DANIEL AND DANIEL ENTERPRISES, INC. d/b/a to Optique Boutique, Inc. 2613 Montgomery Mall Montgomery, AL 36111, Taxpayer, vs. STATE OF ALABAMA DEPARTMENT OF REVENUE.	§ § § § § § §	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION DOCKET NO. S. 93-296

FINAL ORDER

The Revenue Department assessed State sales tax against Daniel and Daniel Enterprises, Inc. ("Taxpayer"), as successor in business to Optique Boutique, Inc., for the period May 1987 through March 26, 1992. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on January 20, 1994. Wheeler Smith appeared for the Taxpayer. Assistant counsel Jeff Patterson represented the Department.

The issues in this case are as follows:

(1) Were the sales of glasses, contacts, and other opthalmic materials (together "eyewear") by Optique Boutique, Inc. during the period in issue exempt from sales tax pursuant to the exemption at Code of Ala. 1975, §40-23-1(d);

(2) Is the Taxpayer liable as a successor in business to Optique Boutique, Inc., and if so, is the Taxpayer's liability limited to the value of the assets transferred from Optique Boutique, Inc. to the Taxpayer;

(3) Should the Department be estopped from assessing the tax in issue because it misled or failed to inform Optique Boutique, Inc. concerning its sales tax liability during the subject period; and

(4) Is Code of Ala. 1975, §40-23-1(d) unconstitutional because it denies equal protection to opticians.

The facts are undisputed.

Optique Boutique, Inc. was formed in February, 1985. Two-thirds of Optique Boutique, Inc. was initially owned by another corporation, D and F Enterprises, Inc., which was wholly-owned by two optometrists. The other one-third was owned by Wes Daniel, an optician, who also managed the business.

Optique Boutique, Inc. prescribed and sold eyewear during the period in issue. The corporation employed optometrists, including the two owners of D and F Enterprises, Inc., who conducted eye examinations and prescribed the eyewear for customers. The prescriptions were filled by laboratory technicians. The finished eyewear was then dispensed or sold by the corporation to the customers. All glasses were delivered to the customer by a technician or optician. All contacts were fitted directly by the optometrist that prescribed the lenses. The corporation paid the optometrists $45.00 for each eye examination during the subject period.

Optique Boutique, Inc. failed to file sales tax returns during the period in question. Rather, it filed and paid use tax during 1987 and 1988 on its cost of the materials used in the business. The Taxpayer offered testimony that on at least two occasions Optique Boutique, Inc. contacted the Department and was informed by an unidentified Department employee that sales tax was not due on its eyewear sales.

Wes Daniel purchased the remaining stock of Optique Boutique,

Inc. from D and F Enterprises, Inc. in September 1991. Thereafter, Optique Boutique, Inc. was dissolved on March 26, 1992 and Daniel and Daniel Enterprises, Inc., the Taxpayer in this case, was incorporated at that time.

The Department audited the Taxpayer, as successor in business to Optique Boutique, Inc., and assessed the sales tax in issue on the sales of eyewear by Optique Boutique, Inc. during the subject period. The Department computed taxable gross proceeds using Optique Boutique, Inc.'s bank deposit records less non-taxable or exempt deposits. The Department also deducted from taxable gross receipts the "professional fees" paid by Optique Boutique, Inc. to the various optometrists employed by the corporation. A credit was also allowed for use tax previously paid. The final assessment in issue is based on the above computations.

Issue (1) - Was the sale of eyewear by Optique Boutique, Inc. during the period in question subject to sales tax.

The Taxpayer does not directly dispute the technical accuracy of the Department's audit. Rather, the Taxpayer argues that all eyewear sold by Optique Boutique, Inc. was exempt from sales tax pursuant to Code of Ala. 1975, §40-23-1(d). That section provides as follows:

> (d) The dispensing or transferring of ophthalmic materials, including lenses, frames, eyeglasses, contact lenses, and other therapeutic optic devices, to a patient by a licensed opthomologist or optometrist, as a part of his or her professional service, shall not, for purposes of this division, be deemed or considered to constitute a sale, subject to the state sales tax.

