**Private Letter Ruling**

|  |  |
| --- | --- |
| **Ruling Number:** | **P-2009-004** |

|  |  |
| --- | --- |
| **Tax Type:** | **Kansas Retailers' Sales Tax** |
| **Brief Description:** | **Sales tax application to electricity, gas, and water used in nursing homes and other assisted living units.** |
| **Keywords:** |  |
| **Approval Date:** | **05/26/2009** |

**Body:**

Office of Policy and Research

May 26, 2009

XXXX
XXXX
XXXX

RE: Your letter dated April 6, 2009

Dear XXXX:

I have been asked to respond to your recent letter. You work for a corporation that files utility sales tax refunds for Kansas businesses. You ask for guidance on how sales tax applies to electricity, gas, and water that is used in nursing homes and in other assisted living utilities. You argue that the department should exempt utilities used in kitchens, housekeeping, laundry, large meeting rooms (living rooms), dining rooms and exercise rooms. The department does not exempt utilities consumed in those areas.

To secure an exemption for residential utility consumption, apartments, private dormitories, retirement and nursing home facilities must complete a Form ST-28B, *Statement for sales tax exemption on electricity, gas, or water furnished though one meter.* The forms contain the following directive:

**RESIDENTIAL**: If the electricity, gas, or water you consume is for residential use only, you do not need to file this form. The utility company automatically exempts you from paying state sales tax (city and county sales tax still applies). However, if the electricity, gas, or water you consume is partly for residential purposes and partly for commercial use, you must determine the percentage of usage that is residential and file copies of your worksheets and this completed form with you utility company and the Department of Revenue. Utilities consumed in commercial common areas such as an office, lounge, hallway, laundry facility, storage area, swimming pool, etc., **do not** qualify for exemption. *Form ST-28B (Rev. 6/05).*

**1) Revenue Ruling 19-2003-1** summarizes how the department currently implements the different utility exemptions for nursing homes:

**REVENUE RULING 19-2003-1**

**Sales taxation of utility services sold to non-profit nursing homes**
**and certain other non-profit housing facilities**
January 3, 2003

**Issue:**Application of Kansas sales tax to sales of utilities purchased by non-profit nursing homes and other non-profit housing facilities that have been extended a property tax exemption under K.S.A. 2001 Supp. 79-201b *Second* through *Sixth*.

**Relevant Statutes:** K.S.A. 2001 Supp. 79-201b *Second* through *Sixth*; K.S.A. 2001 Supp. 79-3603(c); K.S.A. 2001 Supp. 79-3606(w); and K.S.A. 12-189a.

Sales of natural gas, electricity, heat, and water that are delivered through mains, lines, or pipes ("utilities") to a non-profit nursing home or other non-profit housing facility shall be exempt from both state and local sales tax if the home or housing facility has obtained an order from the Board of Tax Appeals (BOTA) that determines that it qualifies for property tax exemption under K.S.A. 2001 Supp. 79-201b *Second* through *Sixth*. To claim a sales tax exemption on its utilities, the qualified facility must attach a copy of the BOTA property tax exemption order to a sales tax exemption certificate form *(Form ST-28B)* and submit a completed form and attachment to each of its utility providers.

Sales of utilities to a for-profit nursing home or housing facility or to a nonprofit nursing home or housing facility that has not obtained a property tax exemption from the BOTA are subject to both state and local sales tax on the commercial portion of the facility and to any applicable local sales tax on the noncommercial or residential portion of the facility. The noncommercial or residential portion of a facility shall include: (1) the residents' bedroom and attached bathroom, if any; and (2) the residents' apartment units, if any. Commercial areas include, but are not limited to: activity rooms, common showers and restrooms, day rooms, dining rooms, examination rooms, hallways, kitchens, lounges, nursing stations, parking lots, utility rooms, storage areas, swimming pools, and all other areas of the facility other than the residents' bedrooms, attached bathrooms, and apartment units. As the list reflects, commercial areas include those areas that are open to members of the public who are visiting residents of the facility.

