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| SELMA ANIMAL HOSPITAL | § | STATE OF ALABAMA |
| 501 Cahaba Road | | DEPARTMENT OF REVENUE |
| Selma, Alabama 36701, | § | ADMINISTRATIVE LAW DIVISION |
| Taxpayer, | § | DOCKET NO. S. 95-231 |
| v. | § | |
| STATE OF ALABAMA | § | |
| DEPARTMENT OF REVENUE. | | |

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed State and City of Selma sales tax against Selma Animal Hospital, a partnership composed of George Wood, Jr., Donald Buster, and Mark Lawrence (jointly "Taxpayers") for the years 1991 and 1992. The Taxpayers appealed to the Administrative Law Division, and a hearing was conducted on August 28, 1995. John Calame represented the Taxpayers. Assistant Counsel Wade Hope represented the Department.

The Taxpayers are licensed veterinarians that operate a veterinary clinic in Selma, Alabama. The Taxpayers sell dog food, flea collars, and other items at retail at the clinic. They also use drugs in treating animals at their clinic. The same drugs are also prescribed and dispensed by the Taxpayers for home use by pet owners. The Taxpayers charge their customers the same price (100 percent mark-up) for the drugs in both cases. The Department concedes that those drugs administered at the clinic are being used or consumed by the Taxpayers, and thus are not subject to sales tax. The primary issue in dispute is whether those drugs prescribed and dispensed by the Taxpayers that are subsequently administered by the pet owner at home are subject to tax. If sales tax is due on those "take-home" drugs, a second issue is whether

the tax should be assessed prospectively only.

The Taxpayers did not have a sales tax license, and thus did not file sales tax returns or pay sales tax during the audit period. Rather, they paid sales tax on their cost at the point of purchase when they purchased the drugs and other items from their suppliers.

The Department audited the Taxpayers and assessed tax on the retail sales price of the dog food, flea collars, and all other non-prescription items sold over-the-counter on which the Taxpayers had failed to pay sales tax. A credit was allowed for the tax previously paid to the suppliers. The Taxpayers concede that additional sales tax is due on those items.

The Department also taxed those "ethical" drugs prescribed and dispensed by the Taxpayers that were administered at home by the owner. "Ethical" drugs are those medicines which by federal law can only be dispensed by a licensed veterinarian after a physical inspection of the animal. As previously stated, the Department concedes that those drugs used or consumed by the Taxpayers in treating animals at the clinic were not sold at retail, and thus are not subject to additional sales tax.

The Taxpayers argue that the "ethical" drugs dispensed to pet owners were not being sold at retail, but rather were provided to the pet owners incidental to a professional service, and thus were not subject to sales tax.

This case turns on whether the "ethical" or prescription drugs in issue are being sold at retail by the Taxpayers, in which case

additional sales tax is due, or whether the drugs are provided incidental to the providing of a professional service, in which case no tax is due.

Alabama's appellate courts have recognized that certain individuals, i.e. lawyers, some doctors, and others, are engaged in a "learned profession". In that case, any tangible personal property transferred or delivered by the professional to a client or patient is only incidental to the professional service provided, and thus is not subject to sales tax. In other words, the property is not being sold at retail so as to be subject to sales tax. See generally, Haden v. McCarty, 152 So.2d 141 (1963), in which dentistry was held to be a "learned profession", and thus dentures, etc. provided by a dentist to his patients were held to be non-taxable. See also, State v. Harrison, 386 So.2d 461 (1980), in which the Alabama Supreme Court, although not using the term, in effect treated an advertising agency as a "learned profession". The Court held that catalogs and brochures provided by the advertising agency to customers were being provided incidental to the agency's professional services, and thus not subject to tax.

The "ethical" drugs in issue can only be prescribed and dispensed by a licensed veterinarian. The drugs are provided incidental to and in furtherance of the professional services provided by the Taxpayers in treating the animals. Under the "learned profession" line of cases, those drugs are being provided incidental to a professional service, and thus are not being sold at retail so as to be subject to sales tax.

The above holding is supported by Code of Ala. 1975, §34-29-61(14)(a), which defines "practice of veterinary medicine" to include "to diagnosis, treat, correct, change, relieve, or prevent animal disease, deformity, (etc.) . . . including the prescription or administration of any drug, medicine, (etc.) . . . ". The practice of veterinary medicine thus includes the "prescription or administration" of any medicine. The fact that the medicine may later be administered by the pet owner at home is not relevant. It was still prescribed and dispensed incidental to and as a part of the veterinarian's professional services.

At the administrative hearing, the Department auditor was asked the following hypothetical (R. 100, 101):

Assume that a veterinarian prescribes five pills for an animal. The veterinarian then administers two of the pills to the animal at the clinic. The remaining three pills are given to the pet owner for home use. How should sales tax be charged on the lump-sum charge by the veterinarian?

The Department auditor gave the following answer:

Well, in my personal opinion, if the prescription -
- those two pills that he initially gave to the pet could be done by the pet owner rather than the doctor, it ought to be a retail sale.

However, almost any drug prescribed and administered by a veterinarian at a clinic could also be administered at home by a pet owner, including injections. The Department examiner did a good job with the audit and gave the best answer possible. But the answer is inconsistent with the Department's stated position that

drugs actually administered by a veterinarian are not taxable. Because of a veterinarian's "learned profession" status, all prescription drugs that can only be prescribed by a veterinarian in treating an animal should be taxed the same, whether they are personally administered by the veterinarian or dispensed for home use by the pet owner. The Taxpayers charge the same price in both cases, and should pay sales tax on their cost in both cases.

In summary, any prescription drug that can only be prescribed and dispensed by a licensed veterinarian is not being sold at retail, but rather is being provided incidental to a professional service. Theoretically, tax should be paid when those drugs are purchased. However, if the veterinarian has a sales tax license and is also selling items over-the-counter at retail, as in this case, everything can be purchased tax-free and then tax paid on the wholesale cost of the prescription drugs when used or dispensed, and on the retail sales price of all other property when sold at retail. Non-prescription drugs dispensed by the Taxpayers that could also be purchased by a customer over-the-counter should be taxed at the full retail sales price.

In light of the above, the second issue concerning whether the tax should be assessed prospectively only is moot.

The Department is directed to recompute the Taxpayer's liability as set out herein. A Final Order will then be entered.

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 November 2, 1995.

BILL THOMPSON
Chief Administrative Law Judge