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JONATHAN MILLER  
Secretary

THOMAS B. MILLER  
Commissioner

In the matter of:

[REDACTED], INC.

Contact: [REDACTED], Inc.

Attn: [REDACTED]

FINAL RULING NO. 2011-27  
March 24, 2011

Cigarette tax refund denial  
for the period  
April 1, 2010 through April 30, 2010

**FINAL RULING**

Period	Tax	Interest as of 3/24/2011	Total
4/1/10 -4/30/10	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]
Total	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]

The Kentucky Department of Revenue ("Department") has denied a refund claim submitted by [REDACTED], Inc. ("[REDACTED]"). The amount of the refund claim and the period to which it relates are set forth above. The Department's denial of the refund claim has been protested in accordance with KRS 134.580(3) and 103 KAR 1:010.

[REDACTED] is a licensed resident wholesaler of cigarettes and other tobacco products authorized to purchase untax-paid cigarettes and to purchase and affix the corresponding cigarette tax evidence as provided under KRS 138.195(2). On February 22, 2010, the Kentucky Attorney General removed Vibo Corporation Inc. (DBA General Tobacco) from the Kentucky

Participating Manufacturer (PM) Directory of certified tobacco product manufacturers and brand families according to the provisions of KRS 131.610. The Attorney General posted a thirty-day notice of intent prior to the Directory removal. See the following link for detail: <http://revenue.ky.gov/NR/rdonlyres/097C17FC-B259-479E-AC11-7EE42B2174F5/0/2010NOTICESOFREMOVALFROMKENTUCKYTOBACCODIRECTORY101410.pdf>

KRS 131.612 contains the following prohibitions regarding brands from a tobacco manufacturer not included in the directory.

It shall be unlawful for:

- (1) Any stamping agent or distributor to affix a stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory; or
- (2) Any retailer to sell cigarettes from a tobacco product manufacturer or brand family sixty-one (61) days or more after the effective date of the removal of the tobacco product manufacturer or brand family from the directory.

██████████ purchased some of its sales product from General Tobacco and claims to have only affixed Kentucky cigarette stamps to cigarette packages prior to the manufacturer's removal from the Participating Manufacturer Directory. Details regarding the purpose, development, and use of the Kentucky Tobacco Directories are set forth in KRS 131.610 as provided below:

(1) The Attorney General shall develop and make available to the department for public inspection, to include publishing on the department's Web site, a listing of all tobacco product manufacturers that have provided current and accurate certifications pursuant to KRS 131.608 and all brand families that are listed in the certifications. The listing shall be referred to as the "directory" and completed no later than July 1 of each certification year.

(2) The department shall not include or retain in the directory the name or brand families of any nonparticipating manufacturer that has failed to provide the required certification or whose certification the Attorney General determines is not in compliance with KRS 131.608, unless the Attorney General has determined that such violation has been satisfactorily cured.

(3) Neither a tobacco product manufacturer nor a brand family shall be included or retained in the directory if the Attorney General determines, in the case of a nonparticipating manufacturer, that:

(a) Any escrow payment required pursuant to KRS 131.602 for any period for any brand family, whether or not listed by the nonparticipating manufacturer, has not been fully paid into a qualified escrow fund governed by a qualified escrow agreement that has been approved by the Attorney General; or

(b) Any outstanding final judgment, including interest thereon, for a violation of KRS 131.602 has not been fully satisfied for the brand family or the manufacturer.

(4) Upon receipt of information from the Attorney General, the department shall update the directory as necessary in order to correct mistakes and to add or remove a tobacco product manufacturer or brand family to keep the directory in conformity with the requirements of this section and KRS 131.608 and 131.620.

(5) (a) The department shall transmit, by electronic mail or other practicable means, notice to each stamping agent and distributor of any addition to or removal from the directory of any tobacco product manufacturer or brand family.

(b) Within seven (7) days of receiving a removal notice from the department, each stamping agent or distributor shall forward:

1. A copy of the removal notice to each of the stamping agent's or distributor's retail customers; and
2. To the department, a list of the retailer customers to whom the removal notices were sent.

(c) 1. The retailer shall have sixty (60) days from the effective date of the removal notice to sell the affected cigarettes before the cigarettes are deemed contraband and become subject to seizure and destruction under KRS 131.622.

