THIGPEN PHOTOGRAPHY 2105 Vivian Drive Mobile, Alabama 36693,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 95-127
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed sales tax against Thigpen Photography, Inc. for the period August 1991 through July 1994. Thigpen Photography is owned and operated by Alec C. Thigpen ("Taxpayer"). The Taxpayer paid the tax, and then applied for a refund. The Department denied the refund, and the Taxpayer appealed to the Administrative Law Division. A hearing was conducted on May 10, 1995. Charles Graddick represented the Taxpayer. Assistant Counsel Mark Griffin represented the Department.

This case involves two issues:

(1) Are various services provided by the Taxpayer subject to sales tax; and,

(2) If the services are taxable, should the Department be estopped from collecting tax on those services during the subject period because the Department had misinformed the Taxpayer that the services were not taxable.

Thigpen Photography was started by the Taxpayer's father in 1947. The Taxpayer took over the business in 1983. The Taxpayer testified that he contacted the Revenue Department's District

Office in Mobile at that time, and was informed that photographic services were not subject to sales tax. Those services are discussed in detail later, and include consultation fees, rush charges, search and stock fees, and typesetting and mosaic services. The Taxpayer's accountant later contacted the Department and was also told that separately stated photographic services were not subject to sales tax. The Taxpayer subsequently billed its customers by separately itemizing each service on the invoice. The Taxpayer then collected and remitted tax on only the separate charge for the photograph itself.

The Department audited the Taxpayer for the subject period and assessed tax on the separately stated services. Those services include the following:

(1) Photographic services - This general category includes consulting fees and travel time by the Taxpayer. These fees are for consulting with the customer, and deciding when, where and how to shoot. The Taxpayer charges a fixed daily or hourly rate for his time. The customer is billed regardless of whether the Taxpayer subsequently sells anything to the customer.

(2) Rush charges - These charges are an extraordinary or additional charge for fast printing and delivery of a photograph.

(3) Search fees - The Taxpayer maintains an inventory of photographs and negatives. The Taxpayer charges a search fee for his time spent in researching the inventory on behalf of a customer. The search fee is charged whether or not a photograph is

subsequently sold to the customer.

(4) Stock fees - If a customer orders a photograph from inventory, the Taxpayer charges a stock fee in addition to any search fee or the charge for the photograph itself.

(5) Typesetting - The Taxpayer is sometimes requested to label or put directional or other markings on a photograph. The Taxpayer charges a separate fee for the typesetting and overlay necessary to prepare the photograph to the customer's specifications. In some cases, the Taxpayer provides typesetting service on a photograph provided by the customer.

(6) Mosaic fees - These services involve the combining of several photographs into a single large picture. For example, if an industrial site is too large to be included in a single photograph, the Taxpayer must take several pictures to capture the entire area. The Taxpayer then combines or pieces together the separate photographs into a single large picture. The Taxpayer makes a separate mosaic charge for that service. As with typesetting, the mosaic services are sometimes performed using photographs already belonging to the customer.

ESTOPPEL

The Taxpayer testified that both he and his accountant were informed by the Revenue Department that tax was not due on separately stated service and labor charges. I have no reason to doubt the Taxpayer. However, Alabama law is clear that the Revenue Department cannot be estopped from properly assessing and

collecting the correct tax due because a taxpayer was given erroneous information or advice by a Department employee. State v. Maddox Tractor and Equipment Co., 69 So.2d 426 (1954); Boswell v. Abex Corp., 317 So.2d 317 (1975). As stated by the Alabama Supreme Court in Boswell v. Abex Corp., supra, at page 319:

> "Taxpayers have no vested right to rely upon an erroneous interpretation of the statute exempting them from taxation, and under Section 100 of the Constitution of Alabama of 1901, the taxing authority has no discretion in a matter of this kind. The reason for this rule is that in the assessment and collection of taxes, the State is acting in its governmental capacity and it cannot be estopped with reference to the enforcement of taxes, even when the taxpayer was advised that it was not responsible for a tax. Were this not the rule the taxing officials could waive most of the State's revenue. *State v. Maddox Tractor & Equipment Co.,* 260 Ala. 136, 69 So.2d 426; *Crutcher Dental Supply Co. v. Rabren,* 286 Ala. 686, 246 So.2d 415."

