



**MATTHEW G. BEVIN**  
Governor

**FINANCE AND ADMINISTRATION CABINET**  
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**WILLIAM M. LANDRUM III**  
Secretary

**DANIEL P. BORK**  
Commissioner

In the matter of:

██████████ INC

Contact: ██████████

FINAL RULING NO. 2016-04  
February 10, 2016

Sales and Use Tax Assessment for  
Audit Period January 1, 2009 through December 31, 2012

### FINAL RULING

The Kentucky Department of Revenue ("DOR") has outstanding sales and use tax assessments against ██████████ Inc. ("██████████") for the periods January 1, 2009 through December 31, 2012. The following schedule reflects the total liability for this case with interest computed to February 10, 2016:

Audit Period	Tax Due	Interest as of 02/10/2016	Fees	Total
01/01/09 - 12/31/09	\$ ██████████	\$ ██████████	\$ ██████████	\$ ██████████
01/01/10 - 12/31/10	\$ ██████████	\$ ██████████	\$ ██████████	\$ ██████████
01/01/11 - 09/30/11	\$ ██████████	\$ ██████████	\$ ██████████	\$ ██████████
10/01/11 - 12/31/11	\$ ██████████	\$ ██████████	\$ ██████████	\$ ██████████
01/01/12 - 12/31/12	\$ ██████████	\$ ██████████	\$ ██████████	\$ ██████████
<b>TOTALS</b>	\$ ██████████	\$ ██████████	\$ ██████████	\$ ██████████

During the audit period, ██████████ operated as a retailer of pharmaceuticals, drug store items and gifts.

As a result of the sales and use tax audit, DOR issued ██████████ an assessment of \$██████████ in tax plus applicable interest and amnesty fees. ██████████ timely protested the assessment and remitted a payment of \$██████████ for the uncontested portion of the assessment. ██████████ provided additional documentation supporting deductions for non-taxable items that resulted in further reductions to the original assessment resulting in the outstanding assessments shown in the schedule above.

During the audit period, ██████████ claimed a deduction or exemption from sales and use tax for sales of what it contended were prescription drugs exempt from sales and use tax under KRS 139.472. These items apparently were sold under prescriptions and consisted of dietary supplements such as vitamins and minerals.

KRS 139.260 states:

For the purpose of the proper administration of this chapter and to prevent evasion of the duty to collect the taxes imposed by KRS 139.200 and 139.310, it shall be presumed that all gross receipts and all tangible personal property and digital property sold by any person for delivery or access in this state are subject to the tax until the contrary is established.

It further provides that “[t]he burden of proving the contrary is upon the person who makes the sale” unless an exemption or resale certificate or direct pay authorization is taken from the purchaser, which was not the case with the sales at issue here. *Id.*

The only exemptions provided under the sales and use tax for items that are claimed to be prescription drugs are:

KRS 139.472 (1)(a) and (b) state:

- (1) Notwithstanding any other provisions of this chapter, the taxes imposed by this chapter shall not apply to the sale or purchase of:
  - a. A *drug* purchased for the treatment of a human being for which a prescription is required by state or federal laws, whether the drug is dispensed by a licensed pharmacist, administered by a physician or other health care provider, or distributed as a free sample to or from a physician’s office;
  - b. An over-the-counter *drug* purchased for the treatment of a human being for which a prescription is issued;

The term “[d]rug” is specifically defined in KRS 139.472(3). This definition starts:

(2) As used in this section:

- a. “Drug” means a compound, substance, or preparation and any component of a compound, substance, or preparation, *other than food and food ingredients, dietary supplements, or alcoholic beverages as defined in KRS 139.485*, that is recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or a supplement to any of them, or is:
  1. Intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or;
  2. Intended to affect the structure of any function of the human body;

This definition explicitly provides that the term “[d]rug” does not include “dietary supplements... as defined in KRS 139.485.” “Dietary supplement” is in turn defined in KRS 139.485(3)(d) to mean:

Any product, other than tobacco intended to supplement the diet that;

1. Contains one (1) or more of the following dietary ingredients:
  - a. A vitamin;
  - b. A mineral;
  - c. An herb or other botanical;
  - d. An amino acid;
  - e. A dietary substance for use by humans to supplement the diet by increasing the total dietary intake; or
  - f. A concentrate, metabolite, constituent, extract or combination of any ingredient described above,
2. Is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid form or, if not intended for ingestion in such form, is not represented as conventional food and is not represented for use as a sole item of a meal or of the diet; and
3. Is required to be labeled as a dietary supplement, identifiable by the “Supplement Facts” box found on the label as required pursuant to 21 C.F.R. 101.36;

Based upon the foregoing, the sales in question are not exempt from sales and use tax. The items sold were dietary supplements and the provisions of law quoted above clearly provide that these kinds of items are not “drugs” that qualify for an exemption from tax under KRS 139.472.

██████████ was assessed amnesty fees pursuant to the Kentucky Tax Amnesty Act, KRS 131.400 to 131.445. Pursuant to KRS 131.440(1)(b)1.b., taxes assessed and collected after the applicable amnesty periods (i.e. October 1, 2012 through November 30, 2012) for taxable periods ending or transactions occurring prior to October 1, 2011, shall be charged a cost of collection fee of 25% at the time of the assessment. As the above schedule shows, the taxes to which these fees apply were assessed for periods ending or transactions occurring prior to October 1, 2011.

For the reasons stated above, the outstanding sales and use tax assessment totaling \$██████████ (plus applicable fees and interest) is a legitimate liability of ██████████ Inc. due to the Commonwealth of Kentucky.

This letter is the final ruling of the Kentucky 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 on 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 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

cc:

██  
Attn: ██  
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