

SIPS N STROKES, INC.  
522 CAHABA PARK CIRCLE  
BIRMINGHAM, AL 35242,

§  
§

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NO. S. 12-377

v.

§

STATE OF ALABAMA  
DEPARTMENT OF REVENUE.

§

### **FINAL ORDER**

The Revenue Department assessed Sips N Strokes, Inc. (“Taxpayer”) for State sales tax for January 2007 through September 2009. 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 22, 2013. The Taxpayer’s owner, Wendy LoVoy, represented the Taxpayer. Assistant Counsel Margaret McNeill represented the Department.

### **ISSUE**

The issue in this case is whether the Taxpayer operated a place of public entertainment or amusement during the period in issue within the purview of the public amusement gross receipts sales tax levied at Code of Ala. 1975, §40-23-2(2).

### **FACTS**

Wendy LoVoy has been a professional artist in Birmingham, Alabama for almost 20 years. She initially opened LoVoy Designs, where she did faux finishing and murals. She subsequently operated a gallery, Art Is, where she also gave private art lessons.

LoVoy became frustrated with how slow her individual students were painting, so in the Fall of 2003, she experimented with having a group of students follow her instructions and complete a painting in a single two hour session. The experiment worked, and in February 2004 LoVoy began conducting regular two hour group teaching sessions.

LoVoy's business grew, and she incorporated the Taxpayer in 2006. She also began hiring instructors with art backgrounds that also taught the group sessions. The specifics of how the Taxpayer operated during the period in issue are succinctly stated in the Taxpayer's notice of appeal, as follows:

During the audit period, the Taxpayer provided professional art instruction at its Birmingham store located on Highway 280. (footnote omitted) According to its website, the Taxpayer's art classes allow students to "paint a picture along with Wendy LoVoy or one of her instructors as they show you step-by-step how to paint a beautiful masterpiece that you will take home at the end of the evening."

Generally, customers register online for a painting specific class, which is the most common type of class offered by the Taxpayer. Each class features an instructor, who is positioned in a central location where all students can watch her paint and hear her explain how to reproduce a particular piece of art. Many of the instructors have educational backgrounds that include training in art or design. The instructors explain how to mix paints to create certain colors and provide step-by-step instructions regarding how best to reproduce the painting. In addition, the instructors teach students about brush sizes and various painting techniques, including blotting, dabbing, shading, rubbing, smoothing, perspective, and positive and negative space. During breaks, the instructor will circulate throughout the classroom, visiting with students and providing individual instruction regarding each student's painting. Furthermore, some classes have an additional instructor, who provides students with one-on-one instruction throughout the class.

Although the most common classes offered by the Taxpayer are those devoted to recreating a specific painting, the Taxpayer also offered a variety of other classes during the audit period, including children's classes, week-long children's art camps, and private lessons. During a children's class, the instructor selects three age and gender appropriate paintings from which the class may choose. The instructor and an assistant circulate throughout the classroom, instructing and guiding each child step-by-step through the painting. During the week-long art camps offered to children, the teaching is even more in-depth. Students learn about particular artists (e.g., Vincent van Gogh, Claude Monet, Andy Warhol, Jackson Pollack) and different styles of art. In addition, the instructors teach children how to work with acrylic paint, chalk pastels, clay, as well as other mediums. During private lessons, customers are allowed to recreate the painting of their own choosing. Private class customers are still taught the same fundamental concepts as students

in other classes, but because these classes typically have five or fewer students, the instructor is able to work with each customer individually.

The Taxpayer allows students to bring food and beverage (including alcoholic beverages) to class, but it does not provide these items (other than water). The Taxpayer does, however, provide the canvas, easel, paint and brushes necessary for students to reproduce the painting.

LoVoy testified that she and the other instructors teach the Taxpayer's customers to paint fast using what she calls the "Sips n Strokes" method, which she described as follows:

And the instruction is step-by-step and it's a method that I now call the Sips n Strokes method. It is a fast-paced method that allows the brain to shut down the left side or the right side of your brain – sorry, the left side, to open up the right side brain. The quicker you do something – and it goes for anything. The quicker you do it, the quicker you draw a circle, the quicker you draw a line, the better the line is, the better the circle is, than someone who sits there and takes their time with it. Because when you take your time with it, that left side of your brain that does not know how to create, tries to. And it can't. But when you go really, really quick, or if you turn something upside down and try to draw it or paint or anything like that, the right side automatically opens up. And that's your creative side.

