



**MATTHEW G. BEVIN**  
Governor

**FINANCE AND ADMINISTRATION CABINET**  
**DEPARTMENT OF REVENUE**  
501 HIGH STREET  
FRANKFORT, KENTUCKY 40620  
Phone (502) 564-3226  
Fax (502) 564-3875  
www.kentucky.gov

**WILLIAM M. LANDRUM III**  
Secretary

**DANIEL P. BORK**  
Commissioner

In the matter of:

██████████, INC.  
D/B/A ██████████

Contact: ██████████

FINAL RULING NO. 2016-31  
October 17, 2016

Cigarette Tax Assessments  
for the Audit Period  
May 1, 2008 through April 30, 2010

**FINAL RULING**

The Kentucky Department of Revenue ("DOR") currently has an outstanding Cigarette Excise Tax assessment against ██████████, Inc. d/b/a ██████████ ("██████████") totaling \$██████████ (plus applicable interest and penalties) for audit period of May 1, 2008 through April 30, 2010. The following schedule reflects the total underpayment represented by the assessment, including the applicable interest and penalty accrued to date:

Tax Period	Tax Due	Interest As of 10/17/2016	Penalty As of 10/17/2016	Total Due As of 10/17/2016
05/01/2008-04/30/2010	\$██████████	\$██████████	\$██████████	\$██████████



██████████ is a “resident wholesaler” as defined under KRS 138.130 (10). ██████████ timely protested the assessment in accordance to KRS 131.110, and adequate documentation existed to warrant an adjustment to reduce the original audit assessment to the amounts reflected in the above schedule.

DOR requested documentation necessary to address ██████████'s remaining tax liability. At issue is whether ██████████ has met the supporting statement requirement of KRS 131.110 (1) to explain the difference between untax paid cigarettes received and the amount of tax evidence affixed during the audit period as reflected by product purchase records DOR examined during the audit.

In ██████████'s ██████████, 2010 protest letter, ██████████, the taxpayer's representative, states, “This to serve as notification of my intent to protest the additional cigarette tax due for the period of July 2008 - April 2010. The reason for this protest is that I do not agree with the number and amounts of several of the months in question. I am requesting an appointment with your office to clear this matter. I will bring with me all documentation supporting the issues which I disagree with the initial findings.” At the initial protest conference held on ██████████, 2010, the initial audit was amended as reflected in the above table. During the conference and in subsequent emails dated ██████████, 2010 and ██████████, 2010, the DOR requested additional documentation to resolve the remaining items still in dispute. ██████████ stated that he could not provide the documentation requested due to an ongoing federal investigation. No additional documentation was received by the Department post the initial protest conference, therefore, the case was transferred to the Division of Protest Resolution. In letters dated ██████████, 2015 and ██████████, 2015, the Division of Protest Resolution again requested documentation necessary to address the protest issue concerning the difference between the untax paid cigarettes received into inventory and the cigarette tax evidence affixed during the audit period. In correspondences received ██████████, 2015, ██████████, 2015 and in the subsequent protest conference held on ██████████, 2015 ██████████ maintains that there is no documentation available due to the seizure of documents by the Bureau of Alcohol, Tobacco, Firearms and Explosives.

The Department did not receive sufficient documentation to reconcile the difference between the amount of Kentucky untax paid product received during the audit period and the corresponding amount of Kentucky tax evidence required during the same period as specified by KRS 138.146 (1) & (2). Since ██████████ has failed to provide documentation that would further substantiate its protest and warrant further reductions to the audit assessment, DOR's assessments are presumed valid and correct, with the burden resting upon the taxpayer to prove otherwise. Revenue Cabinet v. Gillig, 957 S.W.2d 206, 209-10 (Ky. 1998). Hahn v. Allphin, 282 S.W.2d 824 (Ky. 1955).

Therefore, ██████████ is liable for the tax imposed per KRS 138.140 (1) (2) and (3) and detailed in KRS 138.146 (1) & (2).

KRS 138.140 (1) (2) and (3) states:

- (1) A tax shall be paid on the sale of cigarettes within the state at a proportionate rate of three cents (\$0.03) on each twenty (20) cigarettes.
- (2) Effective April 1, 2009, a surtax shall be paid in addition to the tax levied in subsection (1) of this section at a proportionate rate of fifty-six cents (\$0.56) on each twenty (20) cigarettes. This tax shall be paid only once, at the same time the tax imposed by subsection (1) of this section is paid.
- (3) Effective June 1, 2005, a surtax shall be paid in addition to the tax levied in subsection (1) of this section and in addition to the surtax levied by subsection (2) of this section, at a proportionate rate of one cent (\$0.01) on each twenty (20) cigarettes. This tax shall be paid at the same time the tax imposed by subsection (1) of this section and the surtax imposed by subsection (2) of this section are paid. The revenues from this surtax shall be deposited in the cancer research institutions matching fund created in KRS 164.043.

KRS 138.146 (1) & (2) states:

- (1) The tax imposed by KRS 138.130 to 138.205 shall be due when any licensed wholesaler or unclassified acquirer takes possession within this state of untax-paid cigarettes.
- (2) The tax shall be paid by the purchase of stamps by a resident wholesaler within forty-eight (48) hours after the wholesaler receives the cigarettes. A stamp shall be affixed to each package of an aggregate denomination not less than the amount of the tax on the package. The affixed stamp shall be prima facie evidence of payment of tax. Unless stamps have been previously affixed, they shall be affixed by each resident wholesaler prior to the delivery of any cigarettes to a retail location or any person in this state. The evidence of tax payment shall be affixed to each individual package of cigarettes by a nonresident wholesaler prior to the introduction or importation of the cigarettes into the territorial limits of this state. The evidence of tax payment shall be affixed by an unclassified acquirer within twenty-four (24) hours after the cigarettes are received by the unclassified acquirer.

██████████, Inc.

D/B/A ██████████

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For the reasons stated above, the cigarette excise tax assessments totaling \$ ██████████ (plus applicable interest and penalties) are legitimate liabilities of ██████████ due the Commonwealth of Kentucky.

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

### APPEAL

For purposes of this final ruling, the terminology “Kentucky Board of Tax Appeals” and “Board” represent both the current Kentucky Board of Tax Appeals, as well as, the Kentucky Claims Commission that was established by Executive Order on August 8, 2016 and is expected to replace the current Kentucky Board of Tax Appeals on October 1, 2016.

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;

[REDACTED], Inc.

D/B/A [REDACTED]

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3. In accordance with Supreme Court Rule 3.020, if the appealing party is a corporation, trust, estate, partnership, joint venture, LLC, or any other artificial legal entity, the entity must be represented by an attorney on all matters before the Board, including the filing of the petition of appeal. If the petition of appeal is filed by a non-attorney representative for the legal entity, the appeal will be dismissed by the Board; 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,

DEPARTMENT OF REVENUE



Attorney Manager

Office of Legal Services for Revenue