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Kentucky Board of Tax Appeals Rules Contractor Not Entitled to Use Tax Credit

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In *Miller Pipeline Corporation v. Dept. of Revenue*, File No. K11-R-01, Order No. K-21900 (3/22/2012), the Kentucky Board of Tax Appeals (the "KBTA") granted the Kentucky Department of Revenue's (the "DOR") Motion for Summary Disposition and upheld the DOR's denial of sales and use tax refund claims filed by an underground pipeline construction company, Miller Pipeline Corporation (the "Appellant"). The KBTA held that a "special" use tax statute, KRS 139.320, which imposed tax on construction equipment brought into Kentucky, was constitutional and that the DOR's denial of a use tax credit against previously paid Indiana sales and use tax on the same equipment did not violate Kentucky law or the U.S. Commerce Clause.

The Appellant brought various pieces of construction equipment into Kentucky during the audit period, 2002-2004. The Appellant previously paid Indiana sales and use tax on all of the equipment that was brought into Kentucky. The DOR assessed use tax against the Appellant's equipment brought into Kentucky pursuant to KRS 139.320, which was repealed in 2007 but was in effect during the audit period.

The DOR argued in its Motion for Summary Disposition or Judgment that the Appellant was not entitled to a credit for previously paid Indiana tax because the "special" use tax imposed under KRS 139.320 did not specifically provide for a credit. Further, the DOR argued that the credit provision set forth in KRS 139.510 did not specifically refer to KRS 139.320. The DOR also argued that the Kentucky Supreme Court's decision in *Genex/London, Inc. v. Kentucky Board of Tax Appeals*, 622 S.W.2d 499 (Ky. 1981) was controlling. *Genex/London* held that the DOR properly imposed use tax on construction equipment brought into Kentucky pursuant to the special use tax statute, KRS 139.320, but noted that the taxpayers did not challenge the constitutionality of the use tax statute, but only challenged the general credit provision, KRS 139.510.

The Appellant first argued in its Motion for Summary Disposition that it was entitled to the credit provided under KRS 139.510 because there was no language in KRS 139.320 or KRS 139.510 prohibiting such a credit. The Appellant also argued that the failure of the DOR to administer its use tax scheme so as to provide a credit against previously paid taxes on the same equipment to Indiana violated the U.S. Commerce Clause because it discriminated against interstate commerce by increasing the tax burden for out-of-state transactions, thereby coercing taxpayers to conduct intrastate, rather than interstate, business, citing *Oregon Waste Systems, Inc. v. Dept. of Envt'l. Quality,* 511 U.S. 93 (1994) and other U.S. Supreme Court authorities.

The Appellant also argued that *Genex/London* was distinguishable and not applicable since the Court did not have before it in that case the issue of the constitutionality of the underlying special use tax statute, but only the validity of the credit provisions, and in the case before the KBTA the constitutionality of the special use tax statute was challenged.

The KBTA agreed with the DOR, and noted that Kentucky's credit provisions set forth in KRS 139.510 do not specifically refer to the special construction use tax in KRS 139.320, but only refer to the "regular" use tax imposed under KRS 139.310. The KBTA then discussed the Kentucky Supreme Court's decision in *Genex/London,* and held that the decision was controlling. The KBTA held "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." *See* KBTA Order No. K-21900 at 3. The KBTA recognized that in *Genex/London* the taxpayers did not argue that the underlying special use tax statute was unconstitutional so that issue was not before the Court in that case and that the Appellant in the instant case did argue that the underlying special use tax statute was unconstitutional. However, the KBTA rejected the Appellant's argument that *Genex/London* was inapplicable because the question of the constitutionality of the underlying special use tax statute was not considered by the Court in that case. The KBTA also did not address the Appellant's arguments regarding U.S. Supreme Court authorities requiring a credit where sales and use tax is paid on property to another state.