This revenue ruling supersedes, replaces, and revokes all prior notices and rulings that have been issued about the taxability of sales of natural gas, electricity, heat, and water delivered through lines that are purchased by nursing homes and other housing facilities that can qualify for property tax exemption under K.S.A. 2001 Supp. 79-201b *Second* through *Sixth*.
**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

As the ruling explains, sales of gas and electricity delivered though lines for noncommercial use in a residential premise are subject to local sales tax, but not to state sales tax. *See K.S.A. 2008 Supp. 79-3603(c); K.S.A. 2008 Supp. 79-3606(x); and K.S.A. 2008 Supp. 12-189a(a).* Commercial utility usage is subject to both state and local sales tax. Accordingly, the issue you raise is what parts of nursing homes and extended care facilities are subject to state and local sales tax because the areas are considered to be commercial and what parts are subject only to local sales tax because the areas are considered to be for noncommercial use in a residential premise. All sales of water for residential or agricultural use delivered through transmission and distribution lines are exempt from both state and local sales tax beginning January 1, 2006. However, local sales tax will continue to apply to sales of gas and electricity for use in "residential premises for noncommercial use." *See Notice 05-08; and K.S.A. 2008 Supp. 12-189a(a).*

The statutory provisions that subject residential utility usage to local sales tax are K.S.A. 2008 Supp. 12-189 and K.S.A. 2008 Supp. 12-189a. K.S.A. 2008 Supp. 12-189 explains:

Except as otherwise specifically provided in K.S.A. 12-189a, and amendments thereto, such tax shall be identical in its application, and exemptions therefrom, to the Kansas retailers' sales tax act and all laws and administrative rules and regulations of the state department of revenue relating to the Kansas retailers' sales tax shall apply to such local sales tax insofar as such laws and rules and regulations may be made applicable.

K.S.A. 2008 Supp. 12-189a lists the exceptions to the rule that local sales taxes apply to a transaction whenever state sales tax applies:

**Same; certain sales exempt from state sales tax subject to local tax.**The following sales shall be subject to the taxes levied and collected by all cities and counties under the provisions of K.S.A. 12-187 et seq. and amendments thereto:
(a) All sales of natural gas, electricity, heat and water delivered through mains, lines or pipes to residential premises for noncommercial use by the occupant of such premises and all sales of natural gas, electricity, heat and water delivered through mains, lines or pipes for agricultural use, except that effective January 1, 2006, the provisions of this subsection shall expire for sales of water pursuant to this subsection;
(b) all sales of propane gas, LP-gas, coal, wood and other fuel sources for the production of heat or lighting for noncommercial use of an occupant of residential premises; and
(c) all sales of intrastate telephone and telegraph services for noncommercial use. *History: L. 1979, ch. 326, § 4; L. 2003, ch. 147, § 29; July 1.*

The sales tax exemption whose application is discussed in your letter is K.S.A. 79-3606(w). It exempts:

(w) all sales of natural gas, electricity, heat and water delivered through mains, lines or pipes: (1) To residential premises for noncommercial use by the occupant of such premises; (2) for agricultural use and also, for such use, all sales of propane gas; (3) for use in the severing of oil; and (4) to any property which is exempt from property taxation pursuant to K.S.A. 79-201b *Second* through *Sixth*. As used in this paragraph, "severing" shall have the meaning ascribed thereto by subsection (k) of K.S.A. 79-4216, and amendments thereto. For all sales of natural gas, electricity and heat delivered through mains, lines or pipes pursuant to the provisions of subsection (w)(1) and (w)(2), the provisions of this subsection shall expire on December 31, 2005;

It should be noted that an "occupant" of a nursing home or extended care facility includes both the residents and the nursing home employees that operate the home

**2) Department administration of the utility exemptions for nursing homes that are exempt from property tax under K.S.A. 79-201(b) *Second* through *Sixth*.**K.S.A. 2008 Supp. 79-3606(w)(4) exempts "all sales of natural gas, electricity, heat and water delivered through mains, lines or pipes" to non-profit entities that are exempt from property tax under K.S.A. 79-201(b) *Second* through *Sixth.*The non-profit entities that qualify for one of these property tax exemptions include certain "adult care homes," "private care homes," "housing for the elderly and handicapped persons having a limited or low income," "housing for elderly persons" and "property used . . . for the purpose of group housing or mentally ill or retarded or other handicapped persons." Revenue Ruling 19-2003-1 explains that the department administers K.S.A. 79-3606(w)(4) by extending exemption only to entities that establish that the Kansas Board of Tax Appeals ("BOTA") has issued them a property tax exemption order under K.S.A. 79-201(b) *Second* through *Sixth.* *See also Form ST-28B (Rev. 6/05): "Attach a copy of the 'order' from the Board of Tax Appeals."*

Administering the sales tax exemption in this way has required many entities to petition BOTA for an up-to-date exemption order that references the current property tax statutes.

