



ERNIE FLETCHER  
GOVERNOR

**DEPARTMENT OF REVENUE**  
FINANCE AND ADMINISTRATION CABINET  
200 FAIR OAKS LANE  
FRANKFORT, KENTUCKY 40620  
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ROBBIE RUDOLPH  
SECRETARY

In the matter of:

██████████, INC.

Contact: ██████████, Inc.  
██████████

FINAL RULING NO. 2004-38  
December 16, 2004

Sales and use tax assessments  
for the periods June 1, 1993 through May 31, 1997

**FINAL RULING**

On ██████████, 1997, Department of Revenue personnel completed a sales and use tax audit of ██████████, Inc. ("██████████"). In that audit, Department personnel discovered errors in three (3) areas: (1) unallowable deductions; (2) purchases of consumable supplies; and (3) tax due on installation sales. ██████████ timely protested the assessment and filed documents in support of its protest. The Department reduced the assessment based upon information provided by ██████████, resulting in a sales and use tax assessment of \$██████████. On ██████████, 2001, ██████████ remitted a check in the amount of \$██████████ for taxes due on unallowable deductions and consumable supplies. However, ██████████ did not pay any interest on that additional tax due. After crediting this payment, the additional sales and use tax due from this audit is \$██████████. Interest is accruing on this amount. ██████████ also owes interest on the earlier paid uncontested amount.

Period	Tax	Interest as of November 30, 2004	Total
CYE 12-31-94	\$██████████	\$██████████	\$██████████
CYE 12-31-95	\$██████████	\$██████████	\$██████████
CYE 12-31-96	\$██████████	\$██████████	\$██████████
CYE 12-31-97	\$██████████	\$██████████	\$██████████
Totals	\$██████████	\$██████████	\$██████████

The only issue remaining in this audit is ██████'s liability for use tax on carpet installed by ██████. It was ██████'s position that it was not a "contractor" because only ██████% of its sales were for installation. Further, ██████ claims that the sales at issue were to non-profit entities, such as governments, schools, churches, nursing homes and the YMCA, and therefore, should not be subject to tax. Finally, ██████ claims that in previous audits, Department personnel did not issue assessments for these types of transactions involving non-profit organizations. The Department will address each of these arguments.

1. ██████ is not a "contractor". All sales to contractors of materials or supplies which are to be incorporated into a structure are subject to either sales or use tax. 103 KAR 26:070 §1. This regulation defines the term "contractor."

The terms "contractor" and "subcontractor" are used herein in the common and ordinary acceptance of the terms and include both general contractors and subcontractors engaged in such building trades as carpentry, bricklaying, wall to wall carpeting, cement work, steel work, plastering, sheet metal work (including aluminum siding), roofing, tile and terrazzo work, cabinet work, electrical work, plumbing, central heating and air conditioning, painting, interior decorating, and storm window and permanent awning work. The terms "contractor" and "subcontractor" as used herein do not include any person who repairs tangible personal property.

103 KAR 26:070 §2(1)(emphasis added). It is the Department's position that ██████ installs flooring. ██████'s claim that it is not a contractor because only ██████% of its business activities were contract sales does not overcome the clear language of the regulation. There is no question that ██████ installed carpeting. Therefore, under the foregoing definition, ██████ was a contractor for its installation projects and its related purchases were subject to tax.

2. The purchases at issue are not subject to tax because the items purchased were resold to non-profit entities. The construction contractors' regulation is also very clear on this issue. "A contractor may not claim that the purchase of materials or fixtures is not subject to the tax because the property is to be used in fulfilling a contract with the federal government, state government or political subdivision thereof, or any department, agency, or instrumentality of the federal government, state government or political subdivision thereof, or with a religious, educational, or charitable institution." 103 KAR 26:070 § 3. Therefore, tax is applicable to purchases of tangible personal property made by ██████ for use in fulfilling its contracts with the exempt entities. See Pete Koenig Co. v. Department of Revenue, Ky. App., 655 S.W.2d 496 (1983); Crestwood Elec. Co. v. Revenue Cabinet, 1982 WL 14175 (Ky. Bd. Tax App. 1982).

3. Department personnel have previously audited ██████████ and not assessed tax on these transactions. The Kentucky Supreme Court addressed a similar issue in Revenue Cabinet v. Lazarus, Inc., Ky. 49 S.W.3d 172 (2001). In that case, the taxpayer claimed that because Cabinet auditors failed to assess use tax on newspaper inserts in 18 audits against six retailers over a 30-year period, based on the doctrine of contemporaneous construction, the Cabinet could not assess use tax on these inserts against Lazarus. The Court held that the failure of the Cabinet's auditors to assess these inserts in these 18 audits did not prevent the correct and proper assessment of tax under the law. "[W]e are no more disposed to hold that an administrative body can change the law by mistake than to hold it can do so on purpose." Id. at 175-176 (citation omitted)(brackets in original). Thus, the failure of Department personnel to properly assess ██████████ for use tax previously does not now prohibit the Department from assessing this tax as required by law.

You may appeal this final ruling to the Kentucky Board of Tax Appeals pursuant to the provisions of KRS 131.340-131.365, 103 KAR 1:010 and 802 KAR 1:010. If you decide to appeal this ruling, you must file your complaint or petition of appeal with the Clerk, Kentucky Board of Tax Appeals, 128 Brighton Park Boulevard, Frankfort, Kentucky 40601, 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 complaint or petition of appeal must:

1. Be filed in quintuplicate;
2. Contain a brief statement of the law and facts in issue;
3. State the petitioner's position regarding the law, facts or both; and
4. Include a copy of this final ruling letter with each copy of the complaint or petition.

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 2 (3) of 802 KAR 1:010:

1. An individual may represent himself in hearings before the Board;
2. An individual who is not an attorney may not represent any other individual, corporation, trust, estate, or partnership before the Board; and
3. An attorney who is not licensed to practice in Kentucky may practice before the Board if he complies with Rule 3.030(2) of the Rules of the Kentucky Supreme Court.

[REDACTED], Inc.  
December 16, 2004  
Final Ruling 2004-38

You will be notified by the Clerk of the Board of the date and time set for any hearing.

Sincerely,  
FINANCE AND ADMINISTRATION CABINET

A handwritten signature in cursive script that reads "Thomas H. Brown".

THOMAS H. BROWN  
Director  
Division of Protest Resolution

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED