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Kansas AG: New Policy for Taxing Online Sales Is Invalid

By The Associated Press

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TOPEKA, Kan. — Kansas' Republican attorney general declared Monday that Democratic Gov. Laura Kelly's administration lacked the legal authority to impose what some experts see as the nation's most aggressive policy for collecting state and local taxes on online sales.

Top Republicans in the GOP-controlled Legislature called on Kelly to rescind the state Department of Revenue policy immediately after they received a legal opinion from Attorney General Derek Schmidt.

But the department's top administrator, Secretary Mark Burghart, a veteran tax attorney himself, said in a statement that the department is obligated to follow its current course unless told otherwise by the courts. He maintained that that the agency is only trying to enforce existing Kansas tax laws in light of a U.S. Supreme Court decision last year allowing states to collect sales taxes on internet sales.

"The Department of Revenue cannot select which laws it enforces," Burghart said.

The department issued a notice Aug. 1 saying any "remote seller" doing business with Kansas residents must register with the department, collect state and local sales taxes and forward the revenues to the state, starting Tuesday.

Most states now have policies to collect such taxes, but almost all set minimum annual sales or transaction thresholds to exempt small businesses, according to groups tracking tax laws. Tax experts said Kansas was the first to attempt to collect the taxes on online sales without exempting any businesses.

Diane Yetter, founder of the Sales Tax Institute in Chicago, said she has been advising clients outside Kansas not to register with the state before Schmidt issued his legal opinion. In August, she called the department's move "insane," and she said Schmidt has "set it up for the taxpayer to win" a legal dispute with Kansas.

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"I think the department would be remiss in not withdrawing the notice," she said.

Schmidt said Kansas law does not give the department the authority to impose such a policy through a notice, without a public hearing or review by officials outside the department. He said the policy "has not been lawfully adopted and is invalid."

"The last thing Kansans want is to be on the hook for more costly lawsuits," Kansas House Speaker Ron Ryckman Jr., a Kansas City-area Republican, said in a statement calling on Kelly to cancel "what appears to be an unlawful tax mandate."

It's the second time within three months that Schmidt has questioned a Kelly administration policy. In July, he threatened to go to court to block a Department for Children and Families policy allowing several thousand adults to keep receiving food assistance after failing to meet a work requirement. Kelly dropped the policy the next day.

State officials have felt some pressure to collect more taxes from online sales to prevent Kansas businesses from facing a competitive disadvantage. The Department of Revenue has estimated that the state would collect between \$20 million and \$40 million a year in additional tax revenues, and Burghart said about 600 out-of-state businesses have registered with Kansas since Aug. 1.

Legislators included provisions on taxing Internet sales in two GOP tax-cutting bills this year, but Kelly vetoed both measures, saying they would destabilize the state's finances.

The Department of Revenue imposed its policy under an existing tax law that applied to out-of-state businesses but wasn't enforced because court decisions had prevented it. Its officials argued that it was trying to enforce existing tax laws fairly and consistently, without overstepping its legal authority by exempting some business and not others.

"The notice does not reflect a change in policy, but only restates long-established statutory provisions regarding the duty to collect and remit Kansas taxes," Burghart said.

The U.S. Supreme Court last year overturned a previous ruling that states could not collect their sales taxes unless a business had a physical presence within their borders. It upheld a South Dakota law requiring businesses to collect its taxes if they had \$100,000 in sales or 200 transactions in the state within a year.

Schmidt said it's "reasonable to conclude" that some threshold is required for a state to avoid violating the U.S. Constitution by burdening interstate commerce too much.

"You still have to have substantial activities," Yetter said.

But Schmidt focused his opinion more on the technical question of whether the Department of Revenue can set policy with a notice and concluded it could not. If the agency had tried to issue a formal administrative rule, it would have been required to have a public hearing and outside agencies, including Schmidt's office, would have reviewed the proposed policy.

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