**Private Letter Ruling**

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| **Ruling Number:** | **P-1999-47** |

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| **Tax Type:** | **Kansas Retailers' Sales Tax** |
| **Brief Description:** | **Franchise and FCC fees on cable television billings.** |
| **Keywords:** |  |
| **Approval Date:** | **03/02/1999** |

**Body:**

Office of Policy & Research

March 2, 1999

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XXXX

RE: Your letter request of January 15, 1999

Dear XXXX:

I have been asked to respond to your letter received in January. You ask whether the tax base for Kansas sales tax on cable television billings should include the FCC fee and the franchise fee imposed by the municipality. The department recently litigated whether franchise fees should be included in the tax base under the City of Atchison’s cable franchise agreement. The Kansas Supreme Court upheld our argument that the sales tax base should include the franchise fees. The case is *In re the Tax Appeal of Atchison Cablevision, L.P.*, 262 Kan. 223, 936 P.2d 721 (1997). Each case that raises these issues will depend on the terms of the municipality’s franchise agreement. While each case depends on the terms of the franchise, our experience suggests that most Kansas cable franchise agreements will require the franchise and FCC fee to be included in the tax base on which Kansas sales tax is computed.

Whether the tax base for state sales tax includes other excise taxes has been the subject of frequent litigation. This has led to a straightforward test for analyzing whether fees like the franchise fee and FCC fee should be included in the tax base for sales tax. The test asks the following questions: (1) Does the legal incidence of the Kansas retailer’s sale tax fall upon the retailer or the consumer?; (2) does the legal incidence of the franchise fee or FCC fee fall upon the retailer or the consumer?; and (3) does the sales tax act allow the franchise fee to be deducted from the tax base for sales tax? If the retailers’ sales tax act does not specifically exclude excise taxes from the tax base and if the franchise fee falls on the retailer and the sales tax on the consumer, then the franchise fee may properly be included in the sales tax base for sales tax.

United States Supreme Court decisions provide the test for determining where the legal incidence of a tax falls. The location of the economic impact for the tax does not fix the legal incidence of a tax. It is only if the state imposes a legal obligation on the purchaser either to pay the tax, or to reimburse the vendor for the tax payment, that the legal incidence of the tax fall on the purchaser. In Gurley v. Rhoden, 421 US 200, 204-5 (1975), the United States Supreme Court explained:

The economic burden of taxes incident to the sale of merchandise is traditionally passed on to the purchasers of the merchandise. Therefore, the decision as to where the legal incidence of either tax falls is not determined by the fact that petitioner, by increasing his pump prices in the amounts of the taxes, shifted the economic burden of the taxes from himself to purchaser-consumer. The court has laid to rest doubts on that score raised by such decisions as Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 US 218 (1928); Indian Motorcycle Co. v. United States, 283 US 570 (1931); and Kern-Limerick, Inc. v. Scurlock, 347 US 110 (1954), at least under taxing schemes, as here, where neither the statutes required petitioner to pass the tax on to the purchaser-consumer. See Alabama v. King & Boozer, 314 US 1 (1941); Lash’s Products Co. v. Lumber Co. v. United States, 281 US 572 (1930); Agricultural Nat. Bank v. Tax Comm’n, 392 US 339 (1968); American Oil Co. v. Neill, 380 US 451 (1965).

Gurley v. Rhoden, id. instructs that the legal incidence of the tax falls on the consumer if: (1) the state has imposed a legal obligation on the consumer to pay the tax or; (2) the state has required the consumer to reimburse the retailer for the tax paid. As the Supreme Court stated in United States v. Mississippi Tax Comm’n., 421 US 599, 608 (1975):”[T]he controlling significance of First Agricultural Bank for our purposes is the test formulated by that decision for the determination where the legal incidence of the tax falls, namely, that where a State requires that its sales tax be passed on to the purchaser and be collected by the vendor from him this establishes as a matter of law that the legal incidence of the tax fall upon the purchaser.” (Emphasis supplied).

The Kansas retailers’ sales tax requires that the tax “shall be paid by the consumer” and “shall be a debt from the consumer or user to the retailer.” K.S.A. 79-3604. The act requires “every retailer in the state to collect from the consumer or user, the full amount of the tax.” K.S.A. 79-3604. The act makes it unlawful for the retailer to state that the tax will be assumed or absorbed by the retailer. K.S.A. 79-3605. The act does not allow the franchise fee to be deducted from the tax base. See K.S.A. 79-3606(a). The Kansas retailers’ sales tax act requires that the tax be passed on to the purchaser and be collected by the vendor. Thus, as a matter of law, the legal incidence of the Kansas retailers’ sales tax fall on the purchaser/ consumer.

Determining where the legal incidence of the franchise and FCC fee falls requires the same type of analysis that was applied to the retailers’ sales tax act. For purposes of the FCC fee, the pertinent federal law referred to in K.S.A. 12-2010 is found at 47 USCS Sec. 542 (Lawyer’s Co-op Supp. 1989). Under the federal enactment, “any cable operator may be required under the terms of any franchise to pay a franchise fee.” 47 USCS Sec. 542(a). A cable operator “may pass through to subscribers the amount of any increase in a franchise fee. . .” and shall pass through to subscribers the amount of any decrease in franchise fee. . . .” 47 USCS Sec. 542(c) and Sec. 542(e). (Emphasis supplied). Subsection (g) of the federal law defines the term “franchise fee:”

For the purpose of this section . . .

(1) the term “franchise fee” includes any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such. . . . (Emphasis supplied).

The federal law does not fix the legal incidence of the franchise fee on the cable operator or the cable subscriber. By its definition of “franchise fee,” the federal enactment permits the “franchising authority” to impose the franchise fee upon “a cable operator or cable subscriber, or both. . . .” Thus, the federal law has the effect of permitting the local governmental entity that grants the franchise to fix the legal incidence of the franchise fee.

In your case, the wording of the ordinance in question will establish whether the legal incidence of the FCC fee falls upon the “cable operator or cable subscriber. As noted in the first paragraph, the department of revenue has reviewed many of cable franchise agreements from different Kansas communities. Our nearly universal findings are that these fees are not imposed on the consumer but are simply a cost that the cable provider passes on to the customer as a line item on the customer billing. This makes these fees subject to sales tax.

You might wish to discuss this matter with XXX in your XXXX office. In 1989 and 1990, XXXX was the counsel of record for a cable television company on an appeal of a sales tax assessment that raised the same issues that you raise. Please feel free to contact me at (785) 296-3081 if you wish to discuss this matter further.

Sincerely,

Thomas E. Hatten

Attorney/Policy & Research

**Date Composed: 03/17/1999 Date Modified: 10/11/2001**