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FINANCE AND ADMINISTRATION CABINET
DEPARTMENT OF REVENUE
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JONATHAN MILLER
Secretary

THOMAS B. MILLER
Commissioner

In the matter of:

[REDACTED], Inc.

Contact:

[REDACTED] Inc.
[REDACTED]

FINAL RULING NO. 2008-87
November 20, 2008

Sales Tax assessment
for the period
August 1, 2005 through October 31, 2006

FINAL RULING

The Kentucky Department of Revenue has outstanding sales tax assessments against [REDACTED], Inc. ("[REDACTED]") for the period August 1, 2005 through October 31, 2006. The following schedule reflects the total underpayment, including applicable interest and penalty.

Period	Tax	Interest as of 11/20/2008	Penalties	Total per Period
08/01/2005 – 12/31/2005	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]
01/01/2006 – 10/31/2006	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]
TOTAL	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]

██████████ operates a retail establishment that prepares and sells made-to-order fresh pizza for cooking by the customer. ██████████ has one location in ██████████, Kentucky.

At issue is whether the Department of Revenue properly assessed sales tax on the receipts derived from the sale of ██████████ prepared by ██████████.

It is ██████████'s position that although Kentucky sales tax does apply to prepared food, the ██████████ sold by ██████████ is not "prepared food" as defined in KRS 139.485(3)(g). ██████████ argues that the ██████████ in an unheated and uncooked state contains raw ██████████ that is required to be cooked prior to consumption and as such, is not prepared food subject to sales tax.

KRS 139.485(3)(g) defines prepared food as follows:

(g) "Prepared food" means

1. Food sold in a heated state by the retailer;
2. Two (2) or more food ingredients mixed or combined by the retailer for sale as a single item except food that is only cut, repackaged, or pasteurized by the retailer, eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the Food and Drug Administration in Chapter 3, Part 401.11 of the FDA Food Code so as to prevent food-borne illnesses;
3. Food sold with eating utensils provided by the retailer, including plates, knives, forks, spoons, glasses, cups, napkins or straws;

Under the foregoing statutory provision, the mixing or combining two or more food ingredients for sale as a single item places the retailer-prepared ██████████ into the prepared food category. Although the products are baked by the purchaser before consumption, the ██████████ in question do not meet the exclusion provided in the statute. The ██████████ does not contain egg and any meat on the ██████████ is pre-cooked. Therefore, ██████████'s ██████████ sales are not exempt from tax. KRS 139.485(1) and (2)(f).

Furthermore, to meet the definition of "prepared food", the food is not required to be sold in a heated state or necessarily cooked by the retailer. As indicated in KRS 139.485(3)(g), food heated or cooked by the retailer is just one category of prepared food.

Because ██████████ failed to have timely paid at least seventy-five percent of the tax determined due by the Department of Revenue, a late payment penalty has been assessed pursuant to the provisions of KRS 131.180(2).

Based upon the foregoing, the sales tax assessment totaling \$██████████ (plus applicable interest and penalties) is deemed a legitimate liability of ██████████, Inc. 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



JASON SNYDER
Executive Director
Office of Legal Services for Revenue

cc: [REDACTED] PLLC

Attn: [REDACTED]

[REDACTED]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED