**Private Letter Ruling**

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| **Ruling Number:** | **P-2012-003** |

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| **Tax Type:** | **Kansas Retailers' Sales Tax** |
| **Brief Description:** | **Sales of firearms by a Kansas firearms dealer.** |
| **Keywords:** |  |
| **Approval Date:** | **07/10/2012** |

**Body:**

Office of Policy & Research

July 10, 2012

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RE: Your letter dated March 5, 2012

Dear XXXXX:

Thank you for your recent letter. It discusses problems your client, a Kansas firearms dealer, has reporting sales tax on firearms shipped to him that he later transfers to owners or buyers who reside in Kansas. Your letter has prompted a review of an opinion letter the Kansas Department of Revenue (KDOR) issued in 2003. You accessed the letter on our Policy Library data base.

Each Kansas firearm dealer that sells firearms at retail in Kansas is required to register with KDOR as retailer pursuant to K.S.A. 79-3608 and secure a retailers’ sales tax registration certificate. *See Form CR-16, Kansas Business Tax Application.* The dealer is required to collect and remit sales tax on the retail sales of tangible personal property (TPP) it makes in Kansas. Taxable sales include retail sales of firearms, firearm parts, firearm accessories, ammunition, and hunting goods, to name a few. The dealer also is required to collect sales tax on charges it bills to customers for taxable services, which include charges for servicing, repairing, or modifying a customer’s firearm that it redelivers to a customer in Kansas. *K.S.A. 79-3603(p); K.S.A. 79-3603(q).*A firearms dealer cannot use its Federal Firearms Permit issued by the Federal Bureau of Alcohol, Tobacco and Firearms to claim exemption when it buys firearms, parts, ammunition, or other TPP for resale or when it buys taxable services for resale. To claim exemption, it must provide its suppliers or service providers with a properly completed exemption certificate that contains its Kansas registration certificate number.*See e.g. Form ST-28A, Resale Exemption Certificate.*

Firearm dealers often send firearms to gunsmiths for service, repair, or modification. Some dealers perform the work in-house. Regardless of who actually works on the firearm, the dealer is required to collect sales tax on the total amount it bills to its customer for the services. Customer charges for repair and replacement parts, and for accessories that were mounted on the firearm, are also taxable.

A dealer who contracts with a gunsmith for the service, repair, or modification of a customer’s firearm should provide the gunsmith with a properly completed resale exemption certificate. The dealer also should claim exemption when it contracts with a gunsmith to service, repair, or modify a firearm the dealer holds for resale in its resale inventory. The dealer is entitled to claim the resale exemption since there is an expectation the dealer will markup the retail selling price of the firearm to recover the additional expense it incurred having the firearm serviced, repaired, or modified. Any work done by a gunsmith on a dealer’s personal firearms is taxable.

Federal law regulates the manufacture, importation, sale, and possession of firearms in the United States. The Gun Control Act of 1968 (GCA) mandates the licensing of individuals and companies that engage in the business of selling firearms. The GCA applies to intrastate and interstate sales of firearms and prohibits anyone who is not properly licensed from engaging in the business of buying or selling firearms. *18 U.S.C. Secs. 921 through 928; 18 U.S.C. 923(a)(“No person shall engage in the business of . . . dealing in firearms until he has filed an application with, and received a license to do so from the secretary [of the Treasury].”).* Accordingly, every firearm dealer in Kansas must be both a Federal Firearms Licensee (FFL) and a registered retailer who collects Kansas sales tax on its taxable retail sales.

A FFL is required to maintain records that document its acquisition and disposition of firearms. This includes the firearms it holds for resale in its resale inventory, consignment firearms, pawned firearms, firearms accepted for repair if kept overnight, firearms accepted from customers that will be sent to a third-party for repair, firearms that are loaned or rented for off-premise use, firearms shipped to the FFL for redelivery to an in-state resident, and all other acquisitions and dispositions of firearms.

Generally, a Kansas FFL is prohibited from selling or transferring a firearm to a buyer who resides in another state. One notable exception to this rule allows a Kansas FFL to sell a rifle or shotgun over-the-counter to a non-resident if the transaction is properly documented and complies with Kansas law, the law of the buyer’s state of residence, and Federal law. Another exception allows a Kansas FFL to sell a firearm to a resident of another state by shipping the firearm to a FFL in the buyer’s state of residence. This allows the buyer to take possession of the firearm from an FFL in its state of residence after passing a background check and satisfying other legal requirements, such as a mandatory waiting period.

