

State & Local Tax Update KSCPA Annual Tax Conference

S. Lucky DeFries | Attorney
MORRIS LAING LAW FIRM
800 SW Jackson, Ste 1310 | Topeka, KS 66612
P: 785.232.2662 | F: 785.232-9983 | D: 785.430.2018
Email: ldefries@morrisolaing.com
www.morrisolaing.com
Topeka | Wichita | West Palm Beach



KDOR UPDATE

A. AUDIT ACTIVITY

1. Sales and Use Tax
2. Corporate Income Tax
3. Historic Tax Credits
4. Residency Issues



B. DELIVERY CHARGES

- During 2022 session, H.B. 2136 passed excluding separately stated delivery charges from the definition of “sales or selling price.” (See attached KDOR Notice)
- The Kansas Department of Revenue has issued a notice regarding 2022 House Bill 2136, which was signed and passed into law. This bill amended the definition of “sales or selling price.” Prior to the amendment, delivery charges were included in the sales or selling price charged to a customer as part of the gross receipts from the sale of tangible personal property or enumerated services and were therefore subject to sales tax. Under the amended statute, as of July 1, 2023, delivery charges that are separately stated on the invoice, bill of sale, or similar document provided to a purchaser are not included in the sales or selling price charged to the customer, are not part of the gross receipts from the sale of tangible personal property or enumerated services, and are therefore not subject to Kansas sales tax.
- Scope and Implications – Impact on various industries.

C. SALT PARITY ACT OF 2022

1. For tax years commencing on or after January 1, 2022. This is a legislative finding that the purpose of the tax credit found in K.S.A. 2023 Supp. 79-32,288 is to avoid double taxation of income on electing pass-through entity owners. An electing pass-through entity shall be subject to a tax in an amount equal to the highest rate of tax for the applicable income tax year under K.S.A. 79-32,110(a). Non-resident pass-through entity owners are taxed on their pro rata or distributive share of the electing PTE's income attributable to the state. Resident pass-through entity owners are taxed on their pro rata or distributive share of the electing PTE's income calculated as either the sum of income attributable to the state and income not attributable to the state; or income attributable to the state. Senate Bill 410, §§ 20 & 21, amending K.S.A. 2023 Supp. 79-32,287.

2. Implications (See attached KDOR Memorandum)
3. Future options in light of expiration of TCJA at end of 2025.
4. Growth of corporate tax receipts.

FY 2020	\$384 Million
FY 2021	\$652 Million
FY 2022	\$806 Million
FY 2023	\$1.5 Billion
FY 2024	\$1.4 Billion

SALT Parity Act impact on growth of receipts.

D. PROPOSED SINGLE FACTOR AND MARKET BASED SOURCING

1. Components of bills.
2. Implications.
3. Fiscal notes and issues for 2025.
4. Comparison of Kansas to other states.

E. Status of High Performance Incentive Program (HP/IP) and Promoting Employment Across Kansas (PEAK)

1. Importance – Economic Development
2. History of attempts to eliminate
3. Relationship to corporate tax rates

F. CHEVRON DEFERENCE GONE

NASBTS Slides from



National Association of State Bar Tax Sections
45th Annual Meeting
October 4-5, 2024

CHEVRON 1984

- Congress delegated the authority to administer and enforce the Clean Air Act to the Environmental Protection Agency.
- Chevron U.S.A. challenged the EPA's definition of a source of production of pollution, a term undefined by the Act.
- This decision established Chevron deference, which guided 40 years how federal courts addressed ambiguous or silent statutes and what weight to give to the agency's interpretation of those statutes.

Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837 (1984)

CHEVRON DEFERENCE

Chevron set out a 2 Step test of when to grant deference:

1. If Congress has directly spoken to the precise question at issue and its intent is clear, the court and the agency must yield to the **unambiguously** expressed intent of Congress.
2. If the statute is ambiguous or silent, however, the court cannot impose its own interpretation, but **must defer** to the agency's interpretation as long as it is a **reasonable and permissible** interpretation (a fairly low standard) of the statute.

