

**COMMONWEALTH OF KENTUCKY
KENTUCKY BOARD OF TAX APPEALS
FILE NO. K11-R-01**

MILLER PIPELINE CORPORATION

APPELLANT

v.

ORDER NO. K-21900

**DEPARTMENT OF REVENUE,
FINANCE AND ADMINISTRATION CABINET,
COMMONWEALTH OF KENTUCKY**

APPELLEE

The parties in this case having filed cross-motions for summary disposition on a legal issue pursuant to 802 KAR 1:010, Section 10; having presented oral arguments on the issue February 22, 2012; and, the Board being otherwise sufficiently advised,

IT IS HEREBY ORDERED, that the Department of Revenue's Final Ruling No. 2010-95, dated December 10, 2010, is upheld based upon the following conclusions of law.

BACKGROUND

Miller Pipeline Corporation brought various pieces of construction equipment into Kentucky during the audit period 2002-2004. Miller had previously paid sales tax on its purchases of equipment in Indiana. Miller was charged with use tax when it brought the equipment into Kentucky for use here. Miller does not argue that it was not subject to the special use tax for construction equipment set forth in KRS 139.320, which provides in part as follows:

Use tax on machinery brought into state for construction project (1) the use tax of five percent (5%) is hereby levied upon the storage, use or other consumption in this state of any machines, machinery, tools or other equipment brought, imported or caused to be brought into this state for

use in constructing, building or repairing any building....Said use tax shall be computed on the basis of such proportion of the original purchase price of such property as the duration of time of use in this state bears to the total useful life.

The provisions of this section shall not be applicable with respect to sales of such property within this state or to the use, storage or consumption of such property when purchased for use in this state and in such cases the full sales or use tax shall be paid as in all other cases, irrespective of the period of intended use in this state.
(This statute was repealed in 2007).

Miller argues only that it should have been given a credit for the Indiana sales tax it paid, pursuant to the credit provision, KRS 139.510, which provides in pertinent part as follows:

Use tax credit for sales tax paid in another state under reciprocal arrangement. The tax levied by KRS 139.310 shall not apply with respect to the storage, use, or other consumption of tangible personal property in this state upon which a tax substantially identical to the tax levied under KRS 139.200 equal to or greater than the amount of tax imposed by KRS 139.310 has been paid in another state.

CONCLUSIONS OF LAW

The Kentucky construction use tax statute does not have a credit provision built in and the Kentucky credit statute, does not specifically address the special construction use tax in KRS 139.320--it only addresses the regular use tax in KRS 139.310. The Kentucky Supreme Court in 1981 in the case of Genex/London, Inc. v. Department of Revenue, 622 S.W.2d 499 (Ky. 1981) addressed the constitutionality of the credit statute, KRS 139.510, as it pertained to the use tax and construction equipment and in that case the Kentucky Supreme Court ruled against the taxpayer who was seeking the credit for sales tax paid to another state.

Miller argues briefly in a paragraph in its motion that the Genex opinion is not applicable to this case on the basis that in Genex, the constitutional challenge was directed at the credit statute, 139.510. Miller claims that it is challenging the constitutionality of 139.310 and

139.320 as they were applied to them by the Department of Revenue. Miller states, it "is not arguing that Kentucky lacked proper authority to impose its use tax...rather Miller is arguing that the United States Constitution's Commerce Clause requires that Kentucky provide a credit for another state's sales and use tax previously paid against previously paid Kentucky use tax."

(Appellant's motion page 3). Miller in other words, is arguing that the application of the construction use tax without the credit provision makes the construction use tax unconstitutional.

In Genex, the taxpayer brought construction machinery into the state which it had already used in the other state and wanted a credit for sales tax paid in the other state on the basis that the credit provision 139.510 violated the Commerce Clause. In holding against the taxpayer, the Supreme Court held as follows:

There is a marked and definite distinction between the tax imposed pursuant to the provisions of KRS 139.310 and that imposed by KRS 139.320. The constitutionality of these statutes has not been challenged. The constitutional challenge is directed at KRS 139.510, which provides a credit for use tax paid in another state on an item purchased in another state and first used in Kentucky (KRS 139.310). An item, however, purchased in another state and first used in the other state and then brought into Kentucky(KRS 139.320) does not qualify for the tax credit.

It is evident that in the minds of the legislators there existed a legitimate public purpose in allowing the tax credit, thereby equalizing the tax burden among each taxpayer coming within the purview of that particular classification. We find KRS 139.510 to be constitutional.

Id. at 503, 504.

The Genex Court has already clearly held that it is constitutional to deny the credit, if the taxpayer has already used the construction equipment in the other state and brings it in to Kentucky. The taxpayer who purchases construction equipment in Indiana and brings the equipment to Kentucky for its first use, receives a credit against Indiana sales tax, because he pays use tax under the normal use tax provisions, KRS 139.310.

The Supreme Court in Genex was asked to consider whether KRS 139.510 violated state law and the federal equal protection clause and the commerce clause. Here, while the taxpayer Miller is asking this Board to rule on the constitutionality of the application of the imposition statutes rather than the credit provision, the same argument is presented as was presented in Genex. While Miller claims it is focused on the imposition statutes, it is the fact that it did not get the credit that is the crux of its argument. Genex London is not distinguishable and is controlling. Accordingly, the Department of Revenue's final ruling, denying a refund of use tax paid, is upheld as a matter of law.

This is a final and appealable order. All final orders of this agency shall be subject to judicial review in accordance with the provisions of KRS Chapter 13B. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which an appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds upon which the review is requested. The petition shall be accompanied by a copy of the final order.

A party may file a petition for judicial review only after the party has exhausted all administrative remedies available within the agency whose action is being challenged, and within any other agency authorized to exercise administrative review.

A petition for judicial review shall not automatically stay a final order pending the outcome of the review, unless:

- (a) An automatic stay is provided by statute upon appeal or at any point in the administrative proceedings;
- (b) A stay is permitted by the agency and granted upon request; or
- (c) A stay is ordered by the Circuit Court of jurisdiction upon petition.

Within twenty (20) days after service of the petition of appeal, or within further time allowed by the Circuit Court, the KBTA shall transmit to the reviewing court the original or a certified copy of the official record of the proceeding under review in compliance with KRS 13B.140(3).

DATE OF ORDER: March 22, 2012

**KENTUCKY BOARD OF TAX APPEALS
FULL BOARD CONCURRING**

**BILL HAYES
CHAIR**