**Opinion Letter**

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| **Letter Number:** | **O-2011-012** |

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| **Tax Type:** | **Kansas Retailers' Sales Tax** |
| **Brief Description:** | **Sales tax as it applies to a direct-mail advertising company.** |
| **Keywords:** |  |
| **Approval Date:** | **11/18/2011** |

**Body:**

Office of Policy & Research

November 18, 2011

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RE: Your letter dated October 24, 2011

Dear XXXX:

Thank you for your recent letter. You work for ZZZZ . ZZZZ is a direct-mail advertising company whose home office is in Springfield, Missouri. ZZZZ's web site provides the following overview of its Kansas operations and the Kansas residents it targets for its direct-mail advertising promotions:

ZZZZ “the direct mail to the upscale experts” are licensed to provide direct mail advertising in Kansas, including Kansas City, Lawrence, Wyandotte County and Johnson County. ZZZZ is authorized to print and mail coupons/certificates to wealthy sports fans in the following categories: NASCAR, college basketball, and college and professional football.

ZZZZ intends to begin soliciting businesses in the Kansas City metropolitan area to pay for advertisements placed in direct-mail packets that are mailed to homeowners in Kansas and Missouri. The packets, which will contain coupons, offers, and advertisements, will be printed and assembled in Wisconsin. ZZZZ will provide the Wisconsin printer with a list of the homeowner's names and addresses. The printer will use the list to address the direct mail, which it delivers to the United States Postal Service in palletized, shrink-wrapped bundles.

You ask how Kansas sales tax laws apply to your business. ZZZZ's web site and your letter show that ZZZZ will have agents and employees who operate in Kansas. The question of whether an out-of-state business has nexus with a state because it utilizes in-state sales agents was answered by *Scripto, Inc. v. Carson,* 362 U.S. 207 (1960). *Sales and Use Tax Answer Book,* p. 2-20, Nelson, Collins, & Healy, 2008 Ed. CCH, discusses *Scripto*:

*Sales made through independent contractors or brokers*

The regular solicitation of sales by independent contractors or brokers satisfies the due process requirements that there be a definite link or a minimum connection between a state and the person, property or transaction it seeks to tax. The fact that the taxpayers has no regular employees in the state nor does it own, lease, or maintain any office, or other place of business is beside the point where the independent contractors perform the same duties as that of a sales employee. "True, the 'salesmen' or not regular employees of appellant devoting full time to its service, but we conclude that such a fine distinction is without constitutional significance. The formal shift in the contractual tagging of the salesmen as 'independent' neither results in changing his local function of solicitation nor bears upon its effectiveness in securing a substantial flow of goods into Florida. Moreover, we cannot see, from a constitutional standpoint, that it was important that the agent worked for several principals. The test is simply the nature and extent of the activities of the appellant [taxpayer] in Florida."

*See also National Geographic Society v. California Board of Equalization, 430 US 551 (1977).*

The Kansas-Missouri state line runs though the Kansas City metropolitan area. Business competition in the Kansas City market area requires companies in the area to leave their home state and engage in business in the other state if they expect to stay in business. The department works with Kansas and Missouri companies in the Kansas City area on a daily basis helping them sort through their Kansas and Missouri sales and use tax collection and reporting responsibilities.

This knowledge and experience has led the department to advise Kansas companies in the metro with business operations like yours to register as a retailer with the Missouri Department of Revenue and report Missouri tax on their taxable Missouri sales. The department instructs Missouri companies with similar operations to register as a Kansas retailer with the Kansas Department of Revenue and report Kansas tax on their taxable Kansas sales. ZZZZ has nexus with Kansas and is required to register with the Kansas Department of Revenue to report Kansas consumer's use tax.

Kansas is a member of the Streamlined Sales Tax Project (SSTP). Project members have agreed to provide uniform sales tax treatment of direct mail for the benefit of advertisers, their customers, and printers. This uniform treatment means the Kansas requirements should be the same or very similar to the treatment of direct-mail advertising provided by other SSTP member states. Missouri currently is not a member of the SSTP.

The Kansas definition of “direct mail” is” found at K.S.A. 79-3602(j). It is consistent with the SSTP definition of "direct mail":

"Direct mail" means printed material delivered or distributed by United States mail or other delivery services to a mass audience or to addressees on a mailing list provided by the purchaser at the direction of the purchaser when the cost of the items are not billed directly to the recipients. Direct mail includes tangible personal property supplied directly or indirectly by the purchaser to the direct mail seller for inclusion in the package containing the printed material. Direct mail does not include multiple items of printed material delivered to a single address. *(Compare with Streamlined Sales and Use Tax Agreement (Dec. 13, 2010), Appendix C, Library of Definitions, Part I, Administrative Definitions, "direct mail," p. 134).*

K.S.A. 79-3603(a) imposes sales tax on charges for direct mail by taxing: "The gross receipts received from the sale of tangible personal property at retail within this state. . . ." The legislative intent to impose sales and use tax on charges for direct mail is confirmed by: (1) the definition of "direct mail" in K.S.A. 79-3602(j); (2) the exclusion of "direct mail" from the definition of "delivery charges" in K.S.A. 79-3602(i); and (3) the sourcing provisions for "direct mail" and "other direct mail" in K.S.A. 79-3672. The legislative intent shown in these statutes overcomes nearly every claim a direct-mail advertiser with nexus can make about the State's authority to tax charges the advertiser pays for direct mail it has delivered to Kansas residents.

K.S.A. 79-3672 provides:

K.S.A. 79-3672. Same; advertising and promotional direct mail and other direct mail, requirements and procedures; sourcing; bundled transactions. (a) Notwithstanding the provisions of K.S.A. 2010 Supp. 79-3670 and amendments thereto, the following provisions apply to sales of "advertising and promotional direct mail":
(1) A purchaser of "advertising and promotional direct mail" may provide the seller with either:
(A) A direct pay permit;
(B) an exemption certificate, or other statement approved, authorized or accepted by the secretary, claiming "direct mail"; or
(C) information showing the jurisdictions to which the "advertising and promotional direct mail" is to be delivered to recipients.
(2) If the purchaser provides the permit, certificate or statement referred to in subsections (a)(1)(A) or (a)(1)(B), the seller, in the absence of bad faith, is relieved of all obligations to collect, pay or remit any tax on any transaction involving "advertising and promotional direct mail" to which the permit, certificate or statement applies. The purchaser shall source the sale to the jurisdictions to which the "advertising and promotional direct mail" is to be delivered to the recipients and shall report and pay any applicable tax due.
(3) If the purchaser provides the seller information showing the jurisdictions to which the "advertising and promotional direct mail" is to be delivered to recipients, the seller shall source the sale to the jurisdictions to which the "advertising and promotional direct mail" is to be delivered and shall collect and remit the applicable tax. In the absence of bad faith, the seller is relieved of any further obligation to collect any additional tax on the sale of "advertising and promotional direct mail" where the seller has sourced the sale according to the delivery information provided by the purchaser.
(4) If the purchaser does not provide the seller with any of the items listed in subsections (a)(1)(A), (a)(1)(B) or (a)(1)(C), the sale shall be sourced according to subsection (a)(5) of K.S.A. 2010 Supp. 79-3670, and amendments thereto.
(b) Notwithstanding the provisions of K.S.A. 2010 Supp. 79-3670, and amendments thereto, the following provisions apply to sales of "other direct mail":
(1) Except as otherwise provided in this subsection, sales of "other direct mail" are sourced in accordance with subsection (a)(3) of K.S.A. 2010 Supp. 79-3670, and amendments thereto.
(2) A purchaser of "other direct mail" may provide the seller with either:
(A) A direct pay permit; or
(B) an exemption certificate, or other statement approved, authorized or accepted by the secretary, claiming "direct mail."
(3) If the purchaser provides the permit, certificate or statement referred to in subsection (b)(2)(A) or (b)(2)(B), the seller, in the absence of bad faith, is relieved of all obligations to collect, pay or remit any tax on any transaction involving "other direct mail" to which the permit, certificate or statement apply. Notwithstanding subsection (b)(1) the sale shall be sourced to the jurisdictions to which the "other direct mail" is to be delivered to the recipients and the purchaser shall report and pay any applicable tax due.
(c) For purposes of this section:
(1) "Advertising and promotional direct mail" means:
(A) Printed material that meets the definition of "direct mail"; and
(B) the primary purpose of which is to attract public attention to a product, person, business or organization, or to attempt to sell, popularize or secure financial support for a product, person, business or organization. As used in this subsection, the word "product" means tangible personal property, a product transferred electronically or a service;
(2) "other direct mail" means any direct mail that is not "advertising and promotional direct mail" regardless of whether "advertising and promotional direct mail" is included in the same mailing. The term includes, but is not limited to:
(A) Transactional direct mail that contains personal information specific to the addressee including, but not limited to, invoices, bills, statements of account and payroll advices;
(B) any legally required mailings including, but not limited to, privacy notices, tax reports and stockholder reports; and
(C) other non-promotional direct mail delivered to existing or former shareholders, customers, employees or agents including, but not limited to, newsletters and informational pieces.
"Other direct mail" does not include the development of billing information or the provision of any data processing service that is more than incidental.
(d) (1) (A) This section applies to a transaction characterized as the sale of services only if the service is an integral part of the production and distribution of printed material that meets the definition of "direct mail".
(B) This section does not apply to any transaction that includes the development of billing information or the provision of any data processing service that is more than incidental regardless of whether "advertising and promotional direct mail" is included in the same mailing.
(2) If a transaction is a "bundled transaction" that includes advertising and promotional direct mail, this section shall apply only if the primary purpose of the transaction is the sale of products or services that meet the definition of "advertising and promotional direct mail."
(3) Nothing in this section shall limit any purchaser's:
(A) Obligation for sales or use tax to any state to which the direct mail is delivered;
(B) right, if any, to a credit for sales or use taxes legally due and paid to other jurisdictions; or
(C) right, if any, to a refund of sales or use taxes overpaid to any jurisdiction.
(4) This section applies for purposes of uniformly sourcing direct mail transactions.

