

STATE OF ALABAMA,
DEPARTMENT OF REVENUE,

vs.

DALE KENNINGTON
403 West Woodland Drive
Dothan, AL 36302,

Taxpayer.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. S. 93-308

FINAL ORDER

The Revenue Department assessed State, City of Dothan and Houston County sales tax against Dale Kennington ("Taxpayer") for the period May 1990 through April 1992. The Taxpayer paid the tax and applied for a refund. The Department denied the refund and the Taxpayer appealed to the Administrative Law Division. A hearing was conducted on January 20, 1994. Ernest Clark and Gary Culp represented the Taxpayer. Assistant counsel Jeff Patterson represented the Department.

The issue in this case is whether gross receipts derived from the sale of commissioned portraits are subject to sales tax in Alabama.

The facts are undisputed.

The Taxpayer is an artist based in Dothan, Alabama. During the period in issue, the Taxpayer contracted with individuals to paint their portrait or the portrait of a family member. The Taxpayer would spend time getting to know the subject before painting the subject's portrait. The Taxpayer provided all materials necessary to complete the portrait. Beginning in mid-

1991, the Taxpayer also started painting selected landscape scenes that she liked. She sold her landscapes through a gallery. The Taxpayer agrees that the gross receipts derived from her landscapes are subject to sales tax. However, she argues that the gross receipts derived from her portraits are not taxable because she is providing an intangible professional service, and that the transfer of tangible personal property, the portrait itself, is only incidental to those services. I disagree.

The Alabama sales tax is straight-forward and applies to the gross receipts derived from the sale of all tangible personal property, unless specifically exempted by statute. Code of Ala. 1975, §40-23-2. There is no exemption from sales tax for paintings, portraits or other works of art. Accordingly, the gross receipts derived from the sale of commissioned portraits are subject to Alabama sales tax.

I see no difference for sales tax purposes between the Taxpayer's portraits and her landscapes. The fact that the portraits are of individuals is irrelevant, as is the fact that the Taxpayer visits and gets to know the personality of the individual before painting their portrait. Certainly the Taxpayer visits and studies the landscape scene that she intends to paint before painting it.

The Taxpayer argues that her portraits have "absolutely no value to anyone other than the family for whom they were created."

That may or may not be correct, depending on the subject and the

quality of the portrait. Leonardo da Vinci's "Mona Lisa" is a portrait. In any case, custom-built or special ordered items are subject to sales tax the same as mass-produced items.

The courts have ruled that the sale of tangible personal property by those engaged in a "learned profession" is incidental to the professional services provided and thus not subject to sales tax. "Learned profession" as defined by the courts are (some) doctors and lawyers. See, Lee Optical Company of Alabama v. State, Board of Optometry, 261 So.2d 17.

I agree with Justice Jones' dissent in Alabama Board of Optometry v. Eagerton, 393 So.2d 1373, at 1378, in which he questions the relevancy of the "learned profession" dichotomy for purposes of determining the applicability of sales tax. However, recognizing that the courts have created an exception for learned professions, with all due respect painting has not and should not be recognized as a learned profession. The Taxpayer undoubtedly uses great skill in her work, but if the use of skill or talent in creating a product qualifies a vocation as a learned profession, then all artisans such as master furniture makers, clothing designers/makers, etc. that also use skill and originality in designing or making their product would also qualify.

Finally, the Taxpayer points to the Torbett Commission Tax Reform Report in support of her case. The Torbett Commission sought to include services within the scope of the sales tax, and in its report included portrait services within the scope of

taxable services. However, the Torbett Commission Report was never adopted by the Alabama Legislature. The fact that the report included portrait services as a taxable service does not establish the Legislature's present understanding or intent that the sale of portraits is not now subject to sales tax.

The above considered, the refunds in issue were properly denied by the Department. This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered on August 8, 1994.

BILL THOMPSON
Chief Administrative Law Judge