With a few exceptions not relevant here, the GCA bars anyone, other than a FFL and certain GCA-licensed individuals and businesses, from transporting a firearm across state lines to its state of residence after purchasing the firearm in another state. *18 U.S.C. 922(a)(2) & (3).* The GCA also prohibits the direct mail order of firearms by consumers, except for antique firearms. This means that Kansas resident who buys and takes possession a rifle or shotgun in an over-the-counter sales transaction with a FFL in a state other than Kansas is required to ship the firearm to a Kansas FFL who will redeliver it to the buyer.

When an unlicensed Kansas resident buys a firearm in another state or arranges to purchase a firearm from a seller in another state in interstate commerce, such as over the internet or at a telephone auction, the Kansas resident is required to: (1) contact a Kansas FFL and arrange to have the FFL accept delivery of the firearm; and (2) arrange for shipment of the firearm to the FFL by a common carrier, such as UPS or FedEx. The Kansas resident may have made the purchase from a FFL or an unlicensed individual who resides in another state. *See 18 U.S.C. 922(b)(3).*These requirements often result in Kansas FFLs taking delivery of firearms from common carriers where the delivery costs were paid directly to the carrier by the Kansas buyer.

Once the Kansas FFL takes delivery of the firearm from a common carrier, it verifies the serial number on the firearm and then provides required information about the buyer and sale to the National Instant Criminal Background Check System (NICS). The NICS background check is performed free of charge and helps ensure that anyone who acquires a firearm may lawfully possess it. As an alternative to the NICS background check, a Kansas FFL may accept proof the buyer holds a Kansas concealed-carry permit since the buyer was required to pass the NICS background check to secure the permit*. See K.S.A. 2010 Supp. 75-7c05(d); “Open Letter to All Kansas Federal Firearms Licensees,” dated April 8, 2011 issued by the U.S. Department of Justice.*

Once the NICS and other legal requirements for possessing a firearm are satisfied, the Kansas FFL can legally transfer the firearm to the Kansas buyer. The Kansas FFL normally charges the Kansas resident a fee to recover the costs it incurs arranging to accept delivery of the firearm, taking delivery, retaining possession of the firearm, making the recordkeeping entries required by law, confirming the Kansas resident may possess the firearm, and delivering it to the resident.

The department’s 2003 letter opinion suggests a Kansas FFL is responsible for collecting retailers’ compensating use tax on the cost of the firearm because the Kansas FFL is acting as an agent for the seller. This legal rationale is incorrect. The discussion of these arrangements show there is often nothing that infers the Kansas FFL is operating at the direction of the out-of-state seller, solicits business for the seller, or acquires title to the firearm from the seller.

The discussion shows the Kansas FFL may not know who the out-of-state seller is or whether that seller is a FFL or an individual. The sale and delivery of a shotgun or rifle to the Kansas resident may have been completed by an out-of-state FFL in its home state. The buyer may have used the shotgun or rifle in the state of purchase for hunting or other recreation and then taken it to a common carrier for packaging and shipment to the Kansas FFL. In these cases, the Kansas FFL is acting on behalf of the Kansas resident when it accepts delivery of the shotgun or rifle, retains possession of the firearm, and then redelivers it in Kansas to the Kansas resident.

An out-of-state FFL seller and the Kansas buyer may have completed all of the acts required for an interstate sale of a firearm, including payment to the seller and shipment by the seller to the Kansas FFL, except for the actual delivery, inspection, and acceptance by the buyer in Kansas. As the discussion has shown, the Kansas buyer can only take delivery from a Kansas FFL after the background check and other requirements are satisfied. Once this happens, the Kansas FFL isn’t paid for the firearm. The buyer paid the out-of-state seller for the firearm. Furthermore, Kansas buyers often contract directly with the Kansas FFL to accept deliver of the firearm from a common carrier that was hired and paid by the Kansas buyer.

