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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]

Contact: [REDACTED], Tax Director

FINAL RULING NO. 2012-62
November 21, 2012

Sales Tax Refund Denial
For the periods August 1, 2008 through August 31, 2011

FINAL RULING

Period	Tax	Interest as of 11/21/12	Total Refund
08/01/2008 – 08/31/2011	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]

[REDACTED] (“[REDACTED]”) is a retailer that has a Kentucky business location and is a Kentucky seller’s or retailer’s permit holder. The Kentucky Department of Revenue (“the Department”) has denied a refund claim submitted by [REDACTED] related to sales of product to [REDACTED] Inc (“[REDACTED]”). [REDACTED] protested the denial of the refund in accordance with KRS 131.110. The amount of the refund requested plus applicable interest is set forth above.

██████████ sold water level switches and other parts to ██████████ for use in its construction of water tanks and towers. The parts at issue were delivered to ██████████ at ██████████, ██████████ KY, and ██████████ remitted the applicable sales tax on its receipts from these sales. In ██████████ 2011, ██████████ issued a certificate of exemption claiming sales for resale for these transactions that occurred during the period of ██████████ 2008 through ██████████, 2011. In ██████████ 2012, ██████████ filed a claim for the refund of the sales tax paid during this period for the sales referred to above. At issue are the following:

1. Whether the tangible personal property sold by ██████████ to ██████████ and delivered to its Kentucky business location are exempt from Kentucky sales tax as items considered “goods continuously in the stream of interstate commerce”.
2. Whether ██████████’s submission of a certificate claiming a resale exemption to ██████████ after the date of the transactions and after the tax had been collected and remitted is considered valid and accepted in good faith according to the provisions of KRS 139.270.

Regarding Issue 1, ██████████ contends that once the shipment of the items to ██████████ was made, interstate movement has begun and at that point, the items meet the criteria of being continuously in the stream of interstate commerce because ██████████ ultimately took the parts along with other materials to construction job sites out of state.

It is the Department’s position the parts shipped by ██████████ from an in-state location to ██████████ at its ██████████, KY location are subject to the 6% sales tax imposed under KRS 139.200 as retail sales of tangible personal property made within this Commonwealth. In addition, KRS 139.105(1)(b) provides that retail sales are sourced to the address where the customer receives the tangible personal property.

Furthermore, 103 KAR 30:190 § 2(1), addresses the exact fact pattern under consideration as follows:

Where tangible personal property is located in this state at the time of its sale (or is subsequently produced in this state), and then delivered in this state to the purchaser, the seller is subject to the sales tax if the sale is at retail and is consummated in Kentucky. A sale is not presumed to be made in interstate commerce if the purchaser or his representative receives physical possession of such property in this state. This is true notwithstanding the fact that the purchaser may after receiving physical possession of the property in this state transport or send the property out of the state for use outside the state or for use in the conduct of interstate commerce.

Section 4 of this Kentucky administrative regulation defines “consummated” as “the point at which a sales transaction is completed and accepted to the extent that both the seller and the purchaser are legally committed to fulfill the transaction.” Where a customer may subsequently take the property in question has no relevance to the taxability of the earlier retail sale subject to Kentucky sales tax. See Delta Air Lines, Inc. v. Revenue Cabinet, 689 S.W.2d 14 (Ky. 1985).

Regarding the issue of the certificate of exemption and claim for resale, the Department contends that the generation of a post-executed certificate of exemption does not create an exempt transaction under the provisions on KRS 139.270, which states:

139.270 Resale certificate and certificates of exemption.

(1) The resale certificate, certificate of exemption, or Streamlined Sales and Use Tax Agreement Certificate of Exemption relieves the retailer or seller from the burden of proof if the retailer or seller:

(a) Within ninety (90) days after the date of sale:

1. Obtains a fully completed resale certificate, certificate of exemption, or Streamlined Sales and Use Tax Agreement Certificate of Exemption; or

2. Captures the relevant data elements that correspond to the information that the purchaser would otherwise provide to the retailer or seller on the Streamlined Sales and Use Tax Agreement Certificate of Exemption; and

(b) Maintains a file of the certificate obtained or relevant data elements captured in accordance with KRS 139.720.

