to persons engaged in the business of serving meals which are taxable under this act and which articles become a component part of such meals, are construed to be wholesale sales, and are not taxable. Where meals are furnished by employers to employers and a charge is made therefore, the employer must remit the tax on the price of the sale. Where means are furnished by employers to employees and no charge is made therefor, such furnishing of meals does not constitute a sale and the tax does not apply.*1966 K.A.R.. 92-6-60.* *(Underlining provided),*

The underlined sentences are very close to the two that make up subsection (b):

When meals are furnished by employers to employees and a charge is made, the employer must remit the tax on the price of the sales. When meals are finished by employers to employees at no charge, the furnishing of meals does not constitute a sale and is not taxable. *K.A.R. 92-19-21(b).*

The problem appears to be that is that K.A.R. 92-19-21(b) failed to include the language from 1966 K.A.R.. 92-6-60 that expressly limited application of the rule to businesses that are engaged in selling taxable meals or drinks to the public. For the current regulation, this limitation is implied for subsection (b), since not doing so would make the regulation internally inconsistent and in conflict with the statute. The department will eliminate this ambiguity when it revises K.A.R. 92-19-21 sometime in the future.

Please be advised that since the cafeteria in question is not open to the public, your client may elect to pay sales tax on its purchases of food rather than collecting sales tax on its charges to employees for meals and drinks.

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: 01/16/2008 Date Modified: 01/16/2008**