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FINANCE AND ADMINISTRATION CABINET
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JONATHAN MILLER
Secretary

THOMAS B. MILLER
Commissioner

In the matter of:

[Redacted] Inc

Contact: [Redacted] Inc

Attn: [Redacted]

FINAL RULING NO. 2011-26
March 17, 2011

FINAL RULING

The Kentucky Department of Revenue ("DOR") currently has an outstanding sales and use tax assessment against [Redacted] ("[Redacted]") totaling \$ [Redacted] plus interest and penalty for the period January 1, 2003 through December 31, 2008. A breakdown of the outstanding amount of the assessment still due is shown in the chart below:

Period	Tax	Interest as of 2/17/11	Penalty	Total per Period
1/1/03 – 12/31/03	\$ [Redacted]	\$ [Redacted]	\$ [Redacted]	\$ [Redacted]
1/1/04 – 12/31/04	\$ [Redacted]	\$ [Redacted]	\$ [Redacted]	\$ [Redacted]
1/1/05 – 12/31/05	\$ [Redacted]	\$ [Redacted]	\$ [Redacted]	\$ [Redacted]
1/1/06 – 12/31/06	\$ [Redacted]	\$ [Redacted]	\$ [Redacted]	\$ [Redacted]
1/1/07 – 12/31/07	\$ [Redacted]	\$ [Redacted]	\$ [Redacted]	\$ [Redacted]
1/1/08 – 12/31/08	\$ [Redacted]	\$ [Redacted]	\$ [Redacted]	\$ [Redacted]
TOTAL	\$ [Redacted]	\$ [Redacted]	\$ [Redacted]	\$ [Redacted]

[Redacted] Inc. is a [Redacted] & [Redacted] group specializing in construction, development, and real estate throughout the United States and abroad.

At issues are the following:

- (1) ██████████'s vendor did not charge and remit Kentucky tax for materials and supplies that were shipped and used on Kentucky jobs, and ██████████ did not report and remit the related use tax on these purchases.
- (2) Tax charged in error on repairs
- (3) Assessment of penalty on the assessed liability.

Regarding issue (1), no Kentucky sales tax was charged on the invoices for construction materials delivered and used in the Commonwealth nor was Kentucky use tax accrued. Also, even though the invoices display 6% tax, the vendor did not indicate that Kentucky tax was collected and was not registered to remit the tax to the state of Kentucky. It is the Department's position that ██████████ is liable for the taxes not collected and/or remitted according to KRS 139.310 and KRS 139.330.

KRS 139.310 Imposition of excise tax on storage, use, or other consumption states

- (1) An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property and digital property purchased for storage, use, or other consumption in this state at the rate of six percent (6%) of the sales price of the property.
- (2) The excise tax applies to the purchase of digital property regardless of whether:
 - (a) The purchaser has the right to permanently use the goods;
 - (b) The purchaser's right to access or retain the digital property is not permanent; or
 - (c) The purchaser's right of use is conditioned upon continued payment.

KRS 139.330 Purchaser's liability for tax imposed by KRS 139.310 states

Every person storing, using or otherwise consuming in this state tangible personal property or digital property purchased from a retailer is liable for the use tax levied under KRS 139.310. His liability is not extinguished until the tax has been paid to this state, except that a receipt from a retailer engaged in business in this state or from a retailer who is authorized by the department, under such rules and regulations as it may prescribe, to collect the tax and who is, for the purpose of this chapter relating to the use tax, regarded as a retailer engaged in business in this state, given to the purchaser pursuant to KRS 139.340 is sufficient to relieve the purchaser from further liability for the tax to which the receipt refers.

Regarding issue (2), after repeated requests, ██████████ has not provided copies of invoices showing that the repairs were made in ██████████, or otherwise provided documentations that the Department made an incorrect assessment.

In the matter of issue (3), the assessment of penalties on the assessed tax liability, the statutory basis for the penalty assessed is found in subsection 2 of KRS 131.180 (Uniform Civil Penalty Act).

KRS 131.180 states in pertinent part:

- (1) Any taxpayer who files any return or report after the due date prescribed for filing or the due date as extended by the department shall, unless it is shown to the satisfaction of the department that the failure is due to reasonable cause, pay a penalty equal to two percent (2%) of the total tax due for each thirty (30) days or fraction there of that the report or return is late...
- (2) Any taxpayer who fails to withhold or collect any tax as required by law, fails to pay the tax computed due on a return or report on or before the due date prescribed for it or the due date as extended by the department, or...fails to have timely paid at least seventy-five (75%) of the tax determined due by the department shall, unless it is shown to the satisfaction of the department the failure is due to reasonable cause, pay a penalty equal to two percent (2%) of the tax not withheld, collected, or timely paid for each thirty (30) days or fraction thereof that the withholding, collection, or payment is late...

KRS 131.010 (9) states:

“Reasonable Cause” means an event, happening, or circumstance entirely beyond the knowledge or control of a taxpayer who has exercised due care and prudence in the filing of a return or report or the payment of moneys due the department pursuant to law or administrative regulation.

The penalty amount shown above reflects the penalty applied to the total adjusted liability. ██████████ did not pay at least seventy-five percent (75%) of the tax due for the audit period. In ██████████’s previous audit, similar issues were discovered. Accordingly, the penalty was properly applied under the foregoing language.

For the reasons stated above, the outstanding liability totaling \$ ██████████ plus penalty and interest set forth above is a legitimate liability of ██████████ Inc due to 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.

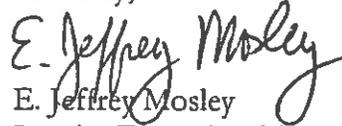
The petition of appeal must be in writing and signed by the petitioner or appellant. Filings by facsimile or other electronic means shall not be accepted.

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