Subsection (a) applies to ZZZZ's direct-mail packets. Subsection (b) does not apply to ZZZZ's direct-mail because the packets satisfy the definition of "direct mail" rather than "other direct mail." *Compare K.S.A. 79-3602(j) with K.S.A. 79-3672(c)(2).*

Wisconsin has enacted SSTP conforming legislation, as have its neighbor states Minnesota, Iowa, and Michigan. SSTP conforming legislation has been introduced in Illinois. All of this legislation enacted by Wisconsin and its neighboring states suggests the Wisconsin printer is familiar with the SSTP requirements for charging and collecting sales tax for the different states when it charges advertisers for printing and mailing direct mail. Please contact the Wisconsin printer to see if it is registered or will become registered to collect and remit Kansas retailers' sales or use tax on the direct mail it prints and ships to Kansans.

If the Wisconsin printer is registered or will become registered with Kansas, the printer probably can instruct ZZZZ how to create a list for the printer to use to report the appropriate Kansas state and local tax. The printer may be equipped to do this already from the ship-to address list ZZZZ provides. A printer that offers direct-mail advertisers this tax collection and remittance service is offering something of value that sets the printer apart from many of its competitors.

If the printer is not registered and does not wish to become registered to collect and remit Kansas state and local sales or use tax, ZZZZ is responsible for self-accruing and remitting the Kansas tax based on the number of direct-mail packets shipped to different taxing jurisdictions in Kansas.

To self-accrue the tax, ZZZZ is required to provide its printer with a completed ST-31, *Direct Mail Sourcing Certificate.* ZZZZ then is responsible for assigning its printing costs for the mailers to each Kansas taxing jurisdiction based on number and cost of the direct mail packets mailed to addresses in each tax jurisdiction. Commercial software may be available that does this for direct mail companies based on the addresses the direct mail company provides to the printer. The ST-31 can be downloaded from the department's home page, www.ksrevenue.org.

Whichever approach is taken, ZZZZ should ask the printer to bill charges for delivering the direct mail as a separate line-item amount. The tax base for the sale and delivery of most tangible personal property to Kansas buyers includes "delivery charges." *K.S.A. 79-3602(ll)(1)(D).*However, the definition of "delivery charges" in K.S.A. 79-3602(i) specifically excludes "charges for delivery of direct mail if the charges are separately stated on an invoice or similar billing document given to the purchaser." K.S.A. 79-3602(i) provides:

"Delivery charges" means charges by the seller of personal property or services for preparation and delivery to a location designated by the purchaser of personal property or services including, but not limited to, transportation, shipping, postage, handling, crating and packing. Delivery charges shall not include charges for delivery of direct mail if the charges are separately stated on an invoice or similar billing document given to the purchaser. *(Compare with Streamlined Sales and Use Tax Agreement (Dec. 13, 2010), Appendix C, Library of Definitions, Part I, Administrative Definitions, "delivery charges," p. 131-2).*

This means delivery charges for direct mail that the Wisconsin printer bills to ZZZZ will not be subject to Kansas sales tax if the delivery charges are separately stated on the invoice or other billing document the printer issues to ZZZZ. The other charges billed to ZZZZ for the direct-mail packets are taxable for direct-mail packets mailed to Kansas residents.

This approach to taxing direct mail means ZZZZ should not charge sales tax when it bills its customers for advertising that will be distributed by direct-mail. The taxable event is ZZZZ's purchase of the direct mail from the Wisconsin printer, which is delivered at ZZZZ's direction to addressees in Kansas. ZZZZ owes Kansas use tax on the cost of the direct-mail packets shipped to Kansas addresses. ZZZZ is required to self-accrue the tax if the Wisconsin printer does not bill Kansas tax to ZZZZ on its charges.

I believe all other SSTP states that tax direct mail will advise you to follow a similar procedure for their state. I recommend that ZZZZ contact the other SSTP states that will receive ZZZZ's direct mail in order to determine whether those states impose tax on charges for direct mail, and if a state does, whether it excludes any amounts like separately-state delivery charges. This knowledge will simplify and clarify ZZZZ's tax collection duties for a large part of the nation.

Sincerely,

Thomas E. Hatten
Attorney/Policy & Research

**Date Composed: 11/21/2011 Date Modified: 11/21/2011**