FINANCE AND ADMINISTRATION CABINET
OFFICE OF THE SECRETARY

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John R. Farris
Secretary

In the matter of:

[redacted], INC.

Contact: [redacted], Inc.
[redacted]

FINAL RULING NO. 2007-08
April 5, 2007

Sales and Use Tax assessments for the periods
April 1, 1994 through March 31, 1998
and
April 1, 1998 through March 31, 2003

FINAL RULING

The Kentucky Department of Revenue has issued sales and use tax assessments to [redacted], Inc. totaling $[redacted], plus interest and penalties, for the period April 1, 1994 through March 31, 1998 and totaling $[redacted], plus interest, penalties and amnesty fees for the period April 1, 1998 through March 31, 2003. The chart below reflects the total underpayment for each period.

Tax Period	Tax Due	Interest as of 3/30/2007	Penalties and Fees	Total
04/01/1995 – 12/31/1995	$[redacted]	$[redacted]	$[redacted]	$[redacted]
01/01/1996 – 12/31/1996	$[redacted]	$[redacted]	$[redacted]	$[redacted]
01/01/1997 – 12/31/1997	$[redacted]	$[redacted]	$[redacted]	$[redacted]
Subtotal	$[redacted]	$[redacted]	$[redacted]	$[redacted]
04/01/1998 – 12/31/1998	$[redacted]	$[redacted]	$[redacted]	$[redacted]
04/01/1999 – 03/31/2000	$[redacted]	$[redacted]	$[redacted]	$[redacted]
04/01/2000 – 03/31/2001	$[redacted]	$[redacted]	$[redacted]	$[redacted]
04/01/2001 – 11/30/2001	$[redacted]	$[redacted]	$[redacted]	$[redacted]
Totals	$[redacted]	$[redacted]	$[redacted]	$[redacted]

[redacted], Inc. is a roofing contractor located in [redacted] which entered into a contract to re-roof some buildings located on [redacted] in Kentucky.

On February 24, 1999, sales and use tax audit assessments for the period April 1, 1994 through March 31, 1998 were issued to [redacted], Inc. in the amount of $[redacted] in tax, plus interest and the applicable penalties levied under KRS 131.180. [redacted], Inc. filed a timely protest of the assessment.

On July 10, 2003, sales and use tax audit assessments for the period April 1, 1998 through March 31, 2003 were issued to [redacted], Inc. in the amount of $[redacted] in tax, plus interest, an amnesty assessment fee mandated by KRS 131.440 and the applicable penalties levied under KRS 131.180. [redacted], Inc. filed a timely protest of the assessment.

At issue are 1) whether tax paid to another state on materials and supplies purchased for use and subsequently delivered directly to Kentucky should be credited against Kentucky use tax levied under KRS 139.310 and 2) whether the materials and supplies purchased by the contractor for use in Kentucky qualify for exemption pursuant to KRS 139.470 as sales to and used exclusively for the federal government.

[redacted], Inc. argues that they are entitled to credit against use tax due Kentucky for sales taxes paid in error to another state.

KRS 139.310 states:

> An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased on and after July 1, 1990, for storage, use, or other consumption in this state at the rate of six percent of the sales price of the property.

KRS 139.510 states:

> The tax levied by KRS 139.310 shall not apply with respect to the storage, use, or other consumption of tangible personal property in this state upon which a tax substantially identical to the tax levied under KRS 139.200 (not including any special excise taxes such as are imposed on alcoholic beverages, cigarettes, and the like) equal to or greater than the amount of tax imposed by KRS 139.310 has been paid in another state. Proof of payment of such tax shall be according to rules and regulations of the department. If the amount of tax paid in another state is not equal to or greater than the amount of tax imposed by KRS 139.310, then the taxpayer shall pay to the department an amount sufficient to make the tax paid in the other state and in this state equal to the amount imposed by KRS 139.310. No credit shall be given under this section for sales taxes

> paid in another state if that state does not grant credit for sales taxes paid in this state.

It is the Department's position that sales made by out-of-state retailers to [redacted], Inc. and delivered into Kentucky were sales made in interstate commerce and as such, sales tax was not due the retailer's state of residence. Any sales taxes paid by [redacted], Inc. to those retailers were not legally owed to the states of those retailers and were therefore paid in error. Accordingly, [redacted], Inc. is not entitled to credit under KRS 139.510 for those sales taxes paid in error.

Alternatively, [redacted], Inc. believes that materials purchased from out-of-state retailers and used in the completion of a job with the federal government are exempt pursuant to KRS 139.470.

103 KAR 26:070 provides that a contractor is considered to be a consumer of materials and supplies used in fulfilling contracts and further, Section 3, provides that:

> A contractor may not claim that the purchase of materials or fixtures is not subject to the tax because the property is to be used in fulfilling a contract with the federal government, state government or political subdivision thereof, or any department, agency, or instrumentality of the federal government, state government or political subdivision thereof, or with a religious, educational, or charitable institution.

In Pete Koenig Co. v. Department of Revenue, 655 S.W. 2d 496 (Ky. App. 1983), the Court of Appeals states:

> 103 KAR 26:070 makes it clear that a contractor is a consumer of materials it uses in fulfillment of its contracts even if the entity it contracts with is itself exempt from the tax. The regulation is neither arbitrary nor unconstitutional; it is a proper and reasonable clarification of the statute.

Based upon the foregoing, the Department of Revenue has determined that the sales and use tax assessments of $[redacted] and $[redacted] (plus respective applicable interest, penalties and fees) are legitimate liabilities of [redacted], Inc. due the Commonwealth.

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