



FINANCE AND ADMINISTRATION CABINET
DEPARTMENT OF REVENUE

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In the matter of:

[REDACTED] CO., INC.

Contact: [REDACTED] Co., Inc.

FINAL RULING NO. 2007-50
October 16, 2007

FINAL RULING

The Kentucky Department of Revenue ("DOR") has issued a corporation license tax assessment against [REDACTED] Co., Inc. ("[REDACTED]") for the taxable periods ending December 31, 2002 and 2003 in the amount of \$[REDACTED] plus applicable interest and penalties. The following table provides a breakdown of the tax due, interest and penalty as of October 13, 2007 for the 2002 tax period.

Tax year	Tax	Interest	Penalty	Total
2002	\$[REDACTED]	\$[REDACTED]	\$[REDACTED]	\$[REDACTED]
2003	\$[REDACTED]	\$[REDACTED]	\$[REDACTED]	\$[REDACTED]

[REDACTED] paid under protest the full amount due on the notice of tax due for the 2003 taxable period. That payment was made on December 21, 2006.

At issue is an adjustment to capital employed made by the DOR to include the amount reflected on the balance sheet for the sum of the account titled "billings in excess of costs."

KRS 136.070 provides:

- (1) Every corporation organized under the laws of this state, every corporation having its commercial domicile in this state, and every foreign corporation owning or leasing property located in this state or having one

(1) or more individuals receiving compensation in this state, except financial institutions as defined in KRS 136.500, savings and loan associations organized under the laws of this state and under the laws of the United States and making loans to members only, open-end registered investment companies organized under the laws of this state and registered under the Investment Company Act of 1940, production credit associations, insurance companies, including farmers' or other mutual hail, cyclone, windstorm or fire insurance companies, insurers and reciprocal underwriters, public service companies subject to taxation under KRS 136.120, those corporations exempted by Section 501 of the Internal Revenue Code, any property or facility which has been certified as an alcohol production facility as defined in KRS 247.910, any property or facility which has been certified as a fluidized bed energy production facility as defined in KRS 211.390, and any other religious, educational, charitable, or like corporations not organized or conducted for pecuniary profit, shall pay to the state an annual license tax of two dollars and ten cents (\$2.10) on each one thousand dollars (\$1,000) of the capital employed in the business as computed under the provisions of subsections (2) and (3) of this section, subject to the credit provided in subsection (6) of this section.

(2) (a) The term "capital" as used in this section means capital stock, surplus, advances by affiliated companies, intercompany accounts, borrowed moneys or any other accounts representing additional capital used and employed in the business. Accounts properly defined as "capital" in this section shall be reported at the value reflected on financial statements prepared for book purposes as of the last day of the calendar or fiscal year;

(b) "Capital employed," in the case of corporations having property or payroll only in this state, means "capital" as defined above;

(c) "Capital employed," in the case of corporations having property or payroll both within and without this state means "capital" as defined above and as apportioned under subsection (3) of this section;

(d) Property means either real property or tangible personal property which is either owned or leased. Payroll means compensation, paid to one (1) or more individuals, as described in subsection (3) of this section. Property and payroll are deemed to be entirely within this state if all other states are prohibited by Public Law 86-272, as it existed on December 31, 1975, from enforcing income tax jurisdiction.

The relevant Provisions of Section 1 of Regulation 103 KAR 20:020 provide:

(7) "Contingent liability" means a liability, including a deferred tax liability, not yet fixed or certain but dependent on events to occur in the future.

- (8) "Debt" means an unconditional and legally enforceable obligation for the payment of money, which:
- (a) Includes trade payables or accrued operating expense accounts; and
 - (b) Does not include a contingent liability or an estimated liability.
- (9) "Estimated liability" means a liability the existence of which is certain but for which the amount, due date, or payee is indeterminable.

It is ██████████'s position that the costs (billings in excess of costs) are not contingent, not estimated, not uncertain, not indeterminable, and are costs of carrying inventory.

After reviewing the applicable statute and regulation and the available information, it is the position of the DOR that the account titled "billings in excess of costs" appears to be a contingent liability and the corporation license tax assessments issued against ██████████ for the years 2002 and 2003 are valid liabilities due the Commonwealth of Kentucky. KRS 136.070(1) and (2); 103 KAR 20:020, Section 1(6), (7), (8), (14) and (16) and Section 3. This account represents a liability ██████████ may have to incur for excess costs resulting from weather conditions, increases in material or labor or other future events.

The Division of Protest Resolution, in an attempt to resolve the matter, requested specific information on three separate occasions and ██████████ was granted additional time to submit this information on the contested issues. However, ██████████ has never submitted the information requested.

The Division of Protest Resolution offered ██████████ extensions in letters dated ██████████, 2007, ██████████, 2007 and ██████████, 2007 to provide documentation to support its protest. However, ██████████ failed to respond or submit any documentation that would allow the DOR a basis for reconsideration of the tax liabilities.

The Kentucky courts have held that this statutory provision imposes upon a taxpayer protesting an assessment or a refund denial a legal duty to provide the Department with "something more substantial than mere denials of tax liability." Eagle Machine Co., Inc. v. Commonwealth ex rel. Gillis, Ky. App., 698 S.W.2d 528, 530 (1985). In order to make a valid protest, a taxpayer must "provide financial statements, records or some other documentation that would allow the Revenue Department some basis for reconsideration." Id. at 529.

An applicable late filing penalty has been applied on the 2002 and 2003 notices of tax due in accordance with KRS 131.108(1).

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



DONALD S. GUIER
Executive Director
Office of Legal Services for Revenue

CERTIFIED MAIL
RETURN RECEIPT REQUESTED