The Taxpayer's representative makes a compelling fairness argument as to why estoppel should apply in this case. But the Alabama Supreme Court has clearly stated that the Revenue Department cannot be estopped in the assessment and collection of taxes. The Taxpayer's estoppel argument is accordingly rejected.

TAXABILITY OF TAXPAYER'S SERVICES

Taxable "gross proceeds" is defined at Code of Ala. 1975, §40-23-1(a)(6) as "[T]he value proceeding or accruing from the sale of tangible personal property . . . without any deduction on account of . . . labor or service costs . . . or any other expenses whatsoever . . . ". That is, labor or services performed by the seller as a part of and necessary to complete the sale are taxable.

The difficult question is determining what labor or services are performed as a necessary part of the sale.

Clearly, labor and services necessary to manufacture or otherwise prepare an item for sale are taxable. For example, separately stated engraving services performed by a trophy shop have been held to be taxable because the engraving was necessary to prepare the plaques, trophies, etc. for sale. State v. Mary B. Montgomery, Admin. Docket No. S. 94-132, decided December 29, 1994.

Transportation and delivery charges are also taxable if performed by the seller prior to the close of the sale. East Brewton Materials, Inc. v. State, Department of Revenue, 233 So.2d 751 (Ala.Civ.App. 1970). See also, State v. Pinkston, Admin. Docket No. S. 94-294, decided January 30, 1995, in which separately stated gravel loading charges performed by a third party acting as agent for the gravel seller were held to be taxable.

On the other hand, labor or services not required or necessary to manufacture, prepare or deliver the sale item, or not otherwise performed by the seller as a part of the sale, are not taxable.

A fixed rate fee for services or labor that is not based on or contingent on the subsequent sale of property is not taxable. For example, fixed rate consultation fees charged by an interior decorator that are not contingent on the sale of property by the decorator are not taxable, even if the decorator subsequently sells tangible personal property to the customer. See, Department Reg.

810-6-1-.81.01(4).[1]

[1]In State v. Accents of the South, Admin. Docket No. S. 91-155, decided February 20, 1994, fees charged by a decorator based on a percentage of the sales price of furniture were held to be taxable. The opinion confirmed, however, that if the decorator had charged a fixed rate not contingent on the sale of property, the fixed rate fee would not have been subject to sales tax.

In summary, the general rule is that service or labor performed by a seller is taxable, even if separately stated on the invoice, if the service or labor is necessary to manufacture, complete, or otherwise prepare the item for sale or for delivery by the seller, or if the charge is based on a percentage of the sale price and is contingent on the sale of the item.[2]

The Taxpayer cites State v. Harrison, 386 So.2d 461 (1980), and argues that he could designate his business as an advertising agency and thus owe no sales tax. In Harrison, the Court of Civil Appeals held that an advertising agency in the business of rendering public relations services was not liable for sales tax on catalogs and brochures provided to the customer. Comparing the advertising agency to a dentist or a lawyer, the Court held that the advertising agency was primarily providing a professional service to its customers. The transfer of catalogs and brochures was held to be only incidental to that service, and thus not a taxable sale. The Court stated as follows, at page 461:

> "Just as a lawyer depends upon his legal expertise in preparing a deed or will, the appellee must rely upon his

[2]While transportation by the seller is taxable if performed in conjunction with and prior to the close of a sale, the Department's long-standing position is that separately stated installation charges are not taxable. See, Department Reg. 810-6-1-.81.

> creativity in producing a catalogue or brochure suitable for his individual client. We think the creation of a catalogue or brochure by the appellee and the subsequent transfer of these materials to a client after being printed is incidental to the professional service being rendered."

Prior to Harrison, Alabama's courts had held that individuals engaged in a "learned profession", i.e. lawyers, dentists, and some doctors, are primarily providing a professional service. In that case, the transfer of tangible personal property by the professional to the client or patient is only incidental to the service provided, and thus does not constitute a retail sale subject to sales tax. See generally, Haden v. McCarty, 152 So.2d 141 (1963) (dentistry held to be a learned profession). Although the term was not used, the Court in Harrison followed the "learned profession" rationale in holding that the advertising agency was not making retail sales.

Neither Harrison nor the "learned profession" exclusion applies in this case.

