STATE OF ALABAMA, DEPARTMENT OF REVENUE, vs. ACCENTS OF THE SOUTH, INC. 501-C Church Street Huntsville, AL 35801, Taxpayer.	§ § § § § §	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION DOCKET NO. S. 91-155

FINAL ORDER

The Revenue Department assessed sales tax against Accents of the South, Inc. for the period November, 1986 through September, 1989. The Department also denied a refund of sales tax filed by the corporation for the same period. The corporation is co-owned by Beverly Farrington and Debbie Fraley (together "Taxpayers"). The Taxpayers appealed the assessment and the denied refund to the Administrative Law Division. A hearing was conducted in the matter on August 16, 1993. The Taxpayers represented themselves. Assistant counsel Gwen Garner represented the Department.

This case involves two issues: (1) Is sales tax owed on interior decorator fees that are computed on a percentage of the cost of merchandise sold by the decorator; and, (2) Can the Department be estopped from collecting sales tax on an otherwise taxable transaction because the taxpayer was misled by a customer into believing that the transaction was tax-free.

The facts are undisputed.

The Taxpayers are interior decorators that provide decorating services and advice and also sell merchandise at retail to their customers. The Taxpayers initially purchase the merchandise at wholesale using their Alabama sales tax license.

The Department concedes that the Taxpayers are not liable for sales tax on their fees for service and advice not involving the sale of merchandise. However, the Department taxed the Taxpayers on their fees that were based on a percentage (35%) of the cost of merchandise sold to a customer. The Taxpayers had reported and paid sales tax only on their wholesale cost of the merchandise, and not on the 35% cost-plus fee.

Do the fees in issue constitute taxable gross receipts subject to sales tax?

"Gross receipts" is defined at Code of Ala. 1975, §40-23-1(a)(8) as the value proceeding from the sale of tangible personal property, without deduction for various costs, including ". . . labor or service cost . . ." The issue is whether the cost-plus decorator fees in issue constitute "labor or service cost" that cannot be deducted from taxable gross receipts, or whether those fees are unrelated to the sale of the merchandise and thus not taxable.

The Department's position concerning decorator fees is set out in Department Reg. 810-6-1-.81.01. That regulation provides generally that decorator fees are taxable if they are contingent on

the sale of property, even if separately stated on the invoice. Decorator fees are not taxable if they are provided for services not contingent on the sale of property. In other words, a decorator's fee based or computed on a percentage of the property sold is taxable, whereas a fixed hourly fee or a pre-set charge for services not based on the cost of merchandise is not taxable, even if merchandise is also sold by the decorator.

In my opinion, Department Reg. 810-6-1-.81.01 adequately explains under what circumstances decorator fees are subject to sales tax. The fees in issue were based on a percentage of the cost of merchandise sold by the Taxpayers. Consequently, the fees constituted a labor or service cost relating to the sale of the merchandise and must be included in taxable gross receipts.

The Taxpayers argue that their fees are analogous to labor fees charged by an automobile repair shop, which are not taxed by the Department. However, automobile repair labor fees are not taxed (if separately stated) because they are generally based on an hourly rate, not on a percentage of the cost of the repair parts sold by the repair shop. Consequently, auto repair labor charges are not taxed for the same reason that hourly rate decorator fees are not taxed.

A decorator must keep adequate records proving that a fee is an independent charge separate and apart from the sale of merchandise. Substance over form must control, and a decorator

cannot charge what appears to be an hourly or fixed rate fee which is in fact a fee based on the percentage of the cost of the merchandise sold. Each case must be decided on its own facts.

A second issue in dispute is the taxability of carpet purchased by the Taxpayers at wholesale and subsequently withdrawn and used by the Taxpayers on a furnish and install contract with a tax exempt entity, Wallace State College. The Taxpayers failed to include sales tax in their bid for the job because the College had notified them that the job would be tax-free.

The Taxpayers concede that tax is due[1], but argue that the Department should be estopped from assessing the tax because they were misled into believing that the job was tax-free. Unfortunately for the Taxpayers, the Department cannot be estopped from collecting a tax that is legally due because the Taxpayers relied on erroneous advice. Boswell v. Abex, 317 So.2d 317; State v. Maddox Tractor and Equipment Company, 69 So.2d 426. The above cases involved erroneous advice given by a Department employee. Certainly the same rule would apply to erroneous advice given by a third party customer. The above considered, the assessment in issue is upheld and judgment is entered against Accents of the South, Inc. for State sales tax in the amount of $4,794.84, with

[1] The tax is due under the "contractor" provision of Code of Ala. 1975, §40-23-1(a)(10). Department Reg. 810-6-1-.81.01(5) also warns interior decorators that tax is due on furnish and install contracts even if the customer is a tax exempt entity.

additional interest computed from the date of entry of the final assessment, February 27, 1991. The petition for refund in issue is also denied.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered on February 23, 1994.

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BILL THOMPSON
Chief Administrative Law Judge