

The Taxpayer engages in the selling, marketing and servicing of non-insured home service contracts (warranties) for pre-owned homes. The basic home service contract is generally one year in length and covers major mechanical items in the home. The warranties are sold by either salespersons located in ██████████ that respond to on-line or telephone solicitations or by salespersons located in Kentucky. The warranty products are developed and serviced by the Taxpayer's management and employees at its corporate headquarters located in ██████████. When the warranties are exercised, the repairs and maintenance performed in Kentucky are performed by 3rd party contractors, not employees of the Taxpayer. Additionally, per information provided by the Taxpayer, the salespersons located in ██████████ are not assigned specific states to generate sales but rather, work to generate sales in all states in which the Taxpayer operates.

At issue in the dispute is whether the Department properly assessed the above referenced taxes, interest and penalties based on its examination. The examination disclosed that when the Taxpayer files the appropriate separate entity returns submitted with its letter dated ██████████, 2014 in response to the Department's letter dated ██████████, 2013 that determined that the parent cannot file a consolidated return in accordance with KRS 141.200, the Taxpayer did not report the Kentucky sales which was in error. To correct this situation, the examiner looked at the parent's Schedule A-C for the years in question. These Schedules correctly reflected the Taxpayer's apportionment details, specifically Kentucky sales and total sales; Kentucky property and total property; and Kentucky payroll and total payroll. These figures were used to determine the Taxpayer's overall apportionment factor in accordance with KRS 141.120.

It is the Taxpayer's position that sales to Kentucky customers should be assigned to the state of ██████████ in accordance with KRS 141.120(8)(c)(3) which states:

Sales, other than sales of tangible personal property, are in this state if the income-producing activity is performed in this state; or the income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.

The Taxpayer claims the income-producing activity is the servicing and marketing of warranties and that the Taxpayer properly assigned the Kentucky sales to the state of ██████████.

It is the Department's position that the income-producing activity is the selling of the warranties and not the servicing and marketing of the warranties.

In determining whether the greater proportion of the income-producing activity is performed in this state than in any other state, the comparison needs to be made between the payrolls of the ██████████ salespersons selling warranties to Kentucky customers verses Kentucky salespersons selling warranties to Kentucky customers. This is the "cost of performance" test.

Multiple requests were made to the Taxpayer to provide adequate or sufficient information that proves the sales made to Kentucky customers should be assigned to ██████████ based on “cost of performance”. The Taxpayer failed to provide any substantial or persuasive information.

Based on the foregoing and the applicable statutes and regulations, the outstanding taxes, interest and penalties issued by the Department for the December 31, 2010 and December 31, 2011 tax periods are valid liabilities due to the Commonwealth of Kentucky.

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. 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

CERTIFIED MAIL
RETURN RECEIPT REQUESTED