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GOVERNOR

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ROBBIE RUDOLPH
SECRETARY

In the matter of:

██████████ COMPANY

Contact: ██████████
██████████ Company Inc.
████████████████████

FINAL RULING NO. 2006-43
June 20, 2006

Sales and Use Tax Assessment
for the tax period January 1, 1997 through December 31, 1997

FINAL RULING

The Kentucky Department of Revenue has outstanding sales and uses tax assessments against ██████████ Company, Inc. for the above referenced periods. The following schedule reflects the total underpayment, including the interest accrued to the date of this final ruling and any applicable penalties for the period.

Tax Year	Tax Due	Interest	Penalty	Total Due
12/31/1997	\$██████████	\$██████████	\$██████████	\$██████████

On ██████████, 2001, you were notified that as a result of a sales and use tax audit the Kentucky Department of Revenue had issued assessments for tax in the amount of \$██████████. Then on ██████████, 2001, you notified the Department that the assessments were being protested.

At issue, as stated in your protest letter, is that sales consummated during auctions held in 1997 are not taxable. For some sales you contend the occasional sale exemption applies. For other sales you contend resale or exemption certificates were accepted in good faith. Specifically the issues are:

- (i) The sale of the ██████████ Marina located in ██████████, Kentucky qualifies as an occasional sale as provided in KRS 139.070.
- (ii) The sale of equipment to automobile dealerships for which resale certificates were issued was accepted in good faith in accordance with KRS 139.270.

- (iii) Items sold to individuals where agricultural exemption certificates were issued were accepted in good faith in accordance with KRS 139.270.
- (iv) The sale of houseboats at the ██████████ Marina is sale in interstate commerce in accordance with KRS 139.470(5).
- (v) The taxability of the buyer's premium is a commission for services rendered and not subject to tax in accordance with KRS 139.050(2)(d).

Concerning the first issue it is your position that the sale of the ██████████ Marina should qualify as an occasional sale under KRS 139.070(1)(b). You state the sale of the marina was a transfer of substantially all of the property held or used by ██████████ Marina in the course of its ongoing business activities as a full service marina. You further state that the transfer was not a retail sale or a transfer in the regular course of business. Instead, it represents a transfer of ownership from one group to another, i.e., from one partnership group to another. Although the identities of the owners changed, the character of the ownership, the nature of the marina's business and the composition of the marina's assets remain unchanged.

In citing the Kentucky Supreme Court decision of Lockett v. Revday Industries, Inc. 432 S.W.2d 819, you noted that the legislature had intentionally excluded going out of business sales from sales tax exclusion. The court also noted in their ruling of George Wohrley, Inc. v. Dept. of Revenue, 495 S.W.2d 173, the character of the intended use of the property is important when determining whether an exemption applies.

The Department's position is the sale of ██████████ Marina does not qualify as an occasional sale under KRS 139.070(1)(b). The statute states:

Any transfer of all or substantially of the property held or used by a person in the course of such an activity when after such transfer the real or ultimate ownership of such property is substantially similar to that which existed before such transfer.

Since the transaction resulted in all of ██████████ Marina's property being sold to another group of owners, the real ownership of the property is not similar to that which existed before the sale. In addition, since the transaction in question clearly does not meet the requirements of KRS 139.070, the interpretation by the Supreme Court in this instance does not apply.

The second issue disputed is a series of transactions related to the sale of automobile repair equipment to various dealers of automobiles. During the course of the auction, resale certificates were issued by the buyers and were accepted by you. However, as a result of the audit conducted, the certificates were deemed invalid as not being accepted in good faith. It is your contention that these certificates were taken and accepted in good faith and the certificates are valid.

The Department maintains that the resale certificates were not accepted in good faith. The certificates kept on file by you and examined by the auditor were not properly completed. In some

instances the name of the purchaser was not identified on the resale certificate. Instead the sale ticket number of the customer was written on the certificate. It was only through matching the sales tickets with the resale certificates that the customer could be identified. Also, the type of property that is normally sold by the purchasers was not listed nor was a description of the property being bought listed on the certificates. For example, the customers were all automobile dealerships in the business of selling cars. The items sold at auction included tools, lifts, tire systems, jacks and various other equipment used by businesses in this industry. Therefore, after identifying both the customers in question, their type of business and the property purchased the auditor determined that the type of property purchased at auction was not that which is normally offered in their normal course of business. Therefore, good faith had not been demonstrated and the certificates have been declared invalid.