T. at 10.

As indicated, the Taxpayer allows its customers to bring food and drink, including alcoholic beverages, while they are painting. LoVoy testified, however, that the primary purpose and function of the business is to teach her customers how to paint.

The Department audited the Taxpayer and assessed it for the gross receipts sales tax at §40-23-2(2). The Department audit report explains that the Taxpayer "does not operate as an art studio that teaches actual art techniques but as a place to go for an entertaining day or evening out with friends." Dept. Ex. 1 at 4, 5.

## ANALYSIS

Section 40-23-2(2) levies a gross receipts sales tax on any taxpayer “engaged or continuing within this state in the business of conducting or operating places of amusement or entertainment. . .” that are open to the public. The tax applies to a variety of activities, including bowling alleys, *Starlite Lanes, Inc. v. State*, 214 So.2d 324 (Ala. 1968), bingo games, *Fraternal Order of Eagles v. White*, 447 So.2d 783 (Ala. Civ. App. 1984), and golf courses, *State Dept. of Rev. v. Teague*, 441 So.2d 914 (Ala. Civ. App. 1983), to name only a few.

The Administrative Law Division has also held that the tax applied to a business that allowed the public to reserve and use arenas and party rooms within its facility, *2MC, Inc. v. State of Alabama*, Docket S. 07-587 (Admin. Law Div. 3/11/2008); a private club that conducted parties, events, etc. that were open to the public, *Gulf Coast Elks Lodge 2782 v. State of Alabama*, Docket S. 13-137 (Admin. Law Div. O.P.O. 7/9/2013); and a business open to the public that allowed its customers to play games on its computers, *The Docking Station, LLC v. State of Alabama*, Docket. S. 07-124 (Admin. Law Div. 5/1/2007).

The Administrative Law Division has held, however, that the gross receipts derived from providing private professional lessons or instructions are not subject to the tax, even if the person giving the private lessons or instructions also operated a public place of amusement that was subject to the §40-23-2(2) tax. *Garrison v. State of Alabama*, Docket No. S. 86-108 (Admin. Law Div. 10/16/1986).

The Taxpayer in *Garrison* was a registered PGA golf professional that operated a public golf recreation center. He conceded that he owed the gross receipts sales tax on

the receipts he charged for the use of the driving range, putt-putt golf, etc. He argued, however, that his receipts derived from giving private golf lessons should not be taxed.

The Administrative Law Division agreed.

The tax is levied upon the privilege of operating a place of amusement, and applies to the gross proceeds derived from charges for specific entertainment activities carried on therein, such as the green fees charged at public golf courses, admission fees charged at various sporting events, etc. However, the fact that a portion of a business may be subject to the public amusement or entertainment sales tax does not mean that every activity carried on by the Taxpayer is also subject to the tax. Only if the specific activity or event to be taxed constitutes a public amusement or entertainment, or is directly related to or constitutes an integral part thereof, should it be subject to tax. Thus, although the Taxpayer's business does include several taxable activities, the golf lessons, which are a professional service and are not provided for entertainment or amusement within the purview of (§40-23-2(2)), would not be taxable. The golf lessons are separate and distinct from the Taxpayer's golf amusement center.

*Garrison at 2.*

I have no doubt that most of the Taxpayer's customers enjoy themselves during a class with LoVoy or one of her instructors. And that enjoyment may certainly be heightened if the customer chooses to have a cocktail or another adult beverage during the class. The evidence is convincing, however, that the Taxpayer's primary purpose is to teach its customers how to paint, and not to provide them with entertainment or amusement. In substance, LoVoy and her instructors are providing professional services by teaching the customers how to paint a picture, and also "about brush sizes and various painting techniques, including blotting, dabbing, shading, rubbing, smoothing, perspective, and positive and negative space." Taxpayer's Notice of Appeal at 2. The fact that the customers are allowed to partake of food and their favorite beverage while attending the class may make the experience more enjoyable, but that fact does not change the

Taxpayer's providing of professional art lessons into a place of amusement or entertainment within the purview of §40-23-2(2).

The final assessment is voided. Judgment is entered accordingly.

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

Entered December 16, 2013.

---

BILL THOMPSON  
Chief Administrative Law Judge

bt:dr

cc: Margaret Johnson McNeill, Esq.  
Wendy LoVoy  
Joe Walls  
Mike Emfinger