Skidmore differs because it does not mandate deference but gives weight and reliance based on several different considerations

JUSTIFICATIONS FOR CHEVRON DEFERENCE

1. Agencies have Special Technical Expertise that Courts do not
2. Agencies are Politically Accountable
3. Congress delegated the Authority to Agencies
4. Protects Confidential information that would be public in a trial
5. Deference is the best use of Agency resources

CRITICISMS OF CHEVRON DEFERENCE

- **Contrary to Law**: The Administrative Procedure Act (APA) says a reviewing court “shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action.”
- **Separation of Powers**: Deference violates Constitutional separation of powers by granting the administrative agencies of the executive branch legislative law-making power & judicial power by requiring judges to abandon their duty to independently interpret the law.
- **Due Process**: Deference violates the DP fairness principle because deference creates an inherent bias in favor of the agency’s position when the agency is a party in the litigation.
- **Thumb on the Scale**: Strict construction of taxing statutes in favor of revenue agencies.
- **Dedicated Tax Tribunals**: Which expert is due deference?
- **Inconsistently Applied**: Not all Court’s apply deference.

LOPER BRIGHT 2024

Issue: Whether the Court must defer to the interpretation by the National Marine Fisheries Services of a provision in the Magnuson-Stevens Fishery Conservation & Management Act requiring an observer to be on the commercial fishing boat, paid for by the boat's captain or owner.

Held: Although an executive agency may have superior technical expertise of the subject matter it administers, ambiguity in a statute does not mean that Congress intended the agency to interpret its meaning instead of a court **because** executive agencies do not have the power to control, but only the power to persuade, using their expertise. The agency did not have the authority to interpret the regulation the way it did.

After 40 years with Chevron being the cornerstone of federal administrative law about how courts review agency ----- **OVERRULED!!!**

Loper Bright Enterprises v. Raimondo, NO 22-451 (6/28/24)

STATE IMPACT OF LOPER BRIGHT

- Loper Bright over-ruled federal court deference to federal agency interpretations of statutes
- Loper Bright did not directly disturb state court deference to state agency constructions.
- Some states had adopted Chevron-like deference, while others did not, and still others legislated against the doctrine.
- Even in those States that adopted mandatory deference, the impact may be negligible because they generally
 - skipped Chevron's initial inquiry of whether the legislature has clearly or unambiguously expressed a **specific intent** to elevate agency decisions
 - used a **one-step** "reasonableness" standard.

G. ETHICAL AND EFFECTIVE USE OF AI IN STATE TAX ADVISORY SERVICES

1. There are differences between issues faced by attorneys vs. those of you in public accounting.
2. Issues are receiving considerable attention.

3. Some of the issues discussed at a recent tax conference for attorneys:

- Can one rely on generative AI for tax advice without human review
- Is it ethical to share confidential client information with an AI-powered platform to analyze tax memos.
- Can one use AI to draft legal opinions that might be relied on for significant tax decisions.
- How can one ensure that the AI's conclusions don't introduce bias into one's tax positions.
- If AI makes an error, who is responsible – me or the tool.
- Can one trust that the AI tool adheres to privacy laws when handling client data.¹

Notwithstanding the differences between the regulatory standards associated with the legal profession and public accounting, the emergence of AI has created profound issues for many professions.

¹ "Ethical and effective use of AI in State Tax Advisory Services" Diane Yetter – Yetter Tax & Sales Tax Institute and Austin Murray, Esq. – Prophit. AI – National Association of State Bar Tax Sections Annual Conference – Boston – 2025

H. NET OPERATING LOSS SUBTRACTION MODIFICATION

1. A subtraction modification is created for taxpayers who carried back a federal net operating loss arising in tax years 2018, 2019, and 2020. Losses will be subtracted from their income to determine Kansas Adjusted Gross Income. If the amount of the net operating loss exceeds the KAGI of the taxpayer, the taxpayer is permitted to carry forward such net operating loss for up to 20 years. The deadline for filing amended returns extends to tax years 2018 through 2020 until April 15, 2025. Senate Bill 410, § 18, amending K.S.A. 79-32,117(c)(xxviii).
2. Background and feedback regarding actual impact and implications.

