



ERNIE FLETCHER  
GOVERNOR

**DEPARTMENT OF REVENUE**  
FINANCE AND ADMINISTRATION CABINET  
200 FAIR OAKS LANE  
FRANKFORT, KENTUCKY 40620  
www.kentucky.gov

ROBBIE RUDOLPH  
SECRETARY

In the matter of:

██████████ INC.

Contact: ██████████

FINAL RULING NO. 2005-36  
September 30, 2005

Sales and Use tax assessments for tax periods  
June 1, 1999 through September 30, 2002

**FINAL RULING**

The Department of Revenue has outstanding sales and use tax assessments against ██████████, Inc. for the taxable periods June 1, 1999 through September 30, 2002. The following table provides a breakdown of the amount of tax due, all assessed fees and penalties, as well as the accrued interest as of the date of this final ruling.

Period	Tax	Interest as of 06/27/05	Penalty	Fee	Total per Period
06/01/99 12/31/99	\$ ██████████	\$ ██████████	\$ ██████████	\$ ██████████	\$ ██████████
01/01/00 12/31/00	\$ ██████████	\$ ██████████	\$ ██████████	\$ ██████████	\$ ██████████
01/01/01 11/30/01	\$ ██████████	\$ ██████████	\$ ██████████	\$ ██████████	\$ ██████████
12/01/01 12/31/01	\$ ██████████	\$ ██████████	\$ ██████████	\$ ██████████	\$ ██████████
01/01/02 09/30/02	\$ ██████████	\$ ██████████	\$ ██████████	\$ ██████████	\$ ██████████

At issue are the following:

1. Whether gross receipts derived from sales of prepaid phone cards are subject to sales tax imposed by KRS 139.200;
2. Whether gross receipts derived from sales of pagers are subject to sales tax imposed by KRS 139.200; and
3. Whether tangible personal property given to the customer free of charge is subject to use tax imposed by KRS 139.310.

Concerning the first issue, it is the taxpayer's position that the phone cards were sold as a service for ██████████, thus, ██████████ is the party responsible for the collecting and remittance of any sales tax that is due.

It is the Department's position that ██████████ was the retailer of the phone cards as tangible personal property, thus, they are the party responsible for the collection and remittance of the sales tax to the Commonwealth of Kentucky.

Concerning the second issue, it is the taxpayer's position that they were only paid a commission by ██████████ on the sales of their pagers. The taxpayer argues that they only collected money for ██████████.

It is the Department's position that ██████████ was acting in the capacity of a retailer and, thus is liable for the sales tax on the transactions at issue.

Concerning the third issue, it is the taxpayer's position that they are not liable for use tax on phones given free of charge to customers who have signed a long-term contract for phone service. The taxpayer argues that if they had sold the phones for .08 cents or less, their liability would have been substantially lower.

KRS 139.310 states:

An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased on and after July 1, 1990, for storage, use, or other consumption in this state at the rate of six percent (6%) of the sales price of the property.

It is the Department's position that ██████████, Inc. is subject to use tax on the cost of the "giveaways" as imposed by KRS 139.310. Regarding the taxpayer's argument that if they had sold the phones instead of giving them to the customer free of charge their liability would have been lower, the Department must address the taxability of the transaction that took place, and not what

could have taken place. In this instance, the phones at issue were not the subject of a retail sale, but were instead given to the customers.

Based upon the foregoing, the Department of Revenue has determined that the sales and use tax audit assessments totaling \$██████████ (plus applicable interest) are deemed legitimate liabilities 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 40602-2120, 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 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.

██████████, Inc.


September 30, 2005 – Final Ruling No. 2005-36

Page 4

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, appearing to read "Thomas H. Brown".

THOMAS H. BROWN

Director

Division of Protest Resolution

CERTIFIED MAIL

RETURN RECEIPT REQUESTED