**3) Department administration the utility exemptions for nursing homes that are *not* exempt from property tax under K.S.A. 79-201(b) *Second* through *Sixth*.**K.S.A. 2008 Supp. 79-3606(w)(1) exempts "all sales of natural gas, electricity, heat and water delivered through mains, lines or pipes" . . . "[t]o residential premises for noncommercial use by the occupant of such premises." K.S.A. 2008 Supp. 79-3606(w)(1) is primarily intended to benefit homeowners and apartment dwellers.

To claim this exemption, apartment complexes, nursing homes, and private dormitories must complete a Form ST-28B, "Statement for Sales Tax Exemption on Electricity, Gas, or Water Furnished Through One Meter." The 1999 Form ST-28B instructed:

[If] the electricity, gas, or water you consume is partly for residential purposes and partly for commercial use, you must determine the percent of usage that is residential and file copies of your worksheets and this completed form with your utility company and the Department of Revenue. Utilities consumed in commercial common areas such as an office, lounge, hallway, laundry facility, storage area, swimming pool, etc., do not qualify for exemption. (Contained in every utility exemption claim form with publication dates from May 1996 through February 2005).

Given the administrative policy determination that some parts of an apartment complex, private dormitory, or private nursing home are entitled to the residential exemption for utility usage, the next question becomes what parts of those facilities are residential and how should such a determination be implemented and administered?. The answers to those questions are found in exemption certificate form ST-28B and in Revenue Ruling 19-2003-1.

Exemption certificate form ST-28B instructs how the department construes this exemption: "Utilities consumed in commercial common areas such as an office, lounge, hallway, laundry facility, storage area, swimming pool, etc., **do not** qualify for exemption." Revenue Ruling 19-2003-1 construes this exemption to mean that the only "residential premise" that a nursing resident occupies is his or her own room or apartment.

The common areas, such a lounges, hallways, and eating areas, do not qualify for the residential exemption for state sales tax. Under the department's policy, these areas are considered to be used commercially because they are open to employees and to visitors who visit residents socially, transact business with them, or want to transact business with staff members or the nursing home itself. When a resident is in these common areas, he or she has no expectation of privacy and has little say about how the nursing home allows the area to be used by other patients or by guests and staff. In fact, the only areas that a nursing home maintains "for noncommercial use by the occupant of such premise" is the patient's sleeping room or apartment and any private bathroom, kitchen, or other area associated with it. *K.S.A. 2008 Supp. 79-3606(w)(1).* This is a reasonable construction and implementation of the state sales tax utility exemption that extends to "residential premises for noncommercial use by the occupant of such premise."

This construction is also reasonable as applied to for-profit residential and nursing facilities, given that the legislature has fully exempted utility purchased by non-profit nursing homes that qualify for certain property tax exemptions. If the department exempted everything in a for-profit nursing home that you ask for in your letter (e.g. kitchens, housekeeping, laundry, large meeting rooms (living rooms), dining rooms and exercise rooms), the department would be providing for-profit nursing homes with an exemption that is almost as extensive as the one the legislature provided for non-profit nursing homes that qualify for certain property tax exemptions.

When the Kansas legislature enacted K.S.A. 2008 Supp. 79-3606(w)(4), it did so with the knowledge that the department did not extend the utility exemption to a nursing homes kitchens, housekeeping, laundry, large meeting rooms (living rooms), dining rooms, exercise rooms and other common areas. If the difference between how for-profit and non-profit nursing homes were as narrow as you now claim in your letter, the imposition would only have applied to areas such as business offices that are exclusively used for business purposes. The legislature knew when it enacted the exemption for non-profit nursing homes that is was exempting utilities consumed in areas that the department had always held to be taxable, i.e. kitchens, housekeeping, laundry, large meeting rooms (living rooms), dining rooms, exercise rooms and other common areas in addition to the non-profit nursing homes business offices.

At any given time, the common areas of a nursing home, private dormitory, or apartment may be occupied by the residents and the employees of the business that operates the facility. Guests may occupy the common areas at appropriate times. Thus, it is reasonable to assert that the only "residential premises for noncommercial use by the occupant of such residence" is a resident's room or apartment. The other areas in a nursing home, private dormitory, or apartment are open for staff to come and go without any expectation of privacy on the part of the resident. However, when a resident is in his or her room or apartment, that resident has an expectation of privacy.

Limiting the utility exemption to utilities consumed in a resident's room or apartment is a reasonable implementation of the statutory language. A patient's room or apartment is considered residential while the halls and lounges are for commercial use. This is consistent with K.A.R. 92-19-37, which provides that the utility usage for commercial and residential use in a "combination use building" shall be prorated based on the "portions actually *occupied* as a residence *and* used for noncommercial purposes." *(Emphasis provided).* The exemption also extends to private bathrooms that are attached to a resident's room and are intended to be used by the residents in that room.

More and more retirement facilities contain "independent living units," "assisted living units," and "skilled nursing facilities." How these different facilities are operated appears to be fairly universal and is summarized in *Western Mass. Lifecorp. v. Board of Assessors, City of Springfield,* 434 Mass. 96 (Dec. 29, 1999):

***Independent Living Unit***

An independent living unit ("ILU") is an apartment or cottage set aside for the exclusive use or control of the resident. In total, the ILUs occupy approximately 44% of the total space at Reeds Landing. There are 107 apartment units and 10 cottage-style units. The apartment styles vary from one-bedroom, 706 square foot units, to two-bedroom, 1580 square foot units, with a den and balcony. There are two types of cottages, a two bedroom, 1383 square foot cottage with a deck and garage, and a two-bedroom, 1524 square foot cottage, with a den, deck and garage. . . .

The design of the ILU is intended to meet the special needs of aging persons by accommodating their physical changes, including decreased sensory acuity and mobility. The enhanced lighting, placement of wall outlets, kitchen appliances and bathroom fixtures, and shortened walking distances, are meant to enhance the ability of the residents to live independently. Each unit is equipped with a kitchen with an oven/range, refrigerator/freezer, garbage disposal, dishwasher and washer and dryer hook-ups. Each ILU has an individually controlled heat and air conditioning system and an emergency call system. . . .

Once admitted, residents of Reeds Landing must pay a monthly service fee, which as of January 1, 1997 ranged from $1,325 to $2,050. In return, residents of the apartments receive 30 meals per month and residents of the cottages receive 15 meals per month. Also covered by the monthly fee are various amenities including biweekly light housekeeping, laundering of linens and towels, trash removal, unit and grounds maintenance, local scheduled transportation, assistance with filling out health care insurance forms and arranging for inpatient hospital care, if necessary, and aerobic or other exercise programs. A schedule of charges for services not covered by the monthly service fee is published and distributed to the residents. . . .

If a resident wishes, he or she can go to The Wellness Center located at Reeds Landing for routine medical exams and minor health problems. The Wellness Center, however, is operated by Golan HealthCare Group, not Western, and does not qualify for the real estate tax exemption. If a resident requires more extensive health care, he or she may be placed in the health care center, otherwise known as the skilled nursing facility, if there are available beds. If residents require medical assistance in their individual unit, they may contract with any professional health care provider.

***Assisted Living Units***

There are 54 assisted living units ("ALUs") designed for those individuals who are not in need of full nursing home care but who do require some assistance in their daily activities. All of the units contain a bedroom, a private bath, a kitchen alcove with a refrigerator, sink and a small range that can be dismantled if safety so requires. The ALUs are designed for the elderly who may require some assistance with activities such as bathing and dressing.

There are fifteen memory-impaired ALU units. Residents of these units have their own dining room, activity rooms, fresh air walking paths, and a private lounge for consultation with the staff. Residents of the memory impaired units wear a bracelet which activates a locking system if the individual approaches a door which he or she is not to exit.

All ALU residents pay a monthly service fee ranging from $2,200 to $2,800, for which they receive the following services, among others: three meals a day, weekly housekeeping, weekly laundry, security, routine medical care, emergency call systems, assistance with filling out health insurance forms (if needed), and wellness, education and exercise programs for those who wish to participate. The amount of the service fee is based upon which entrance fee option the individual has chosen and if he or she has chosen a standard or deluxe room. . . .

As of January 1, 1997, five of the 54 ALU residents had contracted for the LifeCare Benefit. All five had initially been residents of the ILU. The remaining forty-nine opted for the monthly direct entry option. Western maintains that as of January 1, 1997, the majority of residents of the ALUs received assistance, from a certified nurse's aid, with bathing, dressing and taking medications.

***Skilled Nursing Facility***

Reeds Landing also contains a 40-bed Level II long-term care facility with 8 private beds and 32 semi-private beds. The more than 100 residents of the ILUs and those of the ALUs who have signed LifeCare Benefits are guaranteed admission into the SNF by virtue of their Residence and Care Agreements. ILU residents who are transferred to the SNF continue to pay the monthly service fee with an additional amount to cover the additional meals provided. To the extent that there are available beds, the services of the SNF are theoretically available to the general public on a per diem basis. However, Western failed to produce any evidence that a member of the general public who had not been a resident of the ILUs or the ALUs had ever occupied a SNF bed.

Residents of the SNF have all of their meals prepared for them by the staff and many must be fed by nurses' aides. In addition, all of the residents of the SNF receive medication by a licensed nurse. There are posted visiting hours. Applications for direct entry into the SNF are reviewed by Reed's Landing medical staff and executive directors. The review focuses on the applicant's medical status and whether he or she is an appropriate candidate for residence in the SNF. Western did not, however, define or explain the term "appropriate candidate.". . . .

These descriptions show that independent living units and assisted living units are like apartments in many ways. Residents living in these units may choose to use their kitchen to fix their meal, they may eat at the facility's cafeteria, or they may dine out. The residents may use exercise rooms, lounges, pool tables rooms, or other common areas that are maintained for such use by the retirement facility. Revenue Ruling 19-2003-1 limits application of K.S.A. 2008 Supp. 79-3606(w)(1) to the apartment-like independent living units and assisted living units. The common areas such as a dining room, cafeteria area, exercise room, pool tables room, etc. are not exempt since they are commercial in the sense that residents do not have any expectation of privacy while in them. These areas typically are open to employees and to other patients and their guests. Facility employees can come and go in these areas as they please. The communal use of these common areas by residents, employees, and guests helps show that policy announced in ST-28B (Rev. 5/96) is a reasonable application of K.S.A. 2008 Supp. 79-3606(w)(1). The department correctly implemented K.S.A. 2008 Supp. 79-3606(w)(1) by limiting the exemption from state sales tax to independent living units and assisted living units. Residents do no occupy the common areas in the same sense that thy occupy their independent living units and assisted living units.

Applying the policy to skilled nursing home facilities is also reasonable. The common areas in skilled nursing home facility often are available for use by other residents and their guests. Employees may come and go in these areas as they please. More importantly, limiting exemption to what are essentially resident living quarters is an administrative policy that can be applied uniformly to apartments, private dormitories, skilled nursing home facilities, independent living facilities, and assisted living facilities.

The policy announced in ST-28B (Rev. 5/96) and reiterated in the Revenue Ruling: (1) sets forth clear guidelines about how an ambiguous statute will be construed and administered; (2) construes an ambiguous partial exemption narrowly and reasonably, which is how exemptions should be construed; and (3) implicitly recognizes that the legislature has extended a blanket sales tax exemption to non-profit nursing facilities, which suggests that the legislature did not intend to change the manner in which the department was administering the exemption for for-profit nursing homes.

Revenue Ruling 19-2003-1 and ST-28B (Rev. 5/96) through ST-28B (Rev. 6/05) provide the same treatment to for-profit nursing homes that is accorded to for-profit apartment complexes, residential dormitories, and other similar residential facilities. This is an appropriate implementation of the exemption. Your proposal to disregard the exemption policy contained in the department's instructions in its utility exemption certificates has no support in the law and would be contrary to the legislature's ratification of the policy that explains how the residential exemption for utilities applies to nursing homes.

You submitted your letter request for the following nursing homes: XXXX, XXXX, XXXX, XXXX, XXXX, XXXX, AND XXXX. Because of this, this is a private letter ruling. This is a private letter ruling pursuant to K.A.R. 92-19-59. It is based solely on the facts provided in your request. If it is determined that undisclosed facts were material or necessary to an accurate determination by the department, this ruling is null and void. This ruling will be revoked in the future by the operation of law without further department action if there is a change in the statutes, administrative regulations, or case law, or published revenue ruling, that materially effects this private letter ruling. If you have any additional questions, please call me at 785-296-3081.

Sincerely,

Thomas E. Hatten
Attorney/Policy & Research

**Date Composed: 06/02/2009 Date Modified: 06/02/2009**