Admittedly, taking photographs was one of the services provided by the advertising agency in Harrison. But clearly, the Taxpayer does not provide the wide range of advertising services provided in Harrison, which included "the filming of a motion picture, taking photographs, making tapes for a television or radio show, and preparing a catalog or brochure to be used by clients . . .". Harrison, at p. 460. The Taxpayer is in substance a professional photographer, not an advertising agency. Harrison

thus does not apply.

Photography has never been held to be a learned profession for purposes of applying the sales tax law. The Taxpayer certainly uses skill and creativity in his business, but that skill and creativity goes into making the tangible photograph, which is sold at retail and sales tax is due thereon. Unlike a lawyer's brief or a will, or a prescription prepared by a physician, or the catalogs and brochures in Harrison, which are only means by which professional services are provided, the final product provided by the Taxpayer is the tangible photograph.

In State v. Kennington, Admin. Docket S. 93-308, decided August 8, 1994, a portrait artist argued that sales tax was not due on the sale of her portraits because she was providing an intangible professional service, and the portrait itself was only incidental to the service. The taxpayer's argument was rejected as follows:

> "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.
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> 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."

The above reasoning applies equally to professional photographers. The finished product sold to the customer is the photograph, not the creative services or labor used in planning for the photograph. The issue here is not whether a taxable sale occurs, it clearly does when the Taxpayer sells a photograph, but rather what services performed by the Taxpayer prior to the sale should be included in the taxable measure.

As stated, the general rule is that a service or labor provided by a seller is taxable if necessary to manufacture or prepare the item for sale or to otherwise complete the sale, or if the service or labor is based on a percentage of the sale price or is otherwise contingent on the sale of the item.

(1) Photographic services - The Taxpayer charges his customers a fixed hourly or daily rate fee for his consultation services. The fee is charged whether or not a sale ever occurs. Like the fixed rate decorator fees in Reg. 810-6-1-.81.01(4), the Taxpayer's photographic services are separate and apart from the later sale of the photograph, if a sale occurs at all, and thus are not subject to Alabama sales tax.

Department Reg. 810-6-1-.119 provides that gross proceeds from the sale of photographs are taxable, "without any deduction for any

part of the cost of production, . . . ". "Cost of production" as used in the regulation should be construed to include only the labor and services necessary to actually prepare and develop the photograph. The regulation, by excluding from tax airplane charter fees incurred in making aerial photographs, also recognizes that certain labor or services performed in conjunction with the making of a photograph are not taxable. The Taxpayer's Bayway accident example (R. 17) clearly illustrates why an airplane charter is not subject to tax. There is no reason why airplane rental fees should be distinguished from any other service fee charged by a photographer that is not contingent on a subsequent sale by the photographer, including the consulting fees in issue.

(2) Rush charges - Rush charges are an extra fee charged by the Taxpayer for fast or expedited delivery of a photograph. Rush fees are charged only in conjunction with a sale by the Taxpayer. They are analogous to an extraordinary special delivery fee incurred in conjunction with a sale, and thus are taxable.

(3) Search fees - Search fees are charges for the Taxpayer's time in searching his inventory. They are charged to the customer even if no sale occurs. Consequently, search fees are not derived from or contingent on a sale by the Taxpayer, and thus are not taxable.

(4) Stock fees - Stock fees are charged only when the Taxpayer uses an in-house negative from which a photograph is developed and sold to a customer. The stock fee is thus contingent

on the sale of the photograph, and is taxable.

(5) Typesetting and mosaic services - These services may or may not be taxable, depending on whether a sale by the Taxpayer is also involved. If the typesetting and mosaic services are performed in conjunction with a sale by the Taxpayer, those services are necessary in preparing the final product for sale, and are taxable. If the services are performed on photographs provided by the customer, then no sale by the Taxpayer is involved, and the services are not taxable. See, Reg. 810-6-1-.130(4), which holds that typesetting services performed by a printer are not taxable if there is no sale by the printer.

The Department is directed to recompute the Taxpayer's liability in accordance with the above opinion. The Taxpayer should, if necessary, provide all relevant records to the Department for that purpose. The Department should then notify the Administrative Law Division of the Taxpayer's adjusted liability, and a Final Order will be entered accordingly.

This Opinion and Preliminary Order is not an appealable order. The Final Order, when entered, may be appealed by either party to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered August 30, 1995.

BILL THOMPSON
Chief Administrative Law Judge