2. On and after the sixty-first day from the effective date of the removal notice, the retailer shall not sell any cigarettes of a tobacco product manufacturer or brand family that has been removed from the directory. Page 2 of 2

(6) Every stamping agent and distributor shall provide and update as necessary an electronic mail address to the department for the purpose of receiving any notifications that may be required by this section and KRS 131.608, 131.616, 131.620, and 131.624.

(7) Notwithstanding the provisions of subsections (2) and (3) of this section, in the case of any nonparticipating manufacturer who has established a qualified escrow account pursuant to KRS 131.602 that has been approved by the Attorney General, the Attorney General may not remove the manufacturer or its brand families from the directory unless the manufacturer has been given at least thirty (30) days' notice of the intended action. For the purposes of this section, notice shall be deemed sufficient if it is sent either electronically to an electronic-mail address or by first class to a postal mailing address provided by the manufacturer in its most recent certification filed pursuant to KRS 131.608. The notified nonparticipating manufacturer shall have thirty (30) days from receipt of the notice to comply. At the time that the Attorney General sends notice of his or her intent to remove the manufacturer from the directory, the Attorney General shall post the notice in the directory.

(8) Beginning on the day after the Attorney General posts a notice in the directory of the Attorney General's intent to remove the nonparticipating manufacturer from the directory as provided in subsection (7) of this section, a stamping agent or distributor shall not purchase cigarettes from the nonparticipating manufacturer unless and until the Attorney General determines that the nonparticipating manufacturer is in compliance with KRS 131.608 and posts the notification of compliance in the directory.

██████████ requested a refund of some of the Kentucky stamps it applied to the General Tobacco cigarette packages. After receiving correspondence from the Department denying its refund request, ██████████ claims to have then removed 34,220 Kentucky cigarette stamps from General Tobacco manufactured product in preparation for delivery of the cigarettes to another ██████████ division in ██████████ and subsequent sale to retail customers in that jurisdiction. The only proof offered by ██████████ of the stamp removal and destruction is the notarized statement of the ██████████ County Constable, ██████████

The Department has received no documentation from ██████████ regarding the serial numbers of the stamps destroyed for verification of the date of stamp purchases and to support its claim that stamps were not affixed to General Tobacco product after the February 22, 2010, Attorney General's notice of removal from the PM Directory. There is also no information to determine whether ██████████ accelerated its purchase and stamping of General Tobacco product after receiving the January 22, 2010, notification regarding the Attorney General's intent to remove this manufacturer from the Directory.

In addition to this lack of data, Kentucky tax law is clear that only unaffixed tax stamps may be returned to the Department for credit or refund.

A taxpayer may request a refund under KRS 138.146(5), which states:

No tax evidence may be affixed, or used in any way, by any person other than the person purchasing the evidence from the department. Tax evidence may not be transferred or negotiated, and may not, by any scheme or device, be given, bartered, sold, traded, or loaned to any other person. Unaffixed tax evidence may be returned to the department for credit or refund for any reason satisfactory to the department.

The procedures for public notifications of the Kentucky Tobacco Directories set forth in KRS 131.610 ensure that the Commonwealth remains in compliance with the Tobacco Master Settlement Agreement (MSA). These guidelines provide controls to prohibit the sale of contraband cigarettes in Kentucky while providing public notice to wholesalers and retailers of pending Master Settlement Agreement actions. ██████████ had ninety days from the public

notice of intent to remove General Tobacco from the PM directory to legally sell its previously stamped product in Kentucky. It also had the opportunity to transfer any remaining General Tobacco product to other jurisdictions with no MSA restrictions. However, ██████████ does not have the right to claim a refund for Kentucky tax stamps it affixed to General Tobacco product.

Any excess inventory of stamped General Tobacco product was the result of ██████████'s attempt to anticipate the remaining Kentucky demand for product before its Directory removal. As a resident wholesaler, ██████████ was not required to affix stamps to its General Tobacco inventory until immediately prior to delivery to its retail customers according to the provision of KRS 138.146(2). Every licensed wholesaler must weigh the inherent risks of continuing to purchase, stamp, and sell product that will soon become contraband in the Kentucky market.

It is the Department's position that KRS 138.146(5) only allows the taxpayer to return unaffixed cigarette stamps to the Department for credit or refund. Kentucky law does not have a provision for credit or refund for affixed cigarette stamps. For the reasons stated, the Department correctly denied ██████████'s cigarette tax refund claim.

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