FINANCE AND ADMINISTRATION CABINET
OFFICE OF THE SECRETARY

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John R. Farris
Secretary

In the matter of:

[redacted] LLC

Contact: [redacted]

FINAL RULING NO. 2007-17
April 27, 2007

Sales Tax Assessment
for the Period September 1, 2001 through September 30, 2001

FINAL RULING

The Kentucky Department of Revenue has an outstanding sales tax assessment against [redacted] LLC ("[redacted]") for the period September 1, 2001 through September 30, 2001. The following schedule reflects the total underpayment.

Period	Tax Due	Interest As of 04-25-2007	Total Due As of 04-25-2007
09/01/2001 - 09/30/2001	$[redacted]	$[redacted]	$[redacted]
Total	$[redacted]	$[redacted]	$[redacted]

[redacted] was a wholesaler of cigarettes and other grocery items. Its business consisted of buying and selling groceries, cigarettes, etc. It bought these products at wholesale, stored them at its warehouses and then resold them to various retailers. [redacted] had warehouses located in [redacted] and [redacted], Kentucky.

At issue is the assessment of sales tax on the sale of selling activity assets. [redacted] sold its entire wholesale business on [redacted], 2001. Included in this transaction were "all trade fixtures & equipment, … and all other tangible assets owned and used in the operation of and located at the warehouses and located at [redacted], [redacted], Kentucky." This included the sale of one warehouse in [redacted], Kentucky and the acquisition of three other warehouses under lease, in [redacted], and two in [redacted], Kentucky.

It is [redacted]'s contention that the sale was an occasional sale and should be exempt from sales tax pursuant to KRS 139.470(4) and KRS 139.070(1)(a).

The Department's position is that the sale of selling activity assets does not qualify as an occasional sale because the property was used in an activity for which a seller's permit was required. The Warehouse Purchase Agreement provided by the taxpayer stated an allocated purchase price of $[redacted] for equipment. KRS 139.070 states in part that an occasional sale includes "...a sale of property not held or used by the seller in the course of an activity for which he is required to hold a seller's permit...." However, the equipment in question was used by the taxpayer in its warehouse operation of selling [redacted] and [redacted] items. According to the provisions of KRS 139.240 and 139.250, [redacted] was required to apply and hold a seller's permit for each place of business within the state where it conducted its selling activities.

Kentucky courts have ruled that property used in the manufacturing process is nonretail assets eligible for the occasional sale exemption. See generally George W. Wohrley, Inc. v. Department of Revenue, 495 S. W. 2d 173 (Ky. 1973); Commonwealth ex rel. Luckett v. Revday Industries, Inc., 432 S. W. 2d 819 (Ky. 1968). Since a Sales and Use Tax Permit is not required to manufacture, the assets used in the manufacturing process qualify for exemption as an occasional sale. However, the assets that are not used in the manufacturing process but in activities such as marketing, sales, and distribution of manufactured products are considered selling activity assets whose sale does not qualify for the occasional sale exemption. Specifically, the court in Revday observed, "in substance, KRS 139.070 provides that a sale of property held or used by a seller in the course of the business of selling is not exempt as an occasional sale." The equipment referred to in the Warehouse Purchase Agreement Article I, Section 1.1(c) states "All the trade fixtures and equipment, including office furniture, fixtures, equipment, computer hardware, and all other tangible assets owned and used in the operation of and located at the warehouses and located at [redacted], [redacted], Kentucky, including racking and compressors ...". Therefore, [redacted]'s sale of these assets would not qualify for the occasional sale exemption.

Based upon the foregoing, the information supplied with the protest and supporting statement, the Department has determined that the sales tax assessment totaling $[redacted] (plus applicable interest) was correctly assessed on the sale of selling activity assets and is deemed a legitimate liability of [redacted] LLC due 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 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

CERTIFIED MAIL
RETURN RECEIPT REQUESTED