(2) The relief from liability provided to the retailer or the seller in this section does not apply to a retailer or seller who:

(a) Fraudulently fails to collect the tax;

(b) Solicits purchasers to participate in the unlawful claiming of an exemption; or

(c) Accepts an exemption certificate when the purchaser claims an entity-based exemption when:

1. The product sought to be covered by the exemption certificate is actually received by the purchaser at a location operated by the retailer or seller; and

2. The state in which that location resides provides an exemption certificate that clearly and affirmatively indicates that the claimed exemption is not available in that state.

For purposes of this paragraph, “entity-based exemption” means an exemption based on who purchases the product or who sells the product. An exemption available to all individuals shall not be considered an entity-based exemption.

(3) (a) If the department requests that the seller or retailer substantiate that the sale was a sale for resale or an exempt sale and the retailer or seller has not complied with subsection (1) of this section, the seller or retailer shall be relieved of any liability for the tax on the transaction if the seller or retailer, within one hundred twenty (120) days of the department's request:

1. Obtains a fully completed resale certificate, exemption certificate, or Streamlined Sales and Use Tax Agreement Certificate of Exemption from the purchaser for an exemption that:

- a. Was available under this chapter on the date the transaction occurred;
- b. Could be applicable to the item being purchased; and
- c. Is reasonable for the purchaser's type of business; or

2. Obtains other information establishing that the transaction was not subject to the tax.

(b) Notwithstanding paragraph (a) of this subsection, if the department discovers through the audit process that the seller or retailer had knowledge or had reason to know at the time the information was provided that the information relating to the exemption claimed was materially false, or the seller or retailer otherwise knowingly participated in activity intended to purposefully evade the tax that is properly due on the transaction, the seller or retailer shall not be relieved of the tax on the transaction. The department shall bear the burden of proof that the seller or retailer had knowledge or had reason to know at the time the information was provided that the information was materially false.

(4) Notwithstanding subsections (1) and (3) of this section, the seller or retailer may still offer additional documentation that is acceptable by the department that the transaction is not subject to tax and to relieve the seller or retailer from the tax liability.

(5) If the department later finds that the retailer or seller complied with subsections (1), (3), and (4) of this section, but that the purchaser used the property in a manner that would not have qualified for resale status or the purchaser issued a certificate of exemption or a Streamlined Sales and Use Tax Agreement Certificate of Exemption and used the property in some other manner or for some other purpose, the department shall hold the purchaser liable for the remittance of the tax and may apply penalties provided in KRS 139.990.

This statute addresses from the perspective of the retailer relief from tax liability burden of proof and good faith for transactions for which that retailer has not collected the tax. For example, subsection 1 establishes 90 days after the date of the sale as the deadline for the retailer to obtain a completed exemption or resale certificate from the customer to be granted general liability relief on transactions where tax was not collected. The 120-day deadline in subsection 3

addresses transactions where the retailer has not collected tax from the customer and also has failed to obtain a valid exemption or resale certificate within the 90-day requirement of subsection 1. The refund claims at issue are for transactions for which tax was properly collected from the customer and remitted to the state. Rather than reselling the parts in question, [REDACTED] used the parts in contract work on job sites located out of state.

There is no statutory basis to refund tax to [REDACTED] on transactions that were properly taxed at the point of sale even if its customer ([REDACTED]) later makes a claim for resale when the actual facts of the transaction are contrary to the resale claim. Section 1 of 103 KAR 26:070 clearly provides that “all sales to contractors, subcontractors, builders or owners of building materials, fixtures and supplies which are to be incorporated or fabricated into any structure or improvement to real estate by the process of erecting, remodeling, or repairing such structure or improvement are subject to the sales or use tax at the time of sale to the contractor, subcontractor, builder or owner.” It is undisputed that the parts that were the subject of the sales in question were used in the construction process, by [REDACTED] and thus [REDACTED]’s sales of these parts to [REDACTED] were properly subject to sales tax. See 103 KAR 26:070 § 1. This reality cannot be altered by the subsequent issuance of a resale or exemption certificate.

For the reasons stated above, [REDACTED]’s refund claim of \$ [REDACTED] plus applicable interest, was properly denied by the Department of Revenue.

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.

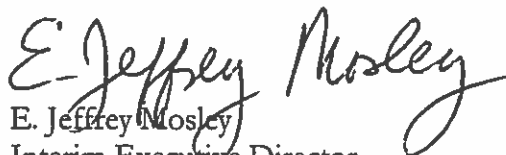
The petition of appeal must be in writing and signed by the petitioner or appellant. Filings by facsimile or other electronic means shall not be accepted.

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

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[REDACTED]

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