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JONATHAN MILLER
Secretary

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Commissioner

In the matter of:

██████████ INC.

Contact: ██████████
██████████ Inc.

FINAL RULING NO. 2011-05
January 28, 2011

Sales and Use Tax Assessment
July 1, 2005 through December 31, 2008

FINAL RULING

The Kentucky Department of Revenue ("DOR") has an outstanding sales and use tax assessment against ██████████ Inc. ("██████████") for the audit period July 1, 2005 through December 31, 2008. The following schedule reflects the total protested liability, which has been paid in full:

Period	Tax	Interest as of 01/25/2010	Penalties	Total per Period
7/1/05-12/31/05	\$ ██████████	\$ ██████████	\$ ██████████	\$ ██████████
1/1/06-12/31/06	\$ ██████████	\$ ██████████	\$ ██████████	\$ ██████████
1/1/07-12/31/07	\$ ██████████	\$ ██████████	\$ ██████████	\$ ██████████
1/1/08-12/31/08	\$ ██████████	\$ ██████████	\$ ██████████	\$ ██████████
Total	\$ ██████████	\$ ██████████	\$ ██████████	\$ ██████████

██████████ protest states that it "is an online textbook retail outlet engaged as a third party seller through sites such as ██████████.com, ██████████.com, ██████████.com, ██████████.com, ██████████.com, ██████████.co.uk, ██████████.fr, and ██████████.ca, and a few smaller sites." The sales for which tax at issue has been assessed were those in which the books in question were shipped to Kentucky

residents from ██████████' ██████████, Kentucky location. ██████████ apparently did not deal with the purchasers of its products (books) directly. Instead, its protest states that it sold these items through the on-line businesses referred to in its protest (██████████.com, ██████████.com, etc.) under an arrangement similar to a consignment. The protest asserts that "all monies collected [were] sent to the online retailers" and "[t]hese businesses then disburse the money to [Books] periodically after they take out any selling fees and costs associated with the sales". According to the protest, this arrangement "is similar to the new 'ebay stores' that are opening across the country like www.██████████.com, and www.██████████.net (branch located in ██████████, KY), who consign items for sale online."

██████████' protest asserts that it is not liable for the tax due on the sales to Kentucky purchasers because it was not the retailer of the items in question and it was not a factor or agent subject to tax under 103 KAR 25:050. It further contends that the sales in question were exempt under KRS 139.480(17) as:

[t]extbooks, including related workbooks and other course materials, purchased for use in a course of study conducted by an institution which qualifies as a nonprofit educational institution under KRS 139.495. The term "course materials" means only those items specifically required of all students for a particular course but shall not include notebooks, paper, pencils, calculators, tape recorders, or similar student aids.

It appears to be undisputed that ██████████ shipped or delivered books to customers located in Kentucky from its Kentucky location. It is also undisputed that ██████████ received consideration for these transfers of title to, and possession of, these books. That is, the online companies (██████████.com, ██████████.com, etc.) whose efforts resulted in these sales admittedly remitted to ██████████ the amounts paid for these books, less their fees and costs incurred by them. Thus, taxable retail sales took place in this state. See KRS 139.200; 139.010(10), (11), (24), (25), (27), and (28).

Although ██████████ claimed deductions for all gross receipts for the audit period, it has not presented to the Department evidence sufficient to relieve it of liability for the tax due for these Kentucky sales. Under the facts presented, ██████████ either made these sales itself or acted as a factor or agent under 103 KAR 25:050 in that the items sold were entrusted to ██████████ by the online companies for delivery in this state.

██████████ has also failed to establish the application of KRS 139.480(17) to any of the sales for which tax has been assessed. The burden of proof rests upon the taxpayer to establish that all of the requirements of the exemption are satisfied. Epsilon Trading Co., Inc. v. Revenue Cabinet, 775 S.W.2d 937, 941 (Ky. 1989). Books has not met this burden.

Based upon the foregoing, and the information supplied as part of or in connection with ██████████' protest and supporting statement, the sales and use tax audit assessment total referred to

above is a legitimate liability due the Commonwealth of Kentucky and ██████' protest is hereby disallowed.

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