STATE OF ALABAMA DEPARTMENT OF REVENUE, vs. NEAL L. ANDREWS, JR. 300 North 21st Street Birmingham, AL 35203, Taxpayer.	§ § § § §	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION DOCKET NO. S. 94-244

FINAL ORDER

The Revenue Department assessed use tax against Neal L. Andrews, Jr. ("Taxpayer") for the period October 1989 through June 1993. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on August 4, 1994. Tom Carruthers appeared for the Taxpayer. Assistant counsel Claude Patton and Beth Acker represented the Department.

The issue in this case is whether the Taxpayer is liable for Alabama use tax on numerous paintings purchased outside of Alabama that were subsequently stored or displayed by the Taxpayer in Alabama. That issue turns on whether the paintings were purchased at retail or at wholesale. Alabama use tax is due only if the paintings were purchased at retail outside of Alabama. See, Code of Ala. 1975, §40-23-61.

The facts are undisputed.

The Taxpayer, a successful businessman, moved from Birmingham, Alabama to Palm Beach, Florida in the mid-1980's. Soon after moving to Palm Beach, the Taxpayer met John Surovek ("Surovek"), a well-known art dealer. Surovek owns and operates an art gallery in

Palm Beach that specializes in 19th and 20th century American paintings.

The Taxpayer had little knowledge concerning paintings or art in general prior to meeting Surovek. Nonetheless, after numerous discussions, the Taxpayer and Surovek verbally agreed to work together to build a collection of American paintings with a common theme (women and children). Their goal was to purchase individual paintings at below market price and then resell the entire collection in a single transaction for a large profit.

The Taxpayer provided the money to pay for the paintings, while Surovek used his knowledge, experience and contacts to find and purchase paintings that fit the collection profile. The parties agreed that the paintings would be purchased in the name of Surovek's gallery because the publicity enhanced the reputation of both the gallery and the individual paintings. Surovek initially paid for each painting and was reimbursed by the Taxpayer. The parties also agreed that because the Taxpayer paid for the paintings, he would also have title to the paintings. To document that agreement, Surovek issued an invoice to the Taxpayer for each painting.

Surovek received a 10% commission on each painting, which generally covered the expenses involved in searching for and obtaining the painting. The Taxpayer and Surovek also agreed that Surovek would receive 30% of the gross sales price of the entire collection, which together with the initial 10% commission would

total approximately 50% of the gross profit.

The Taxpayer and Surovek usually discussed and agreed on which paintings would be purchased. However, Surovek was authorized to purchase a painting without the Taxpayer's prior approval if it fit the collection profile and was a bargain. Surovek also sold several paintings initially purchased for the collection after it was decided that those paintings did not fit the collection's common theme.

After a painting was purchased for the collection, Surovek had the painting restored and/or reframed if necessary. The painting was then displayed either at Surovek's gallery in Palm Beach or at another gallery or museum as arranged by Surovek. A number of the paintings were eventually displayed at the Birmingham Museum of Art. Those paintings are the subject of the use tax assessment in issue. The Taxpayer agreed to show the paintings in Birmingham because the exposure enhanced the reputation of the collection. The museum also provided a controlled atmosphere and insured the paintings while they were on display.

The Birmingham Museum unexpectedly closed for extensive renovations in mid-1993. Consequently, the paintings were moved for protection to the basement of an office building owned by the Taxpayer in Birmingham.

In late 1993, museum officials asked the Taxpayer if he would display the paintings to help recruit a new director for the

museum. Because no other suitable place was available, the Taxpayer agreed to hang the paintings at his prior residence in Birmingham. The house was unoccupied at the time. The museum subsequently showed the paintings to several prospective museum directors. The Taxpayer and Surovek also showed the paintings to potential purchasers, representatives of other museums, a renowned art historian that the Taxpayer and Surovek are trying to persuade to write a catalog to be used in selling the collection, and to Christie's, a famous auction house that the Taxpayer and Surovek hope will sell the collection. The paintings, as of the hearing date in this appeal, were still on display in Birmingham. At no time have any of the paintings ever been displayed at the Taxpayer's primary residence or his office.

Alabama use tax is levied on tangible personal property used, stored or consumed in Alabama that is purchased at retail outside of Alabama. The Department claims that Surovek initially purchased the paintings and then resold the paintings to the Taxpayer at retail, in which case Alabama use tax is due. The Department argues that regardless of whether the Taxpayer intended to resell the paintings, the sales by Surovek to the Taxpayer were at retail because the Taxpayer is not a licensed dealer, citing State v. Advertiser Company, 337 So.2d 942.

The Advertiser Company case does hold that a sale to an unlicensed purchaser is a retail sale for sales and use tax

purposes, even if the sale is for resale. Advertiser Company, at p. 945. However, the Department's argument fails because Surovek did not independently purchase and then resell the paintings to the Taxpayer. Rather, the Taxpayer and Surovek together purchased the paintings as part of a joint venture or partnership. See generally, Taxpayer's brief at pages 1-12 and the cases cited therein.

Surovek, who is a licensed dealer, purchased the paintings in the name of his gallery on behalf of the joint venture or partnership. The parties had previously agreed that Surovek would find and buy the paintings, and that the Taxpayer would pay for and have title to the paintings. They would then split the profit from the eventual sale of the entire collection. Surovek issued an invoice to the Taxpayer for each painting only to document that the Taxpayer owned the paintings, not to document a sale by Surovek to the Taxpayer. In substance, Surovek purchased the paintings as agent for the Taxpayer in conjunction with the partnership or joint venture. Because Surovek is a licensed retailer, the paintings were purchased at wholesale and it is irrelevant that the Taxpayer is not a licensed retailer. The Department also claims that the Taxpayer did not purchase the painting for resale, either because the Taxpayer is a collector or because he purchased the paintings as an investment. I disagree.

First, the Taxpayer is not a collector. A collector is

generally considered as someone that purchases an item for his own private use and enjoyment, not for resale. Clearly, the Taxpayer intended to resell the paintings and did not purchase the paintings for his own personal and private use and enjoyment. The Taxpayer had little interest in art prior to meeting Surovek, and he never displayed the paintings at his personal residence or office, as would a collector.

I agree that the Taxpayer purchased the paintings as an investment. However, the purchase of an item as an investment may or may not be a retail transaction, depending on whether the item was purchased primarily for resale. For example, if an individual purchases a painting for his own private use and enjoyment, the purchase is at retail even though the painting may still be considered an investment that might be resold in the future. On the other hand, if the painting was purchased primarily for resale, the painting would clearly still be an investment, but the purchase would be at wholesale because the individual's primary purpose in buying the painting was for resale. In that context, inventory purchased at wholesale by a retail business for resale would also be considered an investment, but it would also be purchased at wholesale for resale.

In this case, the Taxpayer and Surovek purchased the paintings as investments, but they also clearly intended to resell the paintings. Consequently, the paintings were purchased at wholesale

and Alabama use tax is not due. Rather, sales tax would be due on the retail sales price when and where the paintings are eventually sold to the ultimate consumer.

The above considered, the use tax assessment in issue is dismissed. This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered on January 3, 1995.

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BILL THOMPSON
Chief Administrative Law Judge