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LORI HUDSON FLANERY
Secretary

THOMAS B. MILLER
Commissioner

In the matter of:

██████████, INC.

Contact: ██████████

Final Ruling No. 2013-41
July 15, 2013

Denial of Sales and Use Tax Refund Claims
for the periods May 1, 2011 through June 30, 2011

FINAL RULING

Period	Amount of Refund	Interest as of 7/15/13	Total
05/01/11 - 05/31/11	\$██████████	\$██████████	\$██████████
06/01/11 - 06/30/11	\$██████████	\$██████████	\$██████████
TOTAL	\$██████████	\$██████████	\$██████████

██████████, Inc. ("██████████") is an out-of-state vendor registered in Kentucky to collect sales and use tax. On ██████████, 2012 ██████████ submitted the two separate refund claims that sought refunds of the taxes it remitted on certain sales of tangible personal property for the periods of May 1, 2011 through May 31, 2011 and June 1, 2011 through June 30, 2011. The Kentucky Department of Revenue ("the Department") denied these claims. ██████████ protested that denial in accordance with KRS 134.580(3) and KRS 131.110. The amount of the refunds ██████████ requested plus applicable interest, are set forth above.

The sales of tangible personal property that were the subject of these refund claims were made to an out-of-state contractor named ██████████ ("██████████") that was doing business in Kentucky as a contractor. Pursuant to ██████████'s instructions, ██████████ delivered the tangible personal property to ██████████ at a site in Kentucky. ██████████ charged Kentucky tax on the applicable sales invoices relating to these transactions and remitted the taxes due on its Kentucky sales and use tax returns. ██████████ subsequently submitted a resale certificate to ██████████ claiming that its purchases from ██████████ were for resale and thus not subject to sales and use tax. ██████████ did not pay ██████████ the tax charged on the invoices.



At issue are the following:

- 1) Whether ██████████ accepted a resale certificate from ██████████ in good faith in accordance with KRS 139.270.
- 2) Whether ██████████ is entitled to the refunds it claims based upon its assertions that the sales of tangible personal property in question were not subject to tax.

Kentucky law clearly provides that “all gross receipts and all tangible personal property...sold by any person for delivery or access in this state” are “presumed” to be “subject to” the sales and use tax “until the contrary is established.” KRS 139.260. “The burden of proving the contrary is upon the person who makes the sale unless he takes from the purchaser a certificate to the effect that the property is... [p]urchased for resale according to the provisions of KRS 139.270.” *Id.*

For the periods in question, Subsection 1 of KRS 139.270 in turn stated as follows:

- (1) The resale certificate... relieves the retailer or seller from the burden of proof only if taken in good faith from a person who, at the time of purchasing the tangible personal property or digital property:
 - a. Indicates an intention to sell it in the regular course of business by executing the resale certificate; or

* * * * *

(Emphasis added.) Subsection 3 of KRS 139.270 further provided:

- (3) (a) “Good faith” shall be demonstrated by the retailer or seller if the retailer or seller:
 1. Accepts, within ninety (90) days subsequent to the date of sale, a properly completed resale certificate or certificate of exemption: and
 2. Maintains a file of the certificate or data elements in accordance with KRS 139.720.
- (b) If the retailer or seller has not obtained an exemption certificate or resale certificate or all relevant data elements within ninety (90) days subsequent to the date

of sale, in keeping with the good faith standard, the seller or retailer may offer additional documentation to the department that the transaction is not subject to tax after the ninety (90) day period which the department may consider.

(Emphasis added.)

As noted above, the requirements of taking a resale certificate in good faith include the element of a “properly completed resale certificate”. On this point, KRS 139.280(1) and (2) stated:

- (1) The resale certificate shall;
 - (a) Be signed by and bear the name and address of the purchaser;
 - (b) Indicate the number of the permit issued to the purchaser;
 - (c) Indicate the general character of the tangible personal property or digital property sold by the purchaser in the regular course of business.
- (2) The certificate shall be substantially in a form as the department may prescribe.

The resale certificate in question given ██████████ by ██████████ will not suffice to relieve ██████████ of its burden of proof under KRS 139.260 for at least three reasons. First, it did not contain a valid Kentucky sales and use permit number. Therefore, it was not a “properly completed resale certificate.” KRS 139.270(3)(a)1; 139.280(1)(b). Second, it was obtained more than ninety days after the dates of the sales in question. Therefore, it cannot be considered in having been accepted in good faith. KRS 139.270(3)(a)1. Finally, the resale certificate on its face indicated that the property was not being resold by ██████████, but was instead going to be used in an activity (the performance of a construction contract within the meaning of 103 KAR 26:070) that did not qualify as a resale of the property. Third, this certificate did not, as required by KRS 139.280(1)(c), indicate that ██████████ was selling or reselling property in the regular course of business, and was consequently not a “properly completed resale certificate” for this reason as well.

Turning to the second issue relating to these refund claims, it is clear that ██████████ has not met the burden imposed upon it by KRS 139.260 of proving that the sales in question were not subject to or exempt from tax. As noted above, the items of tangible personal property that were the subject of these sales were delivered to ██████████ at a Kentucky location. Thus, these sales were properly “sourced” to Kentucky in accordance with KRS 139.105(1)(b).

Furthermore, the information provided to the Department by ██████████ in connection with the refund claims clearly indicates that ██████████ was a contractor within the meaning of 103 KAR 26:070 § 2. As such a contractor, ██████████ was the consumer and not a reseller of the tangible personal property sold it by ██████████ and tax accordingly applied to those sales. See 103 KAR 26:070 §§ 1 and 4; Pete Koenig Co. v. Department of Revenue, 655 S.W.2d 496 (Ky. App. 1983).

For the reasons stated above, ██████████, Inc.'s refund claims totaling \$ ██████████, 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 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, 1278 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, requires 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 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 forth 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



