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LORI HUDSON FLANERY
Secretary

THOMAS B. MILLER
Commissioner

In the matter of:

[redacted], INC.

Contact: [redacted]

FINAL RULING NO. 2013-30
May 23, 2013

Use Tax Assessment
January 1, 2007 to December 31, 2010

FINAL RULING

The Kentucky Department of Revenue (DOR) has a use tax assessment against [redacted], Inc. ([redacted]) for the audit period January 1, 2007 to December 31, 2010. The following schedule reflects the total outstanding liability still at issue:

Period	Net Tax Due	Interest as of 5/23/13	Penalty	Total due per period
01/01/07-12/31/07	$[redacted]	$[redacted]	$[redacted]	$[redacted]
01/01/08-12/31/08	$[redacted]	$[redacted]	$[redacted]	$[redacted]
01/01/09-12/31/09	$[redacted]	$[redacted]	$[redacted]	$[redacted]
01/01/10-12/31/10	$[redacted]	$[redacted]	$[redacted]	$[redacted]
TOTALS	$[redacted]	$[redacted]	$[redacted]	$[redacted]

During the audit period, [redacted] was a pure freight company. That is, it did not sell tangible personal property but instead only shipped or delivered pre-packaged boxes or pallets for others.

As a result of the DOR's sales and use tax audit, [redacted] was issued an assessment totaling $[redacted] in tax, plus applicable interest and penalties. [redacted] protested a portion of this assessment and remitted a payment of the tax, interest and penalty comprising the non-contested portions, leaving at issue the amounts set forth in the above schedule. The items at issue are items purchased that [redacted] believed to be exempt under KRS 139.480(32)(a). Other than stating that it does not believe that the contested items were subject to tax, [redacted] has provided no supporting statement as required by KRS 131.110.

At issue are the following:

1) Whether [redacted] has complied with and met the requirements for exemption under KRS 139.480(32)(a) and Kentucky Regulation 103 KAR 26:110 §§ 2 and 3; and
2) Whether [redacted] has complied with the supporting statement requirement of KRS 131.110(1) pertaining to its protest of the tax assessment at issue.

Regarding the first issue, [redacted] is not in compliance. The DOR's position is while KRS 139.480(32)(a) exempts truck repair and replacement parts, 103 KAR 26:110 provides the administrative framework under which taxpayers must qualify for the truck repair and replacement part exemption. This administrative regulation states that the taxpayer must apply for the truck part direct pay authorization ("TP DPA") and comply with the certificate and filing requirements once the DOR issues that taxpayer a TP DPA. Failure to document qualification for a TP DPA will result in a denial of the application and failure to comply with the authorization requirements will result in termination of the authorization. In this case, [redacted] has not applied for and does not hold a TP DPA.

KRS 139.480(32)(a) states in part:

> Repair or replacement parts for the direct operation or maintenance of a motor vehicle, including any towed unit, used exclusively in interstate commerce for the conveyance of property or passengers provided the motor vehicle is licensed for use on the highway and its declared gross vehicle weight with any towed unit is forty-four thousand and one (44,001) pounds or greater. Nominal intrastate use shall not subject the property to the taxes imposed by this chapter.

103 KAR 26:110 (2) and (3) states:

> Section 2. Application Process. (1) The applicant shall complete the Application for Truck Part Direct Pay Authorization, Revenue Form 51A160 (October 2003).
> (2) To qualify for the TP DPA, the applicant shall be:
> (a) Designated as an interstate motor carrier with the Federal Motor Carrier Safety Administration and the Kentucky Transportation Cabinet;
> (b) Registered with a Kentucky sales and use tax account number or a Kentucky consumer use tax account number; and
> (c) Operating one (1) or more motor vehicles exclusively in interstate commerce.
> (3) The cabinet shall issue qualifying applicants a TP DPA (Revenue Form 51A161).
>
> Section 3. Exemption Procedures. The TP DPA holder shall:
> (1) Issue a copy of the authorization to all its truck part vendors:
> (2) Report and remit the sales or use tax to the Revenue Cabinet on purchases of repair and replacement parts used on nonqualifying motor vehicles that the purchaser's vendor would have remitted if the authorization had not been issued;
> (3) Report and pay all taxable purchases in accordance with KRS 139.540, 139.550, 139.560 and 139.590;
> (4) Maintain records pursuant to KRS 139.720(2); and
> (5) File by February 15 of each year the "Truck Part Direct Pay Authorization Purchase Report," Revenue Form 51A162 (October 2003), to report the total tax savings from purchases of repair and replacement parts that are exempt from sales and use tax pursuant to KRS 139.480(32).

Regarding the second issue, by letters dated [redacted], 2012, [redacted], 2012, [redacted], 2012 and [redacted], 2013 DOR requested from [redacted] documentation substantiating its entitlement to the TP DPA. [redacted] did not provide the documentation requested.

In light of the foregoing, [redacted] has not complied with the supporting statement requirement of KRS 131.110(1), which states in relevant part:

> The protest shall be accompanied by a supporting statement setting forth the grounds upon which the protest is made.

The Kentucky courts have held this statutory provision imposes upon a taxpayer protesting an assessment or a refund denial as a legal duty to provide the DOR with "something more substantial than mere denials of tax liability." Eagle Machine Co., Inc. v. Commonwealth ex rel. Gillis, 698 S.W.2d 528, 530 Ky. App. (1985). In order to make a valid protest, a taxpayer must "provide financial statements, records or some other documentation that would allow the DOR some basis for reconsideration.

The courts have further held that KRS 131.110(1) is "mandatory in nature" and that failure to submit documentation as it requires will result in a taxpayer's loss of the right to further review of the assessment or refund denial in question. Scotty's Construction Co. v. Revenue Cabinet, 779 S.W,2d 234 Ky. App. (1989). In both Scotty's Construction and Eagle Machine, the taxpayers failed to provide appropriate documentation in support of their denials of tax liability, despite being given ample opportunity to do so. The same is true in this matter.

Penalties have been assessed pursuant to KRS 131.180(2) because of [redacted]'s failure to timely pay at least 75% of the tax determined to be due by the DOR. [redacted] has not shown that the penalties were erroneously applied and it has failed to demonstrate that the failures triggering the penalties' imposition were due to reasonable cause.

Therefore, the outstanding sales and use tax assessment totaling $[redacted] (plus applicable penalty and interest) is a legitimate liability of [redacted] 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 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 KAR1:010, 802 KAR 1:010 and KRS 131.340-131.365 and KRS Chapter 13B. Final 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 response 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 himself in these 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 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

CERTIFIED MAIL
RETURN RECEIPT REQUESTED