STEVEN L. BESHEAR
Governor

FINANCE AND ADMINISTRATION CABINET
DEPARTMENT OF REVENUE
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LORI HUDSON FLANERY
Secretary

THOMAS B. MILLER
Commissioner

In the matter of:

[redacted] LLC

Contact: [redacted]

FINAL RULING NO. 2012-07
January 27, 2012

Sales and use tax assessments
for the periods October 1, 2004 through December 31, 2005

FINAL RULING

The Kentucky Department of Revenue ("DOR") has an outstanding sales and use tax assessment totaling $[redacted] against [redacted] Company LLC. ("[redacted]") for the period October 1, 2004 through December 31, 2005. The following schedule reflects the amount of outstanding tax and applicable interest accrued to date.

Period	Tax	Interest as of 01/27/2012	Total per Period
10/01/04 – 12/31/04	$[redacted]	$[redacted]	$[redacted]
01/01/05 – 12/31/05	$[redacted]	$[redacted]	$[redacted]
	$[redacted]	$[redacted]	$[redacted]

[redacted] was in the business of retailing tobacco products, beer, candy and soft drinks. [redacted] operated as a business from [redacted] of 2004 until the business was sold [redacted], 2006.

[redacted] purchased cigarettes for resale from [redacted] LLC and purportedly paid sales tax at the time of the purchases although no sales tax was ever remitted to DOR for these transactions. [redacted] subsequently took deductions for the cost of the cigarettes purchased as tax paid purchases resold on its sales and use tax returns. The outstanding liability also includes an assessment on the purchases of various consumable supplies and capital items which are not contested but have not been paid.

At issue is whether [redacted] is entitled to take the tax paid purchases resold deduction on its sales and use return as provided for in 103 KAR 31:091.

103 KAR 31:090 states

> Section 1. A retailer who resells tangible personal property before making any use there of (other than retention, demonstration. display while holding it for sale in the regular course of business) may take a deduction of the purchase price of the property if, with respect to its purchase, he has reimbursed the vendor for the sales tax or has paid the use tax. If such a deduction is taken by the retailer, no refund or credit will be allowed to his vendor with respect to the sale of the property.
>
> Section 2. The procedure described in Section 1 of this administrative regulation should be used in any of the following circumstances:
>
> (1) The retailer when making the purchase intends to use the property rather than resell it but later resells it before making any use thereof.
> (2) The particular property is of a kind not ordinarily sold or stocked by the retailer and not customarily covered by resale certificates given to his vendors and is the subject to an unusual sale, such as a sale for the accommodation of a customer, employee, etc.
> (3) The particular property is generally for the use of the retailer, but a small portion is incidentally resold.
> (4) Through error, sales tax reimbursement or use tax is paid by the retailer with respect to the purchase price of property purchase for resale in the regular course of business.

DOR contends that based on the circumstances at instance, [redacted] is not entitled to take a deduction for tax paid, purchases resold. Considering that [redacted] was a retailer that sold cigarettes in the normal course of its business, requirements (1), (2), and (3) clearly do not apply. [redacted] had a valid seller's permit during the period of the purchases at issue and was apparently correctly issuing resale certificates for other purchases but not for these purchases from its supplier with common ownership. The failure to exercise due diligence in the cigarette purchases renders requirement (4) inapplicable also.

Moreover, [redacted] claims that tax was charged on the cigarettes sold in its stores. The sales and use tax returns and remittance for the periods at issue do not reflect the inclusion of the sales tax on the sale of these cigarettes.

KRS 139.210 (Effective during the period at issue) states in pertinent parts

> (1) The taxes herein imposed shall be collected by the retailer from the consumer.
>
> * * * * * * * * * *
>
> (4) The taxes collected under this section shall be deemed to be held in trust by the retailer for and on account of the Commonwealth of Kentucky.
> (5) The taxes to be collected under this section shall constitute a debt of the retailer to the Commonwealth.

DOR further contends that [redacted] has not complied with and is in violation of KRS 139.210.

For the reasons stated above, the outstanding liability totaling $[redacted] (plus applicable interests) is 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 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,
FINANCE AND ADMINISTRATION CABINET

E. Jeffrey Mosley

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

cc: [redacted] PLLC
[redacted]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED