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JONATHAN MILLER
Secretary

THOMAS B. MILLER
Commissioner

In the matter of:

██████████ LLC

Contact: ██████████, Member
██████████ LLC

FINAL RULING NO. 2010-21
April 1, 2010

Sales and Use Tax Assessment
for the periods October 1, 2006 through June 30, 2007

FINAL RULING

The Kentucky Department of Revenue has an outstanding sales and use tax assessment totaling \$██████████ plus penalties and interest against ██████████ LLC for the period October 1, 2006 through June 30, 2007. The following schedule reflects the amount of outstanding tax, penalty and interest accrued to date.

Period	Tax	Interest as of 4/1/10	Penalties	Total per Period
10/01/06-12/31/06	\$██████████	\$██████████	\$██████████	\$██████████
01/01/07-06/30/07	\$██████████	\$██████████	\$██████████	\$██████████
TOTAL	\$██████████	\$██████████	\$██████████	\$██████████

██████████ LLC ("██████████") is engaged in the business of leasing aircraft without a pilot. At issue is whether ██████████'s use of an hourly rate in arriving at the amount due for the rental or lease of its airplanes means that these leases require recurring periodic payments under 103 KAR 28:051 §10(3)(a).

██████████ contends that the gross receipts from its airplane rentals should be reported based on 103 KAR 28:051§10(3)(a) which states that “[f]or a lease or rental that requires recurring periodic payments, each periodic payment shall be sourced to the primary property location.” ██████████ asserts that its airplane rentals require recurring periodic payments, which would in turn mean that its receipts from these rentals would be taxable only to the extent that the airplane rented was primarily located in Kentucky or Kentucky airspace during a particular hour or hours of rental. The Department does not agree with ██████████’s argument.

The rental payments in question are simply not “recurring periodic payments.” These payments are neither periodic nor recurrent and the use of an hourly rate does not make them so. ██████████ rents its airplanes based upon a flight plan that sets forth where the renter or lessee wants to go. Once the flight is over, ██████████ and the lessee settle up based upon the hours the plane was used, as derived from the flight log. This is not a recurrent periodic payment situation. The rental receipts should therefore be reported in accordance with KRS 139.105(1) (a).

KRS 139.105(1) (a) provides that a retail sale (which includes a rental or lease) of tangible personal property is sourced to the address where the purchaser receives the tangible personal property. Since ██████████ rents the plane to its customer from a Kentucky location, this transaction is properly sourced to Kentucky and the corresponding rental payments or receipts were properly assessed in the audit.

██████████’s interpretation is wholly impractical and produces the bizarre result of re-sourcing the rental receipts based upon the aircraft location per every hour of flight. Furthermore, the definition of “primary property location” does not allow for the sourcing of receipts to aircraft airspace. 103 KAR 28:051 §1(1) defines “primary property location” as:

...the location as indicated by an address for the property provided by the lessee that is available to the lessor from the lessor’s records maintained in the ordinary course of business, if use of this address does not constitute bad faith. This location shall not be altered by intermittent use of the property at different locations.

As indicated above, a penalty has been assessed pursuant to KRS 131.180(2) because of ██████████’s failure to have timely paid at least 75% of the tax determined to be due by the Department. ██████████ contends that its failure to pay was due to its reliance on advice from its tax preparer. 103 KAR 1:040 establishes the criteria used to determine if the taxpayer has demonstrated reasonable cause to justify the waiver of penalties. Section 10, “Erroneous advice by tax advisor” states:

Penalties may be waived if the delay or failure to file a return or report or pay a tax was caused by the receipt of erroneous advice from a tax

advisor or other professional on whom a taxpayer had a reasonable right to rely. The taxpayer shall establish the presence of the following three (3) factors for the Department of Revenue to consider the applicability of this subsection: (a) Unfamiliarity of the taxpayer with the tax laws, and actual reliance by the taxpayer on the advice of the tax advisor; (b) Supporting documentation of full disclosure by the taxpayer of all relevant facts provided to the tax advisor or other professional retained and advice received, including: 1. A copy of the advice requested; 2. A copy of the advice provided; and 3. A statement from the tax advisor explaining the circumstances; and (c) Exercise of reasonable care and prudence by the taxpayer in determining whether to secure further advice.

██████████ has submitted nothing to establish the presence of the three factors required in the regulation above to show that its failure to pay was due to reasonable cause.

Based upon the foregoing, the sales and use tax assessment outlined in the schedule above is a legitimate liability of ██████████ 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 40601-3714, 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.

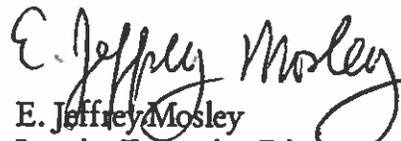
Proceedings before the Kentucky Board of Tax Appeals are conducted in accordance with 103 KAR 1:010, 802 KAR 1:010 and KRS 131.340-131.365 and KRS Chapter 13B. Formal

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 3 of 802 KAR 1:010:

1. An individual may represent himself in any proceedings before the Board where his individual tax liability is at issue or he may obtain an attorney to represent him in those proceedings;
2. An individual who is not an attorney may not represent any other individual or legal entity in any proceedings before the Board;
3. Any party appealing a final ruling to the Board other than an individual, such as a corporation, limited liability company, partnership, joint venture, estate or other legal entity, shall be represented by an attorney in all proceedings before the Board, including the filing of the petition of appeal; and
4. An attorney who is not licensed to practice in Kentucky may practice before the Board only 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,



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

cc:

[REDACTED] PLLC
[REDACTED]

cc:

[REDACTED] CPA
[REDACTED]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED