



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] INC.

Contact:

[REDACTED] Inc.

FINAL RULING NO. 2015-38
September 25, 2015

Sales and Use Tax Assessment
for the period September 1, 2008 through June 30, 2012

FINAL RULING

The Kentucky Department of Revenue ("DOR") has an outstanding sales and use tax assessment against [REDACTED] Inc. ("[REDACTED]") for its sale of tangible personal property for the audit period of September 1, 2008 through June 30, 2012. The following schedule reflects the outstanding tax assessment plus the applicable interest that has accrued through the date of this final ruling:

Period	Tax	Interest as of 09/25/2015	Total
09/01/2008 - 12/31/2008	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]
01/01/2009 - 12/31/2009	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]
01/01/2010 - 12/31/2010	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]
01/01/2011 - 09/30/2011	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]
10/01/2011 - 12/31/2011	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]
01/01/2012 - 06/30/2012	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]
TOTAL	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]

██████████ is a leading North American distributor of high quality components, equipment and materials for the electrical and telecommunications industries. ██████████ is a multi-state corporation and operates ██████████ locations.

As a result of an audit, the DOR originally issued ██████████ a sales and use tax assessment for the period September 1, 2008 through June 30, 2012 in the amount of \$██████████ in tax, plus amnesty assessment fees and applicable interest. ██████████ timely protested this assessment. ██████████ remitted \$██████████ for the uncontested portion of the assessment which represents \$██████████ in tax and \$██████████ in partial payment of the uncontested interest. Adjustments to the assessment were made and the revised assessment is \$██████████, plus applicable interest.

All of the sales of tangible personal property at issue were made to an entity that is referred to in the various invoices provided and the audit workpapers as “██████████,” “██████████” and “██████████” These entities (██████████, etc.) are identified on the relevant invoices or purchase orders as the purchasers. There does not appear to be any question but that the property sold was delivered in Kentucky and in particular ██████████. These entities used the materials they purchased for the installation of communications networks in association with building renovation and new construction at ██████████ Kentucky. In short, ██████████’s purchasers (further referred to below as “██████████”) were acting as contractors within the meaning of 103 KAR 26:070.

██████████ did not receive from ██████████ proper resale or exemption certificates within ninety (90) days after the date of the sales at issue. Subsequent detail provided by ██████████ still has not substantiated that the sales in question were actually for resale to the federal government rather than for use by ██████████ in performing contract services at construction projects at ██████████. See KRS 139.270(1) and (3)(a). ██████████ therefore remains liable for the tax unless it can prove that the sales are not subject to the tax. The burden of proof that a sale is exempt or not subject to tax rests upon ██████████ in accordance with KRS 139.260. (Note: The references to KRS 139.270 above are to the version of this statute in effect on July 1, 2009, which governs nearly all the transactions in question. 2009 Ky. Acts, ch. 73, § 8.)

██████████ asserts that its transactions with or involving ██████████ consist of “a series of nontaxable sales for resale.” It contends that ██████████’s sales of tangible personal property to ██████████ were for resale to the federal government. ██████████ primarily relies upon standard or form language in federal acquisition regulations that provide that title to property purchased by a contractor such as ██████████ for use in performing a government contract shall pass to or vest in the federal government upon delivery of the property to the government.

Under the sales and use tax law, all retail sales or purchases of tangible personal property are presumed subject to tax unless proven otherwise by the taxpayer. *Delta Air Lines, Inc. v. Revenue Cabinet*, 689 S.W.2d 14, 17 (Ky. 1985); KRS 139.260. The taxpayer has the burden of proving that a transaction is exempt from or not subject to sales and use tax. See also *Camera Center, Inc. v. Revenue Cabinet*, 34 S.W.3d 39, 41 (Ky. 2001); *Revenue Cabinet v. Hubbard*, 37 S.W.3d 717, 719 (Ky. 2000); *Epsilon Trading Co., Inc. v. Revenue Cabinet*, 775 S.W.2d 937, 941 (Ky. App. 1981).

It is undisputed that ██████████ sold tangible personal property to ██████████ in Kentucky. ██████████'s primary contention is that this property was *resold* to the federal government. As noted above, the sales tax applies to all “retail sales of... [t]angible personal property...made within this Commonwealth.” KRS 139.200(1)(a); 139.260; *Delta Air Lines, supra*. “Retail sales’ means any sale, lease, or rental *for any purpose other than resale, sublease, or subrent.*” KRS 139.010(28).