These things show there may be nothing in the transaction between the Kansas resident, the Kansas FFL, and the original seller that suggests the FFL is acting as an agent for the seller. If an agency relationship exists, it is probably exists between the Kansas FFL and the Kansas resident. Accordingly the legal rational in the 2003 letter is incorrect. Agency theory cannot serve as the legal basis for requiring Kansas FFLs to collect and remit sales tax on firearms it delivers to a Kansas resident after receiving it from a common carrier. Therefore, it must be determined if there is another basis for requiring the Kansas FFL to collect sales or use tax on such transfers.

The review provided above establishes all Kansas FFLs that sell tangible personal property at retail in Kansas are required to register as retailers under the Kansas law. This means that the statutory definition of “sale” should be applied to determine whether the Kansas FFL is making a taxable retail sale when it delivers a firearm to a Kansas resident under the arrangement being discussed.

The definition of “sale” provides, in parts relevant here:

(kk) "Sale" or "sales" means the . . . sale [of tangible personal property] . . . for money, and every transaction . . . for a consideration, constituting a sale . . . regardless of the method by which the title, possession or right to use the tangible personal property is transferred.

The definition establishes that a “sale” is made for purposes of sales or use tax only if it is made for “money” or “consideration.” This requirement ties into the wording used in other Kansas sales and compensating use tax statutes.

Kansas sales and compensating use taxes are imposed on: ***“The gross receipts received*** from the sale of tangible personal property at retail within this state.” *K.S.A. 79-3603(a).* The taxes are also imposed on the gross receipts from the providing of services that are enumerated in K.S.A. 79-3603. *K.S.A. 79-3602(nn)(“‘Service’ means those services described in and taxed under the provisions of K.S.A. 79-3603 and amendments thereto.”)*The term ***“gross receipts”*** “means the ***total****. . .****amount received****.* . . in money . . . or other consideration . . . ***from sales at retail within this state*** . . . .” Kansas retailers are required to file returns that report their gross receipts from retail sales of tangible personal property and enumerated services received during the reporting period. *K.S.A. 79-3607(5).*

This discussion shows the only money or consideration the FFL receives is payment for: (1) the time and labor the TTL expends arranging to accept and redeliver the firearm to the Kansas resident; (2) the time and labor it expends recording and documenting its acquisition and possession of the firearm; (3) the time and labor it expends confirming the law permits the buyer to lawfully possess the firearm; (4) any overhead costs associated with the time it possesses the firearm, such as insurance that covers risk of loss of the firearm; (5) any employee wages associates with these costs; and (6) all other associated overhead expenses. The Kansas TTL is not paid for the firearm, which was purchased from an out-of-state seller. The Kansas TTL never has title to the firearm.

These things highlight the fact the Kansas FFL does not receive money or other consideration as payment for the firearm. The FFL bills its customers to recover the costs it incurs providing services that allow the customer to take lawful possession of the firearm purchased in another state or in interstate commerce. These services are not enumerated taxable services.

As this discussion shows, a Kansas FFL often does not have a contractual arrangement with the out-of-state seller and receives no money or other consideration for the firearm from the out-of-state seller. The Kansas FFL isn’t paid for the firearm because it doesn’t own it. The Kansas FFL may not know how much the Kansas resident paid for the firearm, or if sales or use tax was paid to the other state or Kansas. If the Kansas buyer fails the background check, the Kansas FFL will either ship the firearm back to the out-of-state seller, on the behalf of the Kansas buyer at the buyer’s expense or may sell it on a consignment basis for the Kansas buyer. In either case, the Kansas FFL is acting at the direction of the Kansas resident buyer.

These things suggest nothing in Kansas sales or use tax acts requires a FFL to collect or remit Kansas sales or use tax when it transfers a firearm that was purchased in another state or in interstate commerce to the Kansas resident.

KDOR has rescinded the 2003 opinion letter. No refunds will be issued to Kansas FFLs who collected the tax previously. Refunds will only be issued if the Kansas buyer can establish it paid sales or use tax to Kansas after it lawfully paid sales tax to the state of purchase, and the payment of tax to the other state was not credited against the Kansas use tax owed in accordance with K.S.A. 79-3704(3). If you have any additional questions, please contact the Office of Policy and Research.

Sincerely,

Thomas E. Hatten
Attorney/Policy & Research

**Date Composed: 07/12/2012 Date Modified: 07/12/2012**