



**FINANCE AND ADMINISTRATION CABINET  
OFFICE OF THE SECRETARY**

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**John R. Farris**  
Secretary

In the matter of:

██████████ PARTNERSHIP DBA ██████████

Contact: ██████████

FINAL RULING NO. 2006-83  
September 21, 2006

**Sales and Use Tax Claim for Refund  
Period February 1, 2001 through March 31, 2002**

Period	Tax	Interest as of 09/21/2006	Total
02/01/2001 – 03/31/2002	\$ ██████████	\$ ██████████	\$ ██████████

**FINAL RULING**

The Kentucky Department of Revenue has an outstanding sales and use tax claim for refund from ██████████ Partnership dba ██████████ (taxpayer) in the amount of \$ ██████████ (plus applicable interest) for the periods February 1, 2001 through March 31, 2002. The documentation submitted was reviewed and a refund of \$ ██████████ was issued. The remaining amount of \$ ██████████ was denied. The taxpayer has withdrawn its protest on the handling charges which amounted to \$ ██████████. The remaining amount of \$ ██████████ has been protested by the taxpayer.

██████████ Partnership dba ██████████ is a leader in delivering broadband and other communication innovations to wireline and wireless customers. Headquartered in ██████████, ██████████ is a joint venture of ██████████ and ██████████.

At issue is whether ██████████ is entitled to a refund of sales and use taxes that it has accrued on certain purchases of tangible personal property. The taxpayer argues that it erroneously accrued and paid tax on: (1) software license and "right to use" (RTU) fees, (2) custom software and (3) freight and transportation charges.

Software License/"Right to Use" Software

The taxpayer purchased from the "right-to-use" information contained on certain computer software. In the taxpayer's Statement of Grounds, it stated that the object of the purchase is the intangible data and not the diskettes used to transfer the software. The taxpayer stated at its conference that loads the software onto the switching equipment which is then sold to the taxpayer. The taxpayer states that the initial "right to use" (RTU) software are fees paid for an intangible asset and are therefore not subject to tax.

KRS 139.050 states in part:

- (1) "Gross receipts" means the total amount of the sale, lease, or rental price, as the case may be, of "retail sales," or "sales at retail," valued in money, whether received in money or otherwise.
- (2) The total amount of the sale or lease or rental price includes all of the following:
  - (a) Any services that are a part of the sale;
  - (b) All receipts, cash, credits, and property of any kind;
  - (c) Any amount for which credit is allowed by the seller to the purchaser, other than credit for property traded when the property so traded is of like kinds and character to the property purchased and the property traded is held for resale.

KRS 139.090 states in part:

"Purchase" means any transfer of title or possession, exchange, barter, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.

KRS 139.160 states:

"Tangible personal property" means personal property which may be seen, weighed, measured, felt or touched, or which is in any other manner perceptible to the senses and includes natural, artificial and mixed gas, electricity, water, and prepaid calling arrangements.

KRS 139.310 states:

An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased on and after July 1, 1990, for storage, use, or other consumption in this state at the rate of six percent (6%) of the sales price of the property.

It is the Department's position that the RTU software fees are services that are a part of the sale to and are purchases of tangible personal property in accordance with KRS 139.050, 139.090 and 139.160 and are therefore subject to tax according to KRS 139.310.

Custom Software

It is the taxpayer's position that it purchased software and software licenses that required extensive modification, customization, and maintenance by the seller. The taxpayer has relied on the outdated Revenue Policy No. 51P171, 12/01/1986, which stated that custom software was not subject to sales and use tax. Furthermore, the taxpayer's reliance on Revenue Policy 51P171 is misplaced; the enactment of KRS 13A.130 abrogated all internal policies and circulars.

KRS 139.090 states in part:

"Purchase" means any transfer of title or possession, exchange, barter, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.

KRS 139.310 states:

An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased on and after July 1, 1990, for storage, use, or other consumption in this state at the rate of six percent (6%) of the sales price of the property.

KRS 139.330 states:

Every person storing, using or otherwise consuming in this state tangible personal property purchased from a retailer is liable for the use tax levied under KRS 139.310. His liability is not extinguished until the tax has been paid to this state, except that a receipt from a retailer engaged in business in this state or from a retailer who is authorized by the cabinet, under such rules and

regulations as it may prescribe, to collect the tax and who is, for the purpose of this chapter relating to the use tax, regarded as a retailer engaged in business in this state, given to the purchaser pursuant to KRS 139.340 is sufficient to relieve the purchaser from further liability for the tax to which the receipt refers.

KRS 139.450 states:

It shall be presumed that tangible personal property shipped or brought to this state by the purchaser after June 30, 1990, was purchased from a retailer on or after July 1, 1990, for storage, use, or other consumption in this state.

The Department treats the provision of custom software as the rendering of a professional service rather than a sale of tangible personal property. Taxpayer has not provided documentation to support its claim that it purchased custom software.

It is the Department's position that the taxpayer purchased tangible personal property in accordance with KRS 139.090 and therefore is subject to tax according to KRS 139.310, 139.330 and 139.450.

Based on the foregoing, the outstanding sales and use tax refund request for Partnership in the amount of \$ (plus applicable interest) is denied.

This letter is the final ruling of the Department of Revenue.

### APPEAL

You may appeal this final ruling to the Kentucky Board of Tax Appeals pursuant to the provisions of KRS 131.110, KRS 131.340-131.365, 103 KAR 1:010 and 802 KAR 1:010. If you decide to appeal this final ruling, your petition of appeal must be filed at the principal office of the Kentucky Board of Tax Appeals, 128 Brighton Park Boulevard, Frankfort, Kentucky 40602-2120, within thirty (30) days from the date of this final ruling. The rules of the Kentucky Board of Tax Appeals, which are set forth in 802 KAR 1:010, require that the petition of appeal must:

1. Be filed in quintuplicate;
2. Contain a brief statement of the law and facts in issue;
3. Contain the petitioner's or appellant's position as to the law and facts; and
4. Include a copy of this final ruling with each copy of the petition of appeal.

The petition of appeal must be in writing and signed by the petitioner or appellant. Filings by facsimile or other electronic means shall not be accepted.

Proceedings before the Kentucky Board of Tax Appeals are conducted in accordance with 103 KAR 1:010, 802 KAR 1:010 and KRS 131.340-131.365 and KRS Chapter 13B. Formal hearings are held by the Board concerning the tax appeals before it, with all testimony and proceedings officially reported. Legal representation of parties to appeals before the Board is governed by the following rules set forth in Section 2 (3) of 802 KAR 1:010:

1. An individual may represent himself in hearings before the Board;
2. An individual who is not an attorney may not represent any other individual, corporation, trust, estate, or partnership before the Board; and
3. An attorney who is not licensed to practice in Kentucky may practice before the Board if he complies with Rule 3.030(2) of the Rules of the Kentucky Supreme Court.

You will be notified by the Clerk of the Board of the date and time set for any hearing.

Sincerely,  
FINANCE AND ADMINISTRATION CABINET



THOMAS H. BROWN  
Director  
Division of Protest Resolution

cc: Company

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

