STEVEN L. BESHEAR
Governor

FINANCE AND ADMINISTRATION CABINET
DEPARTMENT OF REVENUE
501 HIGH STREET
FRANKFORT, KENTUCKY 40620
Phone (502) 564-3226
Fax (502) 564-3875
www.kentucky.gov

LORI HUDSON FLANERY
Secretary

THOMAS B. MILLER
Commissioner

In the matter of:

[redacted], LLC

Contact: [redacted], LLC
c/o [redacted], Shareholder
[redacted]

FINAL RULING NO. 2012-56
December 11, 2012

Sales and Use Tax assessments
for the periods
June 1, 2007 through May 31, 2011

FINAL RULING

The Kentucky Department of Revenue ("DOR") has an outstanding sales and use tax assessments totaling $[redacted] against [redacted], LLC ("[redacted]") for the audit period June 1, 2007 through May 31, 2011. The following schedule reflects the amount of outstanding tax and applicable interest accrued to date:

Period	Tax	Interest as of 12/11/12	Total
6/1/07 – 12/31/07	$[redacted]	$[redacted]	$[redacted]
1/1/08 - 12/31/08	$[redacted]	$[redacted]	$[redacted]
1/1/09 - 12/31/09	$[redacted]	$[redacted]	$[redacted]
1/1/10 – 12/31/10	$[redacted]	$[redacted]	$[redacted]
1/1/11 – 05/31/11	$[redacted]	$[redacted]	$[redacted]
Total	$[redacted]	$[redacted]	$[redacted]

[redacted] is a caterer for weddings, private parties, and businesses such as law firms and hospitals. It is therefore a retailer of prepared meals and various items (dishes, silverware, glasses, etc.) it sells or rents to its customers. See, e.g., KRS 139.200(1); 139.010(25) and (30); 139.485(1), (2)(f) and (3)(g).

At issue are the following:

1. Whether service charges should be excluded from [redacted]'s gross receipts subject to sales tax.
2. Whether [redacted] should be allowed a credit for sales tax paid to its vendor for the rental of items it in turn subsequently rented or leased to its customers.

Regarding the first issue, [redacted] contends that separately stated service charges on the invoices to its customers should be excluded from its gross receipts subject to sales tax. [redacted] cites the version of KRS 139.010(4)(c)4 effective for that portion of the audit period prior to August 1, 2009, which states:

> The amount charged for labor or services rendered in installing or applying the property or services sold, provided the amount charged is separately stated on the invoice, bill of sale, or similar document given to the purchaser.

[redacted] overlooks other relevant provisions of the definition of "gross receipts" subject to tax. These include the following provisions of KRS 139.010(4)(a) (effective until August 1, 2009), which stated in relevant part:

> "Gross receipts" and "sales price" mean the total amount or consideration, including cash, credit, property, and services, for which tangible personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for any of the following:
> 1. The retailer's cost of the property sold;
> 2. The cost of the materials used, labor or service cost, interest, losses, all costs of transportation to the retailer, all taxes imposed on the retailer, or any other expense of the retailer;
> 3. Charges by the retailer for any services necessary to complete the sale;

(Emphasis added.) The same language is found in KRS 139.010(10)(a), which was effective August 1, 2009 and governed the balance of the audit period and stated as follows:

> "Gross receipts" and "sales price" mean the total amount or consideration, including cash, credit, property, and services, for which tangible personal property digital property or services are sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for any of the following:

> 1. The retailer's cost of the tangible personal property or digital property sold;
> 2. The cost of the materials used, labor or service cost, interest, losses, all costs of transportation to the retailer, all taxes imposed on the retailer, or any other expense of the retailer;
> 3. Charges by the retailer for any services necessary to complete the sale;

(Emphasis added.) The charges in question were for services necessary for [redacted] to complete the sale of the prepared meals and not to "install" or "apply" tangible personal property.

[redacted]'s second contention is that the gross receipts from its rental of items to a customer in connection with an event called the [redacted] event should not have been included in its gross receipts because it paid sales tax for its rental of these items from its vendor, [redacted].

This argument is without merit because [redacted] paid sales tax in error to [redacted] The sales tax applies to all "[r]etail sales of... [t]angible personal property... within this Commonwealth." KRS 139.200(1). It was provided in KRS 139.010(18) until August 1, 2009 and in KRS 139.010(25), effective August 1, 2009, that

> "Retail sale" means any sale, lease, or rental for any purpose other than resale, sublease, or subrent.

(Emphasis added.) In other words, [redacted]'s rental of the items in question to [redacted] was not subject to tax. Instead, the tax was properly due on [redacted]'s subsequent rental of these items to its customer. The DOR has therefore correctly assessed tax to [redacted] for this rental.

For the reasons stated above the sales and use tax assessment totaling $[redacted] (plus applicable interest) described above are legitimate liabilities of [redacted], LLC 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 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

E. Jeffrey Mosley
Interim Executive Director
Office of Legal Services for Revenue

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

cc: [redacted], PSC
[redacted]