

J. BRYAN DILL, d/b/a CAPTURE
STUDIO CAFÉ
2217 UNIVERSITY BLVD.
TUSCALOOSA, AL 35401,

Taxpayer,

v.

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

§ STATE OF ALABAMA
DEPARTMENT OF REVENUE
§ ADMINISTRATIVE LAW DIVISION

§
DOCKET NO. S. 09-1231
§
§

FINAL ORDER

The Revenue Department assessed J. Bryan Dill (“Taxpayer”), d/b/a Capture Studio Café for State sales tax for May 2006 through December 2008. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on October 26, 2010. The Taxpayer was notified of the hearing by certified mail, but failed to appear. Assistant Counsel Wade Hope represented the Department.

The Taxpayer operated a small coffee shop/restaurant located in downtown Tuscaloosa, Alabama during the period in issue. He also operated a photography and video business at the location.

The Department audited the Taxpayer for sales tax for the subject period. The Department examiner determined from the Taxpayer’s monthly point of sales reports that he had underreported his food sales during the period by \$3,740. According to the examiner’s audit report, “[t]he taxpayer had no explanation for these underreporting errors.” Dept. Ex. 2 at 2.

Concerning the Taxpayer’s photography/video business, he had contracted to take photographs or make video tapes at weddings, parties, and other social events or gatherings during the audit period. Before May 2008, the Taxpayer offered various

“packages” to his customers for varying lump-sum amounts. The customers could pay additional amounts to upgrade the packages. The Taxpayer uploaded the photographs taken at the specified event to his website. The customer could download the photographs at no charge, and then print the photos themselves or have them printed by a third party.

Beginning in May 2008, the Taxpayer contracted with Smug Mug, Inc., an online photo sharing website through which photographers can sell their photos. The Taxpayer uploaded the photos taken for his customers onto the Smug Mug website. The customers could then go to the website and select which photos they wanted. They then paid Smug Mug to print the selected photos. The Taxpayer, per his contract with Smug Mug, received approximately 85 percent of the printing amounts paid by the customers to Smug Mug, in addition to the lump-sum package amounts already paid by the customers.

The Department examiner assessed the Taxpayer on the lump-sum amounts the Taxpayer charged before May 2008 because that amount constituted the gross proceeds derived from the sale of the photographs. The Department also assessed the Taxpayer on 100 percent of the amounts that the customers paid to Smug Mug for the printed photographs beginning in May 2008.

The total sales tax due on the Taxpayer’s photo/video business during the audit period, including some DVDs sold by the Taxpayer, was \$6,189. The Taxpayer had reported and paid only \$2,449. The Department assessed the Taxpayer on the difference.

The Taxpayer apparently does not dispute the additional tax due on his food sales. He argues, however, that his photography and video gross proceeds are not taxable because he is only providing a non-taxable service. I disagree.

Before May 2008, the Taxpayer was selling the photographs to his customers for the

lump-sum amounts he charged his customers. The Taxpayer obviously performed some services and incurred some expenses in taking the photos, but those services and expenses were incidental to the production and sale of the photos. See generally, *Smith d/b/a FlipFlopFoto v. State of Alabama*, S. 05-1240 (Admin. Law Div. 11/17/2006); *Thigpen Photography v. State of Alabama*, S. 95-127 (Admin. Law Div. 8/30/1995).

The fact that the Taxpayer also electronically delivered the photographs to his customers is of no legal consequence. See again, *FlipFlopFoto* (“Likewise, the form in which photographs (and other digital goods) are delivered is irrelevant.” *FlipFlopFoto*, O.P.O. at 8.

The Department also correctly assessed the Taxpayer on 100 percent of the sales proceeds paid by his customers to obtain the printed photos through Smug Mug. Smug Mug was acting as the Taxpayer’s contractual agent when it printed the photos for the Taxpayer’s customers. The approximately 15 percent the Taxpayer allowed Smug Mug to retain was a cost of doing business to the Taxpayer, and cannot be deducted from the total gross sales proceeds paid by the Taxpayer’s customers. See, Code of Ala. 1975, §40-23-1(a)(8), which in part defines “gross receipts” for sales tax purposes as “[t]he value proceeding or accruing from the sale of tangible personal property, . . . without any deduction on account of the cost of the property sold, the cost of the materials used, labor or service costs, . . . or any other expenses whatsoever. . . .”

The final assessment is affirmed. Judgment is entered against the Taxpayer for

State sales tax, penalty, and interest of \$9,435.48. Additional interest is also due from the date the final assessment was entered, November 30, 2009.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered November 3, 2010.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

cc: J. Wade Hope, Esq.
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