



STEVEN L. BESHEAR
Governor

FINANCE AND ADMINISTRATION CABINET
DEPARTMENT OF REVENUE
501 HIGH STREET
FRANKFORT, KENTUCKY 40620
Phone (502) 564-3226
Fax (502) 564-3875
www.kentucky.gov

LORI HUDSON FLANERY
Secretary

THOMAS B. MILLER
Commissioner

In the matter of:

██████████ Inc
d/b/a ██████████

Contact: ██████████

FINAL RULING NO. 2012-10
February 3, 2012

Sales and Use Tax assessments
for the periods January 1, 2007 through August 31, 2010

FINAL RULING

The Kentucky Department of Revenue ("DOR") has an outstanding sales and use tax assessments totaling \$██████████ against ██████████, Inc. ("██████████") for the period January 1, 2007 through August 31, 2010 ("the audit period"). The following schedule reflects the amount of outstanding tax and applicable interest accrued to date:

Audit Period	Tax	Interest as of 02/03/2012	Totals
01/01/07 – 12/31/07	\$██████████	\$██████████	\$██████████
01/01/08 – 12/31/08	\$██████████	\$██████████	\$██████████
01/01/09 – 12/31/09	\$██████████	\$██████████	\$██████████
01/01/10 – 08/31/10	\$██████████	\$██████████	\$██████████
	\$██████████	\$██████████	\$██████████

During the audit period, ██████████ operated as a retail grocer at ██████████ ██████████, KY. ██████████ took deductions on its sales and use tax returns filed during this period for sales of items it claimed were food items exempt from tax under KRS 139.485.

The DOR's auditors performed a test or sample audit of ██████████'s records. ██████████ agreed that 2009 was a suitable test period, fairly representative of the audit period insofar as the nature of its business operations and the retail sales it made during that period were concerned.

The DOR auditors examined a computer printout of all items sold by ██████████ during the test period and determined that ██████████ had miscoded or misclassified various items as food items tax-exempt under KRS 139.495. These items should have instead been reported as subject to sales tax and tax paid. The DOR's auditors accordingly derived a percentage of error from these findings for the 2001 test period that they applied to the rest of the audit period. Additional sales tax was accordingly assessed. The DOR also assessed use tax for some capital and consumable supply items of tangible personal property that ██████████ had purchased for use, storage or other consumption in this state during the audit period. ██████████ protested the sales tax assessment pursuant to KRS 131.110; however, no challenge was made to the assessment of use tax.

██████████'s protest asserts that the DOR's assessment "charg[es] sales tax for items that were never sold." The only documentation that ██████████ has provided in support of this protest is a listing that purportedly showed the exact number of items sold. This listing had nothing to do with the miscoded items discovered by DOR's auditors on the computer printout from which the percentage of error was derived. The DOR sent S & T numerous additional requests for information and a conference was scheduled pursuant to KRS 131.110(2), which ██████████ failed to attend. ██████████ never did provide the requested information.

The burden of proof rest squarely upon ██████████ to establish that its retail sales were exempt from or not subject to sales tax and that the capital and consumable supply items it purchased for use, storage or other consumption were not subject to the use tax and that all requirements of any exemption claimed have been satisfied. KRS 139.260; 139.400; Epsilon Trading Co. v. Revenue Cabinet, 775 S.W.2d 937, 941 (Ky. App. 1989). The DOR's assessment is presumed to be correct and ██████████ must come forward with proof establishing otherwise. Hahn v. Allphin, 282 S.W.2d 824, 825 (Ky. 1955). As described above, ██████████ has failed to present in support of its protest the evidence necessary to meet its burden of proof and to overcome the presumption that the DOR's assessment is correct. Test or sample audits such as the one conducted of ██████████ "are a recognized technique under Kentucky's taxing statutes and have been used for many years." Henry A. Petter Supply Co. v. Revenue Cabinet, KBTA Order No. K-8530, 1982

WL 14376 at *2 (Ky. Bd. Tax App. File No. K81-R-53, October 8, 1982). ██████████ has failed to show that the DOR's audit was in any way improper or that the resulting assessments described above were inaccurate or erroneous.

For the reasons stated above, the outstanding liability totaling \$ ██████████ (plus applicable interest) is 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 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
Interim Executive Director
Office of Legal Services for Revenue

cc: [REDACTED], CPA
[REDACTED] & Associates
[REDACTED]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED





