**Private Letter Ruling**

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| **Ruling Number:** | **P-2012-001** |

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| **Tax Type:** | **Kansas Retailers' Sales Tax** |
| **Brief Description:** | **Outdoor, dusk-to-dawn lighting service.** |
| **Keywords:** |  |
| **Approval Date:** | **02/20/2012** |

**Body:**

Office of Policy and Research

February 20, 2012

XXXX
XXXX
XXXX

RE: Your letter dated January 9, 2011

Dear XXXX:

Thank you for your recent letter. You work for XXXX, which is a Kansas electric utility company. XXXX offers its customers an outdoor, dusk-to-dawn lighting service.

KCC tariffs refer to the service as a “Private Area Lighting Service.” Under the tariff, charges for the service vary according to the kind and type of light used *(high pressure sodium, metal halide, mercury, filament, and fluorescent and whether it is a space or flood light)*, the light’s wattage/lumens rating, and whether the light is affixed to an existing pole or whether XXXX is required to install a pole in order to provide the service. At night, these outdoor dusk-to-dawn lights are seen illuminating farm and ranch homesteads across the Midwest.

Customer utility bills separately list the service and the monthly service charge. As with any utility charge, a customer’s service can be terminated for repeated nonpayment of the charge. You ask how Kansas sales tax applies to charges for Private Area Lighting Service.

K.S.A. 2010 Supp. 79-3603(c) historically imposed Kansas sales tax on customer charges for electric utility service. The imposition currently reads, in parts relevant here:

For the privilege of engaging in the business of . . . rendering or furnishing any of the services taxable under this act, there is hereby levied and there shall be collected and paid a tax at the rate of 5.3%, and commencing July 1, 2010, at the rate of 6.3%, and commencing July 1, 2013, at the rate of 5.7% . . . upon:

(c) the gross receipts from the sale or furnishing of . . . electricity . . ., which sale is not otherwise exempt from taxation under the provisions of this act, and whether furnished by municipally or privately owned utilities, except that, on and after January 1, 2006, for sales of . . . electricity . . . delivered through . . . lines . . . to residential premises for noncommercial use by the occupant of such premises, and for agricultural use . . . the state rate shall be 0%. . . .

This imposition is unusual. Very few other state or federal taxes are imposed at a rate of 0%. This provision apparently was enacted with the belief it would avoid confusion when K.S.A. 2010 Supp. 12-191 is construed. This local retailers’ sales tax statute instructs local sales tax only applies to “transactions that are subject to the Kansas retailers’ sales tax”:

All retail transactions consummated within a county or city having a retail sales tax, **which transactions are subject to the Kansas retailers' sales tax**, shall also be subject to such county or city retail sales tax. . . . *(Emphasis provided).*

An argument can be fashioned that imposing state retailers’ sales tax at the rate of 0% on certain utility services subjects charges for the service “to the Kansas retailers’ sales tax,” albeit at the rate of 0%. Because these services are subject to Kansas retailers’ sales tax at the rate of 0%, the services are also subject to local retailers’ sales tax under K.S.A. 2010 Supp. 12-191, or so goes the argument.

K.S.A. 2010 Supp. 12-189a eliminates the need to divine why retailers’ sales tax was levied on certain utility services at the state rate of 0% rate. K.S.A. 2010 Supp. 12-189a expressly imposes local sales tax charges on charges for residential and agricultural electric utility services:

**K.S.A. 2010 Supp. 12-189a. 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 plain wording of subsection (a) imposes local sales tax on:

All sales of . . . electricity . . . delivered through . . . lines . . .to residential premises for noncommercial use by the occupant of such premises and all sales of . . . electricity . . . delivered through . . . lines . . . for agricultural use. . . *K.S.A. 2010 Supp. 12-189a*

These statutes mean local sales tax, but not state sales tax, is imposed on a utility company’s charges to customers for electricity used in a residence for noncommercial purposes by its occupants, and on its charges for electricity sold for “agricultural use.”

K.S.A. 79-3606(n) exempts “all sales of tangible personal property which is consumed in the production, manufacture, processing, mining, drilling, refining or compounding of tangible personal property, the treating of by-products or wastes derived from any such production process, the providing of services or the irrigation of crops for ultimate sale at retail within or without the state of Kansas . . . .” “Tangible personal property” is defined to include “electricity, water, gas, [and] steam.” *K.S.A. 2010 Supp. 79-3602(pp).*

K.S.A. 2010 Supp. 79-3602(dd) defines “[p]roperty which is consumed”:

(dd) "Property which is consumed" means tangible personal property which is essential or necessary to and which is used in the actual process of and consumed, depleted or dissipated within one year in (1) the production, manufacture, processing, mining, drilling, refining or compounding of tangible personal property, (2) the providing of services, (3) the irrigation of crops, for sale in the regular course of business, or (4) the storage or processing of grain by a public grain warehouse or other grain storage facility, and which is not reusable for such purpose. The following is a listing of tangible personal property, included by way of illustration but not of limitation, which qualifies as property which is consumed:
(A) Insecticides, herbicides, germicides, pesticides, fungicides, fumigants, antibiotics, biologicals, pharmaceuticals, vitamins and chemicals for use in commercial or agricultural production, processing or storage of fruit, vegetables, feeds, seeds, grains, animals or animal products whether fed, injected, applied, combined with or otherwise used;
(B) electricity, gas and water; and
(C) petroleum products, lubricants, chemicals, solvents, reagents and catalysts.

The consumed in production exemption does not exempt electricity purchased for area lighting in buildings that house manufacturing or agricultural production operations or for area lighting out-side such buildings. K.A.R. 92-19-20 provides:

(a) [A consumed in production] exemption for gas, fuel or electricity shall not be allowed when utilized for the purpose of heating, cooling, and lighting buildings or business premises except electricity, gas, fuel and water actually used by hotels and motels in rented rooms taxable under K.S.A. 79-3603.

In *In the Matter of the Appeals of Genesis Health Clubs*, 42 Kan.App. 2d 239, 210 P.3d 663 (2009), the Kansas Court of Tax Appeals noted:

Kansas tax policy and law consistently recognize that purchases of property such as electricity are not "consumed in" production or in the provision of services if the property merely creates an environment for the business activity instead of becoming part of the product or service being sold. As a result, the exemption for property consumed in the provision of taxable services did not apply.

Similarly, K.S.A. 2010 Supp. 79- 3606(kk)(5)(H) provides that “[m]achinery and equipment used as an integral or essential part of an integrated production operation” shall not include “machinery or equipment used for general plant heating, cooling, and lighting.” This shows a manufacturer’s purchases of lights that provide general area lighting for its plant are not purchases of manufacturing machinery and equipment and are not exempt, just as the electricity purchased to power the area lighting is not exempt as being consumed in production.

The Kansas Board of Tax Appeals has held electricity used to power area lighting over the production area in a manufacturing plant is not exempt from Kansas sales tax because its is not consumed by equipment that is used as an integral or essential part of a integrated production operation. *See In the Matter of the Appeal of Ward Kraft Forms, Inc., Order granting summary judgment, Docket No. 2005-786-DT Kansas Board of Tax Appeals (2005).*

The case law, statutes, and regulations mean that XXXX's charges for “Private Area Lighting Service” are taxed either: (1) at the full, combined state and local rate in place at the light’s location *(commercial use);* or (2) at the city and county tax rate in place at the light’s location *(residential or farm use).* One or both Kansas state retailers’ sales tax or Kansas local retailers’ sales tax will always be charged for Private Area Lighting Service except:

(1) When the purchaser provides XXXX with a copy of a Tax-Exempt Entity Exemption Certificate (PR-78KS) issued by KDOR that affirmatively states the entity can purchase tangible personal property tax exempt.
(2) When the service is billed to the Federal governmental or to Federal instrumentalities, other than those the Buck Act subjects to state sales tax.
(3) The light is for a residence for noncommercial use by its occupants, or for agricultural use, and is installed in a local taxing jurisdiction that that has no local sales tax. *(e.g. 0% state tax and 0 local tax = zero tax.)*

Your letter set forth three rulings that you request KDOR to approve. KDOR does not approve them. The policies that XXXXX should apply are:

(1) The charge for private area lighting service is a charge for electric utility service taxable under K.S.A. 2010 Supp. 79-3603(c) and K.S.A. 2010 Supp. 12-189a(a).Entities that have applied to KDOR for and been issued a Tax Exempt Entity Certificate (PR-78K) may claim exemption if the PR-78K provides the entity is exempt on its purchases of tangible personal property. These PR-78K’s exempt the entity from both state and local retailers’ sales tax on all of their purchases of TTP, which includes purchases of electricity and Private Area Lighting Service.
(2) XXXX may *not* accept or honor a Consumed In Production Exemption Certificate (ST-28C), an Integrated Production Machinery and Equipment Exemption Certificate (ST-201), or a Project Exemption Certificate (PR-76) to exempt charges for Private Area Lighting Service from state or local sales tax.
(3) XXXX may accept and honor an Agricultural Exemption Certificate (ST-28F) to exempt charges for Private Area Lighting Service from state sales tax only. An ST-28F shall not be honored to exempt Private Area Lighting Service from local retailers’ sales tax.
(4) Private Area Lighting Service provided for a Kansas residence, Kansas farm, or Kansas ranch is subject only to the local retailers’ sales tax in place at the situs of the light, since state tax is imposed at 0% on such services.
(5) Charges to industrial and commercial users are taxed at the full combined state and local sales tax rates in place at the situs of the light.
(6) If an industrial or commercial user has provided XXXX with a Statement for Sales Tax Exemption on Electricity, gas, or Water Furnished thought One Meter (ST-28B), and the Private Area Lighting Service is metered though the same meter that the ST-28B calculations are for, the ST-28B should be recalculated to account for the fully taxable Private Area Lighting Service charges

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.

Sincerely,

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Attorney/Policy & Research

**Date Composed: 02/22/2012 Date Modified: 02/22/2012**