I. NEW SALES TAX EXEMPTIONS

- The purchase of equipment, machinery, or other infrastructure used in the provisions of internet access service, telecommunication service, or video service is exempt. There will also be an exemption for the purchase of repair, maintenance, and installation services purchased by providers of such internet access service, telecommunication service, or video services. Effective July 1, 2024 through June 30, 2029. House Bill 2098, § 5, adding K.S.A. 79-3606 (rrrr) and (uuuu).
- The sales of the services of slaughtering, butchering, custom cutting, dressing, processing, and packaging of an animal for human consumption when the animal is delivered or furnished by the customer that owns the animal, and the meat or poultry is for use or consumption by the customer is exempt. The effective date is July 1, 2024. House Bill 2098, § 5, adding K.S.A. 79-3606 (rrrr) and (uuuu).
- All sales of tangible personal property or services purchased by or on behalf of Doorstep in Topeka, Kansas is exempt on or after July 1, 2024. House Bill 2098, § 5, adding K.S.A. 79-3606 (ssss) and (tttt).

- All sales of tangible personal property or services purchased by Exploration Place, Inc., in Wichita, when such property or services are used for the purpose of various construction projects for Exploration Place are exempt on or after January 1, 2024 through December 30, 2030. House Bill 2098, § 5, adding K.S.A. 79-3606 (ssss) and (tttt).
- All sales of tangible personal property or services purchased by the Kansas Children's Discovery Center, Inc. in Topeka, when such property and services are used for the purpose of various construction projects for the Kansas Children's Discovery Center, Inc. are exempt on or after January 1, 2024 through December 30, 2030. House Bill 2098, § 5, adding K.S.A. 79-3606 (ssss) and (tttt).
- There will be an exemption for direct purchases made by the Kansas State School for the Blind and the Kansas State School for the Deaf, if such purchases, are related to the building, maintenance, and enlargement of facilities used for human habitation on or after July 1, 2024. House Bill 2098, § 5, amending K.S.A. 79-3606(c) and adding K.S.A. 79-3606(vvvv).

- Effective May 19, 2023 all sales of tangible personal property or services purchased by a contractor for the purpose of constructing, equipping, reconstructing, maintaining, repairing, enlarging, furnishing or remodeling a building that is operated by, or is intended to be operated by the Kansas Fairground Foundation, that is located on the grounds of the Kansas State Fair. House Bill 2098, § 5, amending K.S.A. 79-3606(c) and adding K.S.A. 79-3606 (vvv).
- Effective July 1, 2026 there will be a Disabled Veterans Sales Tax Exemption for Kansas resident veterans who have been honorably discharged and have a 100% percent disability or be deemed totally disabled or unemployable, provided that such disability is permanent and was sustained through military action. It will apply to tangible personal property and services purchased. This exemption is capped at \$24,000 of taxable sales per year per eligible person. This does not apply for purchase of motor vehicles, alcoholic beverages, tobacco products, electronic cigarettes, as well as purchases not made for personal use or made for the production of income. Veterans need to apply to the Department of Revenue for an exemption identification number. House Bill 2098, New Section 1.
- History of Sales Tax Exemptions During My Career.

J. SALES TAX CASES

In The Matter of The Appeal of Westar Energy Inc. from an Order of The Division of Taxation on Assessment of Kansas Retailers' Sales Tax, BOTAs Docket No. 2017-1311-DT et al. (Summary Decision; Full and Complete decision to be issued by end of November).

In a sales tax refund case being handled by our firm, the Board of Tax Appeals of the State of Kansas (BOTA) concluded that an electric utility's purchases of machinery and equipment utilized in step-down substations located outside a generation plant were exempt from Kansas retailers' sales tax as manufacturing machinery and equipment pursuant to K.S.A. 79-3606(kk). The Board determined that the machinery and equipment was an integral or essential part of an integrated production operation and that the step-down substations were manufacturing or processing plants or facilities as defined by the statute. Because the utility met all the statutory requirements for exemption eligibility, the Board granted the utility's refund requests. The BOTA decision was a preliminary order and the Department of Revenue has requested a full and complete opinion, which is a prerequisite to seeking judicial review.

K. PROPERTY TAX

1. Legislative Changes

a. Authorization of Electronic Property Tax Documents

During the 2023 Legislative Session House Bill 2002 was passed and signed into law and became effective on July 1, 2023. The bill authorizes county treasurers to electronically deliver tax statements, tax notices, and tax information forms to taxpayers upon consent of the taxpayer. The bill also authorizes county appraisers to electronically deliver property classification and appraised valuation information to taxpayers upon consent of the taxpayer. 2023 House Bill 2002.

b. Personal Property Filing and Penalty Charges

When an initial statement listing tangible personal property for taxation has been filed with a county appraiser, future annual filings would only be required when there has been a change to the report of property previously listed or changes to the initial listing statement. SB 410, Section 9, Amending K.S.A. 79-306.

