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LORI HUDSON FLANERY
Secretary

THOMAS B. MILLER
Commissioner

In the matter of:

██████████, LLC

Contact: ██████████

FINAL RULING NO. 2013-21
April 5, 2013

Commercial Watercraft Property or Ad Valorem Tax:
Protest of Assessment for 2011 tax year and
Denial of Refund Claim for 2009 tax year

FINAL RULING

The Department of Revenue (“the Department”) issued commercial watercraft ad valorem tax assessments for the 2009 and 2011 tax years (collectively “the assessment years”) to ██████████, LLC (“██████”). ████████ is a barge service company located at ██████████ on the ████████ River. The taxpayer is a commercial watercraft corporation subject to the commercial watercraft ad valorem tax. See KRS 136.1801 to 136.1806. For the assessment years, ████████ filed the Department’s Form 61A207 for Commercial Watercraft.

For the 2009 tax year, ████████ did not protest the assessment within forty-five days as required by KRS 136.1804(1) and 131.110. Subsequently, the taxpayer’s representative filed Form 62A366R (Exoneration for Property Tax Refund) on ██████████, 2011, which stated:

The taxpayer asserts that the Commercial Watercraft Tax is unconstitutional as applied to it and its operations as it relates to the Commonwealth of Kentucky and all subdivisions thereof. This claim is filed pursuant to KRS 134.590 and KRS 136.1801, et seq., and seeks refund of all such tax paid by the Taxpayer.

On ██████████, 2011 the Department denied the request for a refund. ██████'s representative protested the denial of refund on ██████████, 2011.

With respect to the assessment for the 2011 tax year, ██████ did comply with KRS 136.1804(1) and 131.110, filing a protest and supporting statement on ██████████, 2012, which contended as follows:

- (a) For the taxable period involved, the Department of Revenue has erroneously proposed additional tax on certain property owned or leased by the Taxpayer for the involved taxable period;
- (b) For the taxable period involved, the Department of Revenue has erroneously calculated mileage percent as 90%;
- (c) For the taxable period involved, the Department of Revenue has erroneously calculated the unit assessment as \$██████████; and
- (d) For the taxable period involved, the Department of Revenue has erroneously calculated the Kentucky assessment as \$██████████.

██████████ also asserted in this protest and supporting statement that “[the route miles apportionment of [the commercial watercraft ad valorem tax] is unconstitutional under the Commerce Clause of the United States Constitution.”

By letter dated ██████████, 2012 the Department requested the following documentation: (1) Kentucky actual miles and system actual miles for the tax years in protest; (2) a written description of how ██████ calculated the actual miles; and (3) a description of an alternative allocation method to be considered other than an actual or route mile method. In a correspondence dated ██████████, 2012, ██████ provided a three month sample taken from the 2012 calendar year that reported “miles traveled on Kentucky waters,” as extracted from a “relatively new billing software platform.” This documentation obviously related to the 2012 tax year and thus was not germane to the assessment years.

Therefore, it is the Department's position that the ninety percent mileage allocation percent provided for in KRS 136.1802(4) is a fair representation of ██████'s activity in Kentucky for the assessment years. The Kentucky border extends out to the northern low watermark of the ██████ River which borders ██████████ and ██████████. For this reason, Kentucky provides a ninety percent state adjustment factor on Form 61A207(E) representing Kentucky's ██████ River boundary. The nature of ██████'s business indicates that it would have had substantial activity within the Kentucky boundary line on the ██████ River and this activity (barge service) would not extend to the connecting river systems. Thus, the Department fairly and properly assessed ██████ under the provisions of KRS 136.1801 to 136.1806.

The assessment for 2011 is presumed to be valid and correct and it is the taxpayer's burden to prove otherwise. Revenue Cabinet v. Gillig, 957 S.W.2d 206 (Ky. 1997); Walter G. Hougland & Sons v. McCracken County Board of Supervisors, 306 Ky. 234, 206 S.W.2d 951 (1947). Furthermore, the statutes establishing the commercial watercraft ad valorem tax are presumed to be constitutional and the party asserting that a statute or statutes is or are unconstitutional bears a heavy burden of establishing this to be the case. See, e.g., Cornelison v. Commonwealth, 52 S.W.3d 570, 572-73 (Ky. 2001); 16 C.J.S. Constitutional Law § 202. ██████████ has not met either burden. Accordingly, ██████████ commercial watercraft were properly and correctly assessed for the 2011 assessment year at \$██████████. Its protest of this assessment is therefore denied and that assessment is hereby upheld and affirmed.

As noted above, ██████████ has failed to protest the assessment issued it for 2009 in accordance with KRS 136.1804(1) and 131.110. Therefore, it can only obtain a refund of its payment of the taxes paid for that year based upon that assessment if it establishes that the applicable statutes are unconstitutional. See KRS 134.590(1) and (2). This amount is shown in the schedule below.

Period	Tax	Interest As of 4/2/10	Penalties	Total per Period
01/01/09-12/31/09	\$██████████	\$██████████	\$██████████	\$██████████

As noted above in connection with the assessment for 2011, the commercial watercraft ad valorem tax statutes are presumed constitutional and the burden rests squarely upon ██████████ to prove otherwise. As in the case of the 2011 assessment year, ██████████ has failed to meet its burden of proof on this point. Accordingly, the Department's denial of its refund request was proper and is hereby upheld and affirmed.

This letter is the final ruling of the Kentucky 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

Cc:

[REDACTED] LLC
[REDACTED]





