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Commissioner

In the matter of:

██████████ LLC

Contact:

██████████, L.P.

FINAL RULING NO. 2013-12  
March 1, 2013

Refund Denial  
for the period January 1, 2006 through June 30, 2007

### FINAL RULING

The Kentucky Department of Revenue ("DOR") has denied refund claims filed by ██████████ LLC ("██████████") for sales tax paid by its energy suppliers for the period January 1, 2006 through June 30, 2007 for sales of energy or energy-producing fuel to ██████████.

The following schedule reflects the denied refund claims for the periods including interest that would have accrued through March 1, 2013 had these refund claims been valid.

REFUND CLAIMS DENIED			
Period	Tax	Interest as of 03/01/2013	Totals
1/1/06 - 12/31/06	\$ ██████████	\$ ██████████	\$ ██████████
1/1/07 - 06/30/07	\$ ██████████	\$ ██████████	\$ ██████████
TOTALS	\$ ██████████	\$ ██████████	\$ ██████████

██████████ conducts a large coal mining and processing operation in ██████████ County, Kentucky. This operation includes strip mining, deep mining and coal processing plants at different locations in the county.

As a result of a sales and use tax audit, [REDACTED] was issued an assessment of \$ [REDACTED] covering the periods from January 1, 2006 through December 31, 2009. The DOR and [REDACTED] timely executed a series of statute of limitations waivers, DOR Forms 31A349, holding open the period January 1, 2006 – March 31, 2008 to assessments and/or refund claims. See generally KRS 139.620(1); 134.580(5). During the course of the audit, DOR determined that [REDACTED] had paid tax to its energy suppliers in an amount which exceeded three percent of the cost of production in several of its plant facilities. [REDACTED]' consumption of energy in excess of this 3% threshold at the respective plant facility's location rendered the partial exemption granted by KRS 139.480(3) for "energy or energy-producing fuels used in the course of manufacturing, processing, mining or refining" potentially applicable.

An avenue for claiming this exemption is afforded to purchasers of energy or energy-producing fuel by 103 KAR 30:140. This regulation permits a consumer to pay directly to the Department whatever tax is due on its energy purchases, taking into account the application of KRS 139.480(3). Because this exemption or partial exemption is computed upon the basis of each plant facility location, this energy direct pay authorization must be obtained for each such location. See Application for "Energy Direct Pay Authorization," DOR Form 51A109; 103 KAR 30:140 §§ 4 and 5.

Prior to the conclusion of the audit resulting in the sales and use tax assessment referred to above, [REDACTED] had followed the procedure set forth in 103 KAR 30:140 for only one location, a coal preparation plant. The application for this energy direct pay authorization for this plant was signed and dated by [REDACTED] on [REDACTED], 2011 and this [REDACTED], 2011 date also constituted the date on which [REDACTED] applied for refunds of those portions of the sales tax it had paid on its purchases of energy or energy-producing fuels that [REDACTED] contended qualified for an exemption under KRS 139.480(3). A review of the energy records for the eligible periods from July 2007 forward revealed that the taxpayer had paid sales tax in the amount of \$ [REDACTED] to its suppliers on its energy and energy-producing fuel purchases that exceeded 3% of the cost of production at its coal preparation plant. These suppliers had accordingly reported and remitted the tax on their own sales and use tax returns for the applicable periods. Transfer agreements were therefore executed between [REDACTED] and these suppliers for claiming the refund of the sales tax exempt under KRS 139.480(3) and the resulting overpayment was credited against the assessment. The remainder of that assessment was not contested by the taxpayer and was eventually paid in full under the Kentucky Tax Amnesty program.

At issue is whether [REDACTED]' remaining refund claims for the periods January 1, 2006 through June 30, 2007 for sales tax reported and paid by its suppliers are valid.

The applicable refund statute is KRS 134.580. See KRS 139.770(1). Subsection 4 of KRS 134.580 unambiguously states that "[n]o refund shall be made unless each taxpayer individually files an application or claim for the refund within four (4) years from the date payment was made." The

██████████, 2011 refund claims at issue, which relate to the periods January 1, 2006 through June 30, 2007, are clearly untimely under KRS 134.580(4).

██████████ seeks to avoid the untimeliness of these refund claims by relying upon the following language of KRS 134.580(4):

Nothing in this section shall be construed to authorize the agency to make or cause to be made any refund except within four (4) years of the date prescribed by law for the filing of a return including any extension of time for filing the return, or the date the money was paid into the State Treasury, whichever is the later, except in any case where the assessment period has been extended by written agreement between the taxpayer and the department, the limitation contained in this subsection shall be extended accordingly.

(Emphasis added.) ██████████' reliance upon this language or more precisely, the exception to the four year statute of limitation it provides is misplaced because the taxpayer it refers to is the person who paid the tax in question into the State Treasury. KRS 134.580(2); See also KRS 139.200; 139.210(3) and (4); 139.540; 139.550; 139.580; 139.770(3); The Gap, Inc. v. Revenue Cabinet, Ky. Tax Reporter (CCH) ¶ 202-515 (Ky. Bd. Tax. App., Order No. K-17639, August 12, 1999). In the case of the refund claims at issue here, the persons who paid the sales tax into the State Treasury were ██████████ energy suppliers. The agreement extending the assessment period that ██████████ relies upon was not between the Department and those suppliers and thus did not and cannot extend the time limitation for asserting the refund claims they would have had to assert. See KRS 134.580(3). Accordingly, the refund claims at issue are untimely and the statutory language invoked by ██████████ to avoid the running of KRS 134.580's statute of limitations is inapplicable.

For the reasons stated above, the refund claims totaling \$██████████, plus applicable interest, were properly 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 40601-3714, 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.

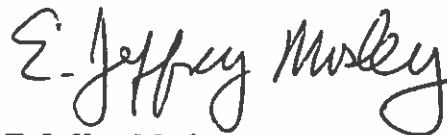
The petition of appeal must be in writing and signed by the petitioner or appellant. Filings by facsimile or other electronic means shall not be accepted.

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 3 of 802 KAR 1:010:

1. An individual may represent himself in any proceedings before the Board where his individual tax liability is at issue or he may obtain an attorney to represent him in those proceedings;
2. An individual who is not an attorney may not represent any other individual or legal entity in any proceedings before the Board;
3. Any party appealing a final ruling to the Board other than an individual, such as a corporation, limited liability company, partnership, joint venture, estate or other legal entity, shall be represented by an attorney in all proceedings before the Board, including the filing of the petition of appeal; and
4. An attorney who is not licensed to practice in Kentucky may practice before the Board only 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



E. Jeffrey Mosley  
Interim Executive Director  
Office of Legal Services for Revenue

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

