

STATE OF ALABAMA  
DEPARTMENT OF REVENUE,

§  
§

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

v.

§

DOCKET NO. S. 87-169

DESIGN FORUM, INC.  
132 Cove Commercial Park  
Gulf Shores, AL 36542,

§  
§

Taxpayer.

§

#### ORDER

This case involves several disputed preliminary assessments for State, Baldwin County, and City of Gulf Shores sales tax, and City of Gulf Shores use tax, all for the period January 1, 1984 through December 31, 1986, as well as City of Orange Beach sales tax for the period January 1, 1986 through December 31, 1986.

A hearing was conducted in the matter on July 31, 1987 at the Revenue Department Taxpayer Service Center in Mobile Alabama. The Hon. Walter B. Chandler was present and represented the Taxpayer.

Assistant counsel Ron Bowden appeared on behalf of the Department.

Based on the evidence presented at said hearing, the following findings of fact and conclusions of law are hereby made and entered.

#### FINDINGS OF FACT

During the periods in dispute, the Taxpayer contracted to sell or furnish "condo packages" to various condominium owners in Baldwin County, Alabama. Said packages consisted of furniture, housewares, linens, wallpaper, drapes and carpeting. The Taxpayer maintained a place of business, but kept very little inventory.

Rather, the Taxpayer's customers, with the Taxpayer's advice and assistance, would select the desired furnishings from catalogs kept by the Taxpayer or from a model condominium unit maintained by the Taxpayer. The items would then be ordered by the Taxpayer, and upon shipment to the Taxpayer's business location, the Taxpayer would deliver and install the furnishings at the designated location.

When the Taxpayer went into business in 1983, it applied for a sales tax number with the Department. However, the application was rejected by the Department and the Taxpayer was informed that it should obtain a use tax number, which was subsequently issued. During the period in question, the Taxpayer duly paid use tax measured by its cost of goods sold.

However, the evidence indicates that the Taxpayer charged a sales tax of from 4% to 8%, depending on the local tax rate, on each of its sales. The sales tax was based on the total amount charged by the Taxpayer to its customers. The Taxpayer argues that the amount delineated as a sales tax on its invoices was in actuality a charge for storage and handling.

The Department audited the Taxpayer and set up a sales tax liability measured by the difference between the Taxpayer's cost of goods sold, on which use tax had already been paid, and the sales price charged by the Taxpayer. The Taxpayer's charges for carpet, wallpaper and related labor were subtracted from the sales tax measure, those items being considered by the Department as being

subject to tax measured by the Taxpayer's cost, and not the subsequent sales price.

The Department's position is that the Taxpayer is in the business of selling tangible personal property, and not rendering a professional service. Further, the Department argues that it cannot be estopped from collecting a tax because of incorrect information given by a Department employee. Finally, the Department contends that as between the Taxpayer and the Department, the Department is due to receive any tax that was erroneously collected from the Taxpayer's customers.

On the other hand, the Taxpayer argues that it is providing a professional service and is not in the business of selling tangible personal property. The Taxpayer further contends that the sales tax charged to its customers was in fact a storage and handling charge for which an extra charge would have been added if the amount charged as a sales tax had not been collected. Finally, the Taxpayer asserts that the Department should be estopped from retroactively collecting any delinquency because the Taxpayer had reported and paid tax in strict accordance with the Department's instructions.

#### CONCLUSIONS OF LAW

The Taxpayer contends that as an interior designer, he is rendering a professional service, and that the sale of furniture is merely incidental to that profession. The Alabama Supreme Court

has long recognized the distinction for tax purposes between the incidental, nontaxable transfer of property involved in the exercise of professional skill, and the taxable sale of tangible personal property. State Tax Commission v. Hopkins, 176 So. 210; Haden v. McCarty, 152 So.2d 141; Crutcher Dental Supply Co. v. Rabren, 246 So.2d 415; State v. Harrison, 386 So.2d 460. The distinction is now based on whether the Taxpayer is engaged in a "learned profession." Alabama Board of Optometry v. Eagerton, 393 So.2d 1373.

Using that criteria as a guideline, it is clear that an interior designer is not practicing a "learned profession". While an interior designer may advise a customer as to color, coordination and style of furniture, the purpose of the transactions in the instant case was the sale of furniture, and the designer's assistance was incidental to those sales.

In the present case, the Taxpayer's customers are not purchasing his skills as a designer, but rather, the furniture and other items that are being sold. The fact that the Taxpayer's sales are made mostly through catalogs, as opposed to off a showroom floor, is of no consequence. A taxpayer does not have to maintain a fully stocked retail outlet to make taxable retail sales.

Concerning the Taxpayer's estoppel argument, the Alabama Supreme Court has specifically held that a taxpayer cannot be relieved of liability for a tax due because of incorrect or misleading advice or information given by a Department employee. State v. Maddox

Tractor and Equipment Company, 69 So.2d 426; State v. Norman Tie and Lumber Company, 393 So.2d 1022 .

Further, the Taxpayer was not harmed by the Department's incorrect instructions to pay a use tax on its cost of goods sold, as opposed to a sales tax, in that the Taxpayer in fact charged and collected from his customers the amount presently assessed by the while the Taxpayer had reported and paid its costs of the items sold, it had question collected sales tax on the higher charged and collected from his customers a sales tax equal to the amount presently assessed by the Department. That is, while the Taxpayer had reported and paid use tax measured by its costs of the items sold, it had during the period in question collected sales tax on the higher sales price of said items. Thus, even if the sales tax was not due, as between the Taxpayer and the Department the Department is entitled to any overpayment of tax that was erroneously collected Taxpayer's customers. State v. Ross Jewelers, 72 So.2d 402.

The above considered, it is hereby determined preliminary assessments in issue are correct and should final, with applicable interest as required by law.

Done this 15th day of October, 1987.

---

BILL THOMPSON  
Chief Administrative Law Judge