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JONATHAN MILLER
Secretary

THOMAS B. MILLER
Commissioner

In the matter of:

[REDACTED], Inc.

Contact: [REDACTED], Inc.
[REDACTED], Controller

FINAL RULING NO. 2009-35
September 17, 2009

Sales and Use Tax Refund Claims
October 1998 though July 2007

FINAL RULING

[REDACTED], Inc. (" [REDACTED] ") has made an refund request for sales and use tax for the periods October 1998 though July 2007 (excluding July 1999 and November 1999) that were held in abeyance pending the results of Finance and Administration Cabinet, Department of Revenue v. Duplicator Sales & Service, Inc., No. 2006-CA-001783-MR, disc. rev. denied. These refund claims totaling \$ [REDACTED], plus applicable interest. Of that total, the Department of Revenue ("Revenue") has verified \$ [REDACTED] in tax with supporting documentation [REDACTED] provided and after reviewing some [REDACTED] transactions and approximately [REDACTED] exemption certificates, as further detailed in the following table:

Tax Year	Tax	Interest	Total
10/1998 to 12/1998	[REDACTED]	[REDACTED]	[REDACTED]
1999	[REDACTED]	[REDACTED]	[REDACTED]
2000	[REDACTED]	[REDACTED]	[REDACTED]
2001	[REDACTED]	[REDACTED]	[REDACTED]

2002	██████████	██████████	██████████	██████████	██████████	██████████
2003	██████████	██████████	██████████	██████████	██████████	██████████
2004	██████████	██████████	██████████	██████████	██████████	██████████
2005	██████████	██████████	██████████	██████████	██████████	██████████
2006	██████████	██████████	██████████	██████████	██████████	██████████
01/2007 to 07/2007	██████████	██████████	██████████	██████████	██████████	██████████
Total:	██████████	██████████	██████████	██████████	██████████	██████████

The current dispute arose as the result of the unpublished decision from the Kentucky Court of Appeals in the case mentioned above. That case began with an audit of ██████████, which is primarily a retailer of office equipment. It also provides parts, supplies, and maintenance for the equipment it sells or leases. The audit assessed use tax against ██████████ for parts and supplies it used or provided in the fulfillment of maintenance contracts to tax exempt entities. These maintenance contracts were not required as a part of the sale of office equipment and covered service, sometimes with supplies and parts, for a set contract price. If the contract covered parts and supplies, ██████████ did not separately invoice the parts and supplies used in the repair or maintenance or make any separate charge for the materials provided. If its customer was a taxable entity, it absorbed what it contended was sales tax and remitted to the then-Revenue Cabinet (“Revenue”) six percent of its cost for the item. If the customer was tax-exempt, ██████████ remitted no tax.

Prior to the Court of Appeals decision, Revenue, however, likened the situation to a contractor, in which the essence of the transaction is the provision of a service, not the sale of parts or supplies. In a contractor situation, the contractor is responsible to the Commonwealth for use tax on its cost of any tangible personal property used to fulfill the contract. See 103 KAR 26:070. Under this analysis, whether ██████████’s customer was tax exempt had no bearing on whether tax was due, because ██████████ itself is not tax exempt.

The Court of Appeals ruled against Revenue and stated on Page 11 of its opinion:

Based upon . . . the essence of the transaction in this case, it is apparent that ██████████ was engaged in retail sales of parts and supplies it transferred under the maintenance contract. . . .The fee paid for the contract represented a prepayment or payment over time for the parts and supplies that ██████████ provided and was the consideration for the transfer of the tangible personal property. As such, the customers were required to pay sales tax on the parts and supplies provided, unless an exemption applied, as in the case before us.

Therefore, this ruling confirmed ██████████’s position regarding its “retail sales” of parts and supplies to its exempt customers. However, the treatment of maintenance contracts which

include the provision of parts and supplies as a retail sale also requires ██████████ to remit sales tax on its charges to taxable customers while continuing to exempt its non-taxable customers.

Throughout the proceedings dealing with the audit, which occurred more than ten years ago, ██████████ filed refund claims that were being held in abeyance pending the case becoming final. On ██████████, 2009, ██████████ requested a final ruling for the periods detailed above relating to these refund claims. Under KRS 134.580(2), Revenue is authorized to make a refund only where there has been “any overpayment of tax and any payment where no tax was due.” Because any refund claims asserted by ██████████ are more than offset or exceeded by the sales tax that would be due from contract sales to non-exempt customers under the Court of Appeals’ ██████████ decision, there have been no overpayments for the periods in question, which in turn requires that the refund claims be denied. 4

As stated in KRS 139.210, if a transaction contains both goods and services, but does not separately invoice the goods, the retailer is required to collect tax on the entire contract price. The Court of Appeals has held that sales tax is due from the customer in the context of warranty or maintenance contracts. Sales tax, by definition, is only due on a “sales price” as defined under KRS 139.050. To give effect to the Court of Appeals decision, Revenue must collect sales tax on the total contract price, which includes labor, parts, and other services, because this is the only time money changes hands in this service contract arrangement. The contract price is the only “sales price.” At no other time does the customer pay ██████████.

██████████ did not, when requested, provide Revenue with documentation of these contract prices for the periods in question. However, based on even its most conservative estimates, Revenue has determined that the tax due on taxable contracts would far surpass the tax ██████████ has asked to be refunded. Therefore, the sales and use tax refund claims are denied.

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:

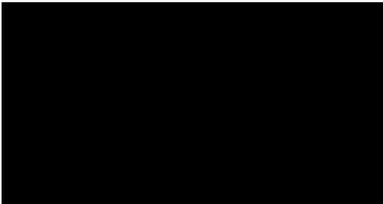
1. An individual may represent himself in hearings before the Board;
2. An individual who is not an attorney may not represent any other individual, corporation, trust, estate, or partnership before the Board; and
3. An attorney who is not licensed to practice in Kentucky may practice before the Board 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


E. Jeffrey Mosley
Interim Executive Director
Office of Legal Services for Revenue

cc:



CERTIFIED MAIL
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