KRS 139.270 states:

“good faith” shall be demonstrated by the seller if he:

- (a) Accepts a properly completed resale certificate;
- (c) Determines that the kind of property being sold to the purchaser is normally offered for resale in the type of business operated by the purchaser...

Since the certificates were neither completed properly nor was the kind of property sold to the purchasers normally offered for resale in the business operated by the purchasers, these sales are considered taxable.

The third issue protested is items sold where an agricultural exemption certificate was accepted. It is your contention that the agricultural exemption certificates were accepted in good faith.

The Department's position is that the equipment sold by you is taxable until the contrary is established. The property in question includes a copier, tires and a grasshopper mower sold to individuals. The Department requested that copies of the certificates be provided, however, none were produced.

KRS 139.260 states:

For the purpose of the proper administration of this chapter and to prevent evasion of the duty to collect the taxes imposed by KRS 139.200 and 139.310, it shall be presumed that all gross receipts and all tangible personal property sold by any person for delivery in this state are subject to the tax until the contrary is established. The burden of proving the contrary is upon the person who makes the sale unless he takes from the purchaser a certificate to the effect that the property is either:

- (1) Purchased for resale according to the provisions of KRS 139.270;

- (2) Purchased through a properly executed certificate of exemption in accordance with KRS 139.270;

Also in examining the property sold and who it was sold to, it was not evident that the property in question would qualify for the exemption.

KRS 139.480(11) states in part:

“...farm machinery means machinery used exclusively and directly in the occupation of tiling the soil for the production of crops as a business, or in the occupation of raising and feeding livestock or poultry or of producing milk for sale...”

In that you did not provide copies of the agricultural exemption certificates, the sales are taxable as provided under KRS 139.260.

The fourth protested issue is related to the sale of boats at the ██████████ Marina. You contend that it was your belief that sales tax was collected by the local county clerk's office so the tax was not collected on these houseboats. In addition, you argue that several of the houseboats were sold to out of state residents as exhibited by the purchasers' addresses and are not subject to tax anyway.

The Department maintains that documentation was not evident to verify that these sales were indeed made out of state.

KRS 139.200 states:

A tax is hereby imposed upon all retailers at the rate of six percent (6%) of the gross receipts derived from:

- (1) Retail sales, regardless of the method of delivery, made within this Commonwealth;

Furthermore, if the purchaser receives the property in this state the sale is not considered to have been made in interstate commerce and sales tax is due.

103 KAR 30:190 Section 2 states:

Sales Tax: Transactions Consummated in Kentucky.

- (1) Where tangible personal property is located in this state at the time of its sale...and then delivered in this state to the purchaser, the seller is subject to the sales tax if the sale is at retail and is consummated in Kentucky. A sale is not presumed to be made in interstate commerce if the purchaser or his representative receives physical possession of such property in this state. This is true notwithstanding the fact that the purchaser may after receiving

physical possession of the property in this state transport or send the property out of the state for use outside the state or for use in the conduct of interstate commerce.

- (6) To establish that the gross receipts from any given sale are exempt because the tangible personal property is delivered by the seller from a point within the state to a point outside this state under terms of an agreement with the purchaser, the seller will be required to retain in his records documentary evidence which satisfies the cabinet that there was such an agreement and a bona fide delivery outside this state of the property which was sold.

Consequently, since there was no evidence showing that delivery was made out of state the sales of houseboats are taxable.

The final issue disputed is the liability for tax on the "buyer's premiums" added on to the bid price of the purchased items. You note that sales tax was computed on the total price paid by the customer. Only the bid price represents the sum paid for the particular piece of merchandise. The buyer's premium is a commission intended to compensate the auctioneer for his services in connection with the sale.

The Department maintains that a buyer's premium is part of the sales price as defined under KRS 139.050.

KRS 139.050 (a) states:

- (a) Charges by the retailer for any services necessary to complete the sale.

The buyer's premium is the price paid to the auctioneer above and beyond the bid price and therefore is included in gross receipts.

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



THOMAS H. BROWN
Director
Division of Protest Resolution

CERTIFIED MAIL
RETURN RECEIPT REQUESTED



























