COLOR CRAFT, INC. 1616 Mt. Meigs Road Montgomery, Alabama 36103-4279,	'	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	'	DOCKET NO. S. 96-323
v.	'	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	'	

FINAL ORDER
ON APPLICATION FOR REHEARING

The Final Order entered on February 12, 1997 concluded that the Taxpayer's charges for using a computer in producing color separations cannot be deducted from taxable gross receipts derived from the sale of the color separations. A rehearing was conducted on March 18, 1997. Stan Gregory and Stephanie McGee again represented the Taxpayer. Assistant Counsel Margaret McNeill again represented the Department.

The Taxpayer raises two issues on rehearing. First, the Taxpayer claims that one computer is used to alter the customer's photograph, and a second computer is used to produce the tangible color separation, not a single computer for both as indicated in the Final Order. I agree. However, that factual correction does not alter my legal conclusions in the Final Order.

The Taxpayer reiterates that using the computer to alter the customer's photograph is separate and distinct from the production of the color separation. I disagree. Although a separate computer is used, altering the photograph is clearly a required step in creating the finished color separation sold to the customer. The fact

that the Taxpayer on occasion produces color separations without altering the photograph is irrelevant.

The Taxpayer claims that sometimes it only performs alteration services, without a tangible color separation being produced and sold to the customer. I agree that sales tax is not due in that case because the services are not performed in conjunction with a subsequent sale of tangible personal property. As stated in the Final Order, at page 3:

> Service and labor costs may be taxable in some cases and non-taxable in others, depending on whether the service or labor is performed as a part of a retail sale. For example, the engraving charges in issue in Mary B. Montgomery were taxable because the engraving was performed on items subsequently sold at retail by the trophy shop. However, the trophy shop did not charge sales tax for engraving a trophy or other item brought in by a customer because the trophy shop was not making a retail sale.
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> In this case, the Taxpayer produces a new product, the color separation, which the Taxpayer concedes is subject to sales tax. The computer work required to change the computer image of the photograph is a necessary and essential step in producing the finished color separation. The computer services are thus performed in conjunction with preparing the color separations for sale, and are subject to sales tax.

The Taxpayer offers a "tenable argument" that the sale of the color separation itself is not a taxable sale of tangible personal property. See, transcript of rehearing, at page 18. The Taxpayer is in effect arguing that it is providing a professional service, and that the transfer of the tangible color separation to the customer is only incidental to the services provided, and thus not taxable. I disagree.

In certain cases, the transfer of tangible property has been held to be only incidental to professional services provided, and thus not a taxable sale. Haden v. McCarty, 152 So.2d 141 (1963) (Transfer of dentures by a dentist held incidental to the professional services provided, and thus not taxable); State v. Harrison, 386 So.2d 460 (1988) (Catalogs and brochures provided by advertising agency to customers held incidental to professional services provided, and thus not taxable); and State, Dept. of Revenue v. Kennington, 679 So.2d 1059 (Ala.Civ.App. 1995) (Sale of portraits was incidental to the professional service provided by the artist, and thus not subject to sales tax).[1] But the above cases do not apply here because the aim and substance of the transaction is the sale of the tangible color separation to the customer. The fact that a high-tech computer is used to enhance or alter the photograph in the process of creating the tangible product does not convert the transaction into primarily a profession service.

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[1]I respectfully disagree with the rationale in Kennington, for the reasons stated in Selma Animal Hospital v. State, S. 95-231 (Preliminary Order on Application for Rehearing decided 3/26/96). I tend to agree with Justice Jones' concurring opinion in Ala. Board of Optometry v. Eagerton, 393 So.2d 13783, 1378 (1981), that the "practice of a learned profession" dichotomy is irrelevant to the application of the sales tax law. Rather, "where the aim and end of the transaction is the passing of a tangible article from one to the other for the latter's use or consumption, the fact that service or materials, or both, have been put into the article, or that it is useful only to the party who received it, does not remove such business from the scope of the (sales tax) act." Long v. Roberts and Sons, 176 So. 213 (1937), J. Bouldin concurring, at page 219. If the purpose of the transaction is primarily to transfer tangible personal property, sales tax is due, even if professional or technical services and labor are necessary to create the final product. The end goal in this case is the transfer of the tangible color separation to the customer. The charges for using a computer to enhance the photograph clearly represent a nondeductible cost incurred in producing the finished tangible product.

The Final Order is affirmed. This Final Order on Application for Rehearing may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, '40-2A-9(g) and Dept. Reg. 810-14-1-.24(7)(b).

Entered May 20, 1997.

BILL THOMPSON
Chief Administrative Law Judge