Thus, if this sale to ██████████ was for any purpose other than resale, sublease, or subrent, it was properly subject to Kentucky tax. As described above, the sale was indeed for purposes other than resale. That is, the property was used by ██████████ to perform or fulfill construction contracts or services for the federal government. Kentucky law is clear that these activities do not constitute the sale or resale of tangible personal property; instead, the person or entity to whom the property in question was sold (in this case ██████████) was the consumer of the property and tax applies to that consumer’s sale or purchase of the property. 103 KAR 26:070; *Pete Koenig Co. v. Dept. of Revenue*, 655 S.W.2d 496 (Ky. App. 1983). *Cf.* 103 KAR 26:010 § 1 and 2; 103 KAR 26:080; 103 KAR 30:270 § 5(1);

Pete Koenig is directly applicable to this situation. There, the taxpayer was

a plumbing, heating, air conditioning and mechanical contractor. It provided materials and labor pursuant to two contracts with the Transit Authority of River City in construction and renovation of a building for its new headquarters.

655 S.W.2d at 498. The Kentucky Court of Appeals relied upon 103 KAR 26:070 § 3 in upholding the sales and use tax assessment:

(3) 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, education, or charitable institution.

Id. (emphasis in italics added). The Court of Appeals stated that this regulation makes it clear that

a contractor is a consumer of materials it uses in fulfillment of its contracts even if the entity it contracts with is itself exempt from the tax. The regulation is neither arbitrary nor unconstitutional; it is a proper and reasonable clarification of the statute....

Id.

Thus, the fact that title to the property was vested in the federal government at some point in time in the course of the contract’s performance does not provide ██████████ with any immunity or exemption from the tax. *Alabama v. King & Boozer*, 314 U.S. 1 (1941). *See also United States v. New Mexico*, 455 U.S. 720 (1982). Based upon the information presented and outlined above, the property

in question was sold by ██████████ to ██████████ for use in the performance of U.S. Government contracts; ██████████ was therefore a consumer and not a reseller of that property. Tax therefore applies to these transactions and the involvement of the federal government does not change this. 103 KAR 26:070 § ; 103 KAR 30:235 § 5; *Pete Koenig, supra* ; *Alabama v. King & Boozer, supra*. The property was therefore sold by ██████████ for a purpose other than resale. The transactions in question between ██████████ and ██████████ were therefore retail sales subject to tax.

██████████ also relies upon a number of decisions from other states. These decisions are not controlling on a question of Kentucky law or the proper application of federal law, for that matter. *United States v. Kentucky Bar Association*, 439 S.W.3d 136, 146, n. 44 (Ky. 2014); *Epsilon Trading Co.*, 775 S.W.2d at 941-42. Under Kentucky law, tax applies to all retail sales that consist of sales of tangible personal property *for any purpose other than resale, sublease, or subrent*. KRS 139.200(1)(a); 139.010 (28). As we have seen above, the items in question were sold by ██████████ to ██████████ for a purpose other than resale. These sales by ██████████ were therefore subject to tax.

As we have also seen above, no exemption has been shown to apply to these retail sales. *See, e.g., Delta Air Lines, supra, King & Boozer, supra*, 103 KAR 30:235 § 4. ██████████ has also contended that the retail sales in question are exempt because they were made to an Indian tribe. Even assuming for the sake of argument that this is true, and it is not entirely clear that this is the case, the “principle” that accords Indians and Indian tribes immunity from state taxation “does not operate outside Indian country.” *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 464 (1995)(attached). *See also Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005); *State ex rel. Edmondson v. Native Wholesale Supply*, 237 P.3d 199 (Okla. 2010)(attached); *Matter of Protest of Val Tech & Associates*, 1997 WL 34501420 (N.M. Tax Rev. Dept. July 7, 1997)(attached); 1997 Nev. Op. Atty. Gen. No. 30, 1997 WL 816854 (Nev. A.G. December 31, 1997)(attached). Accordingly, ██████████ would be subject to any applicable Kentucky sales tax. As we have also seen above, it is ██████████ that is in fact liable for the tax here, as it did not take a resale or exemption certificate from ██████████.

For the reasons stated above, the outstanding assessment totaling \$ ██████████, in tax, plus applicable interest, is a legitimate liability 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 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. In accordance with Supreme Court Rule 3.020, if the appealing party is a corporation, trust, estate, partnership, joint venture, LLC, or any other artificial legal entity, the entity must be represented by an attorney on all matters before the Board, including the filing of the petition of appeal. If the petition of appeal is filed by a non-attorney representative for the legal entity, the appeal will be dismissed by the Board; 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,

DEPARTMENT OF REVENUE



Attorney Manager
Office of Legal Services for Revenue

CERTIFIED MAIL
RETURN RECEIPT REQUESTED