**Final Written Determination**

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| **Docket Number:** | **WFD-P-2003-1** |

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| **Tax Type:** | **Kansas Retailers' Sales Tax** |
| **Brief Description:** | **Project Exemption Request for the construction of a new facility to be used for medical business consisting of optometry and ophthalmology including eye exams, screening, eye surgery and laser surgery.** |
| **Keywords:** |  |
| **Approval Date:** | **08/25/2003** |

**Body:**

Office of the Secretary

August 25, 2003

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XXXX

**Re: Written Final Determination in the Matter of the Appeal of XXXX from a denial of Project Exemption Certificate, dated August 26, 2002**

Dear XXXX:

Pursuant to K.S.A. 79-3609 and K.S.A. 79-3226, the informal conference in the above-referenced matter was held before me on August 15, 2003. The facts and disposition of this matter are summarized below.

On August 15, 2002, XXXX completed a Request For a Project Exemption Certificate (hereinafter “PEC”) and forwarded it to the Kansas Department of Revenue. Said request for a PEC claimed that XXXX is located in XXXX, Kansas and would be constructing a new facility in Topeka. This new facility would be used for its medical business consisting of optometry and ophthalmology including eye exams, screening, eye surgery and laser surgery. XXXX does not claim to provide any other services. XXXX claimed to have one doctor and support staff. XXXX anticipates expanding to possibly two doctors and two optometrists. XXXX claimed that the construction of its new facility should be exempt from sales tax pursuant to K.S.A. 79-3606(cc) also known as the Kansas Enterprise Zone Act (hereinafter “KEZA”).

On August 26, 2002, the Kansas Department of Revenue (hereinafter “Department”) denied XXXX’s request for a PEC. The reason for the denial provided by the Department is that XXXX is a “retailer” for purposes of the KEZA. Given that XXXX is located in a town with population in excess of 2,500, it does not qualify for the sales tax exemption under K.S.A. 79-3606(cc).

On October 24, 2002, the Department’s Office of Administrative Appeals received XXXX’s Request For Informal Conference. In its Request For Informal Conference, XXXX determined that other taxpayers similar to XXXX were considered to be “nonmanufacturers” under KEZA. Specifically, XXXX attached a copy of a 1997 Initial/Final Order of the Department concerning *YYYY* (Docket No. 95-3221). This Order opined that YYYY was a hospital and therefore, it fits the definition of a “nonmanufacturer” under KEZA rather than a “retailer”. As such, this Order determined that YYYY’ expansion of its medical facility qualified for a sales tax exemption.

The Department concludes that the YYYY Order is factually distinguishable, is without authority, and is not the policy of the Department or relevant to this matter.

A “retailer” is defined in K.S.A. 74-50,114(i) as including “any service provider set forth in K.S.A. 17-2707”. Some of the service providers listed in this statute are optometrists, physicians, surgeons and doctors of medicine. The services provided by XXXX it this definition. Therefore, XXXX is a “retailer” under the KEZA.

Taxpayer further argues that the YYYY Order provides that the business entity, *i.e.* corporations, is separate from the services provided by the staff employed by the corporation. Taxpayer argues that even if the employees of a corporation provide services that are specifically listed in K.S.A. 17-2707, the corporation is not necessarily a “retailer” for the KEZA because the corporation itself is not providing the services. The Department disagrees.

Taxpayer’s argument would leave the statutory distinction between retailer, manufacturers and nonmanufacturers meaningless. If all a taxpayer had to do was incorporate and then claim that the corporation itself did not provide any services then taxpayers such as Wal-Mart would not be considered to be a “retailer”. This is clearly not the intention of the legislature. Although it is possible that a corporation may provide both services that are listed under K.S.A. 17-2707 and services that are not, that is not the situation with XXXX. As noted above, when XXXX applied for a PEC they were a one doctor office limited to eye care. Thus, the only service XXXX provides is specifically listed in K.S.A. 17-2707.

After examining the facts, it is the determination of the Department that XXXX is a “retailer” as defined under the KEZA and not entitled to a sales tax exemption.

This written final determination constitutes final agency action subject to administrative review by the state board of tax appeals. Notice of such appeal must be filed with the secretary of the board within 30 days after the date of this written final determination and a copy served upon the Secretary of Revenue.

Very truly yours,

Joan Wagnon

cc: Michael Burrichter, Legal Services

**Date Composed: 03/16/2004 Date Modified: 03/16/2004**