The penalty for late filing or failure to file of oil and gas leases has been reduced as follows:

- April 2 through April 30 – 2%
- May 1 through May 31 – 4%
- June 1 through June 30 – 6%
- July 1 through July 31 – 8%
- August 1 through March 31 of the following year – 10%
- Late filing penalty of more than one year from April 1 – 12.5%
- Failure to file penalty – 12.5%

Senate Bill 410, § 10, amending K.S.A. 79-332a.



The penalty for late filing or failure to file of tangible personal property has been reduced as follows:

- March 16 through April 15 – 2%
- April 16 through May 15 – 4%
- May 16 through June 15 – 6%
- June 16 through July 15 – 8%
- July 16 through March 14 of the following year – 10%
- Failure to file penalty but not more than one year from March 15 – 12.5%

SB 410, § 11, amending K.S.A. 79-1422.



County appraisers, who currently have discretionary authority to do so, can grant an extension of a reasonable amount of time for taxpayers to file tangible personal property for taxation upon a showing of good cause. SB 410, §11.



2. CASES

a. Shelby Development, LLC v. Shawnee Cnty, No. 125,299, 2023 WL 4831201, (Kan. Ct. App. 2023) (unpublished opinion)

The Kansas Court of Appeals affirmed the district court's conclusion that a taxpayer's stipulation to a valuation meant that the taxpayer could no longer prove any damages no matter what theory of liability is presented. The taxpayer, Shelby Development, LLC, claimed it had been damaged due to the reduction in the value of its property, lost profitability of the premises, increased tax liabilities, decreased net income, and other damages. The taxpayer changed positions on whether they were challenging the stipulated value, the stipulation itself, the damages caused, or the valuation amount. The taxpayer failed to explain or present specific evidence supporting damage claims. Without showing any evidence of damage, the taxpayer did not explain how the court could grant relief, because the taxpayer agreed to the stipulated value of the property. Further, the taxpayer failed to exhaust all of its administrative remedies before coming to court. Here, the fundamental complaint was the assessed valuation of the property being too high, an administrative question. If the assessment was erroneous, the valuation must be decided by the Board of Tax Appeals, because where a full and adequate administrative remedy is provided in tax matters by statute, the remedy must be exhausted before a litigant may resort to the courts. Thus, the Court affirmed the district court's decision.

b. Matter of NFM of Kansas, Inc., No. 124,842, 2023 WL 3556172529, (Kan. Ct. App. 2023) (unpublished opinion)

The Kansas Court of Appeals affirmed a decision from the Board of Tax Appeals (BOTA) in which it found that Wyandotte County's expert violated the Uniform Standards of Professional Appraisal Practice (USPAP) and failed to put forth a credible report during the contested valuation of Nebraska Furniture Mart (NFM). NFM had a dispute with the ad valorem tax value assigned for the tax years 2018, 2019, and 2020. BOTA conducted a hearing to address the County's concerns. NFM's valuations were conducted by Maier, and BOTA stated Maier developed the capitalization rate from examinations of comparable sales. However, the County's valuations which were conducted by Marx, were primarily from the PWC Real Estate Investor Survey, which is, according to BOTA, contrary to USPAP standards and accepted appraisal practice. BOTA found Maier's approaches a better indicator of value because Marx did not competently compile his capitalization rate. Kansas law requires that the appraisal processes used to assess ad valorem taxes conform to generally accepted appraisal procedures and standards which are consistent with fair market value unless otherwise specified. Marx failed to utilize any comparable market data for his capitalization rate development and therefore "deprived BOTA of the ability to engage in any meaningful examination of that data." The county argues that the comparable market data is not required to be in the expert report, only in their own personal work file. Therefore, BOTA would be premature in determining that Marx violated USPAP. However, the Kansas Court of Appeals uses previous case law to support that BOTA is free to decide whether one appraisal or methodology is more credible than the other. Therefore, BOTA's concerns are valid and the Court affirms BOTA'S decision.



L. BOTA UPDATE

1. Current Board Members and Chief Hearing Officer
2. Terms of Board Members
3. Headcount of BOTA
4. Case Load
5. Johnson County