

**COMMONWEALTH OF KENTUCKY
BOARD OF TAX APPEALS
FILE NO. K11-R-20**

PINKERTON TOBACCO COMPANY LP

APPELLANT

v.

ORDER NO. K-23033

**FINANCE AND ADMINISTRATION CABINET
DEPARTMENT OF REVENUE**

APPELLEE

The parties presented this case at an evidentiary hearing on October 16, 2012. Following the hearing, the case was fully briefed by the parties. The Board enters the following findings of fact and conclusions of law on the single issue presented by the parties at the hearing--whether the inventory stored at the Owensboro, Kentucky warehouse qualifies for the state property tax exemption for inventory-in-transit as set forth in KRS 132.097.

BACKGROUND

This is a tangible property tax case which derives from a tangible tax audit for the 2003 and 2004 tax years, Swedish Match North America, Inc. ("Swedish Match") has two wholly owned subsidiaries, Pinkerton Tobacco Co. and Swedish Match Leaf Tobacco, Co. Pinkerton Tobacco Co. owns Pinkerton Tobacco Co., LP, the taxpayer in this case, which was created in 2002. The taxpayer manufactures tobacco products (loose leaf tobacco, pipe tobacco and snuff) in Owensboro, Kentucky and stores the products on-site until they are sold. The taxpayer only sells these products to Swedish Match. The undisputed evidence presented showed that 93% of the products are then sold to customers located out-of-state by Swedish Match. (TR 1:12, 1:13; 1:15; 2:27). Either Pinkerton or Swedish Match made arrangements with a third-party common

carrier to deliver the goods to those out-of-state customers. There was also undisputed evidence that in order to be fresh, the products had to be shipped out within six months of manufacture.

(1:14-1:15; 2:17-2:19; 2:29)

The exemption in question, KRS 132.097, provides as follows:

There shall be exempt from ad valorem tax for state purposes, personal property placed in a warehouse or distribution center for the purpose of subsequent shipment to an out-of-state destination. Personal property shall be deemed to be held for shipment to an out-of-state destination if the owner can reasonably demonstrate that the personal property will be shipped out-of state within the next six (6) months. (emphasis added)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Department of Revenue takes the position that the taxpayer was the owner on the assessment date and it did not sell the property to a buyer located out-of-state. Instead, it sold the property to Swedish Match, which took possession of the property in Kentucky at the warehouse dock. The Department does not deny that 93% of the product goes to an out-of-state destination, nor does it dispute that the products are shipped out within 6 months' time from the warehouse. The Department's witness testified that the entire crux of the dispute is that once the sale had been made to Swedish Match, the taxpayer could no longer be considered to have "reasonably demonstrate[d] that the personal property will be shipped out-of-state within the next six months,." as is required by the statute. He further explained that when you lose control of the product through an intervening sale, the Department believes that the taxpayer can no longer meet the "reasonable demonstration" requirement. (TR 2:18-2:20)

KRS 132.097 is neither ambiguous nor unclear, and it must be given its plain meaning. As the Supreme Court most recently stated, "[w]here the words of the statute are clear and unambiguous and express the legislative intent, there is no room for construction or interpretation and the statute must be given its effect as written." Kentucky Unemployment Commission v. Diana Cecil, 381 S.W.3d 238 (Ky. 2012). In addition, the Court has stated, "we

must look to the language of the statute to ascertain the intention of the legislature from the words used in enacting the statute rather than surmising what may have been intended, but was not expressed.” Metzinger v. Kentucky Retirement Systems, 299 S.W.3d 541 (Ky. 2009).

The statute in question does not require the out-of-state sale to take place in a certain manner, nor does it matter that the actual sale is first consummated in Kentucky before the goods go out-of-state, nor does it matter whether the owner is the one shipping the personal property out-of-state. This Board is bound by the plain words used in this statute. All that is required is a showing that the “owner can reasonably demonstrate that the personal property will be shipped out-of-state within the next six months.”

The Board finds that the undisputed evidence in this record shows that the taxpayer has reasonably demonstrated that the personal property in question in 2003 and 2004 was shipped out-of-state within six month’s time. The Department of Revenue does not dispute that this is what actually happened, nor does it dispute that the taxpayer provided it with this information during the audit. The Department appears to contend that a “reasonable demonstration” can never be made when the January 1 owner loses control of the goods before they are shipped out, even if that owner can actually show that the goods were shipped out-of-state, as was demonstrated in this case.

The Department appears to have created an un rebuttable presumption that intervening sales automatically disqualify the January 1 owners from claiming the exemption. This un rebuttable presumption is not supported by the law. The taxpayer in this case, has proven its case, despite the existence of the intervening sale, and made a reasonable demonstration that the tobacco products were to be shipped out-of-state within a six month period. While there may be taxpayers with intervening sales who cannot “reasonably demonstrate that the personal property will be shipped out-of-state within the next six (6) months,” that factual scenario is not before

the Board in this case. The Department's denial of the exemption to this taxpayer is neither supported by the law nor the evidence in the record, and the Department's final ruling is reversed. The parties have entered into a Joint Stipulation which addresses the resolution of the remaining issues upon entry of this Board's final order, and this Joint Stipulation is incorporated herein by reference.

FINAL ORDER

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. The Board's statute, KRS 131.370(1), provides that the Circuit Court of venue for any party aggrieved by any final order of the Kentucky Board of Tax Appeals, except on appeals from a county board of assessment appeals, is the Franklin Circuit Court or the Circuit Court of the county in which the party aggrieved resides or conducts his 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 on 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;

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- (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 Kentucky Board of Tax Appeals 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
AND MAILING: March 27, 2013**

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

**CECIL DUNN
CHAIR**