

NOTICE 23-02

DELIVERY FEES CHARGED BY A RETAILER

(JUNE 22, 2023)

During the 2022 Legislative Session House Bill 2136 was passed and signed into law. Section 17 of the Bill amended K.S.A. 79-3602 to change the definition of “sales or selling price” for purposes of the Kansas sales tax. Specifically, K.S.A. 79-3602(l) was amended to provide, in part:

(l) (1) “Sales or selling price” applies to the measure subject to sales tax and means the total amount of consideration, including cash, credit, property and services, for which personal property or services are sold, leased or rented, valued in money, whether received in money or otherwise, without any deduction for the following:

(A) The seller’s cost of the property sold;

(B) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller and any other expense of the seller;

(C) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;

(D) *(i) prior to July 1, 2023, delivery charges; and*

*(ii) on and after July 1, 2023, delivery charges that are not separately stated on the invoice, bill of sale or similar document given to the purchaser; and*

(E) installation charges.

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 so were subject to Kansas sales tax. In accordance with the amendment, on and after 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 so are not subject to Kansas sales tax.

The term “delivery charges” is defined in K.S.A. 79-3602(i). The subsection provides as follows:

(i) “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.

Like exemptions from the sales tax, exclusions from the sales tax base are narrowly construed. Kansas courts have clearly stated taxation is the rule and exemption the exception. Accordingly, to qualify for the exclusion from the sales tax base, delivery charges that are separately stated on the invoice, bill of sale, or similar document provided to a purchaser must be clearly denominated as charges for: (1) delivery; (2) transmission; or (3) transportation. Charges that are not clearly so denominated on the invoice, bill of sale, or similar document provided to a purchaser will be included in the tax base as part of the gross receipts from the sale.

It is important to note any separately stated charges must be representative of a true or reasonable cost of delivery based upon the underlying products or services sold and provided by either the retailer or service provider directly, or by a third party or agent (ex. a package delivery company) used by the retailer or service provider. Records regarding delivery costs and charges must be retained by the retailer and, pursuant to Kansas law, must be available for, and are subject to, inspection by the Director of Taxation or authorized representative at all times during normal business hours. Depending upon the amount of the delivery charges relative to the sales price of the item sold, a detailed, itemized list of all the charges may be required for each delivery. Delivery charge does not include the cost of transportation to the seller (typically called "freight-in"), fuel surcharges, or charge-back for delivery charge on returned goods.

In some instances, there is a clear line of demarcation between the cost of the product being sold and the delivery charges associated with the sale. For example, the sale of a large item by a "big box" store which can be transported by the purchaser at the time of sale or, for an additional fee, be delivered to the purchaser by the store later. In other cases, such as when services are being sold, the line between the cost of the product and the delivery charges associated with the sale may be more difficult to determine. In either case, if the delivery charges are not to be included in the sales or selling price, the delivery charges must be clearly and separately stated on the invoice, bill of sale, or similar document provided to the purchaser.

The decision of how to prepare and issue a billing statement to a customer is up to the retailer. K.S.A. 79-3602(l)(1)(D)(ii) does not mandate that delivery charges be separately stated on the invoice, bill of sale or similar document given to the purchaser. If delivery charges are not separately stated they will be included in the sales or selling price, and so will be subject to sales tax, but retailers that do not break out delivery fees will not be obligated to do so and, instead, for sales tax purposes will be able to maintain current business practices for the foreseeable future. The Department of Revenue declines to opine or give advice regarding billing issues that are not directly related to sales tax.

The change in treatment of delivery charges will affect both the state sales tax and local sales taxes imposed by cities, counties, and political subdivisions (along with special jurisdictions within the cities, counties, and political subdivisions, community improvement districts, transportation development districts, and STAR bond project districts). After July 1, 2023, these delivery charges, if separately stated on the invoice, bill of sale, or similar document provided to a purchaser, will not be included in the sales or selling price and, therefore, will not be subject to state and local sales tax.