> Such licensed ophthalmologist or optometrist shall be considered the ultimate consumer of the ophthalmic materials and shall have no responsibility or duty pursuant to this division for the collection of the state sales tax. The sale of the ophthalmic materials to a licensed opthomologist or optometrist by a supplier thereof shall be considered a retail sale subject to the state sales tax, and the supplier shall be responsible for collecting such sales tax from the licensed opthomologist or optometrist. In no event shall the providing of professional services in connection with the dispensing or transferring of ophthalmic materials by a licensed ophthalmologist or optometrist be considered a sale subject to the state sales tax. All transfers of ophthalmic materials by opticians shall be considered retail sales subject to the state sales tax. The term supplier shall include but not be limited to optical laboratories, ophthalmic material wholesalers, or anyone selling ophthalmic materials to opthomologists and optometrists.

The above exemption was enacted as Act 82-402 in 1982. What did the Legislature intend to exclude or exempt from sales tax by Act 82-402?

Alabama's courts have designated certain professionals, i.e., dentists, lawyers, and some doctors, as members of a "learned profession." The courts have ruled that the sale of tangible personal property by someone engaged in a learned profession is incidental to the professional services provided, and thus not subject to sales tax. See, Haden v. McCarty, 152 So.2d 141 (1963); Lee Optical Company of Alabama v. State Board of Optometry, 261 So.2d 17 (1972).

The Alabama Supreme Court ruled in Lee Optical, supra, that optometry was not a "learned profession", and consequently that the sale of eyewear by an optometrist was subject to sales tax. The

Supreme Court reaffirmed that optometry was not a learned profession in Alabama Bd. of Optometry v. Eagerton, 393 So.2d 1373 (1981).

In both Lee Optical and Alabama Bd. of Optometry, cited above, the Supreme Court suggested that if the legislature did not agree with the Court's finding, it should pass legislation making optometry a learned profession. See, Alabama Bd. of Optometry, at p. 1377. The legislature obviously attempted to follow that suggestion by passing Act 82-402 in 1982. Unfortunately, the wording of Act 82-402 does not clearly identify exactly what sales or services the legislature intended to exempt from taxation.

Clearly, the §40-23-1(d) exemption would apply and sales tax would not be due if an optometrist prescribed eyewear and then either personally or through an employee dispensed or sold the eyewear to the customer. In that case, the eyewear is both prescribed and then actually dispensed or sold by the optometrist as required by the statute.

However, what if the eyewear is prescribed by an optometrist, but is actually dispensed or sold by an optician that is in partnership with the optometrist? Sales by opticians are specifically taxed under §40-23-1(d). Thus, because the eyewear is sold or dispensed by an optician and not an optometrist, technically the sale would not be exempt under §40-23-1(d). What if the optometrist is incorporated or is an employee of a

corporation? A corporation must be treated as a separate entity for tax purposes, Ex parte Capital Asphalt, Inc., 437 So.2d 1291, in which case the eyewear is being dispensed or sold by the corporation, not the optometrist. Would it make a difference if the corporation is owned in part by an optometrist and in part by an optician? What if the optometrist is only a minority stockholder in the corporation? What if the business is managed by an optician? Obviously, a number of situations can exist in which application of the exemption is questionable.

If §40-23-1(d) is strictly construed, the exemption would apply only if an optometrist both prescribed eyewear and then either personally or through an employee also dispensed or sold the eyewear to the customer. If that interpretation is adopted, then clearly the sales in issue by Optique Boutique, Inc. would not be exempt. The corporation made the sales, not the optometrists employed by the corporation. However, I do not believe that limited interpretation was intended by the legislature.

In my opinion, the intent of Act 82-402 was to exclude from sales tax the professional fees charged by an optometrist (or ophthalmologist) relating to his or her professional services rendered in prescribing eyewear. That is, that portion of the sales price attributable to the eye examination should not be taxed. If the optometrist then also fills the prescription and either personally or through an employee sells the eyewear to the patient, the sale would be incidental to the rendering of the

professional service, and the entire gross proceeds would be exempt.

However, if the eyewear is actually dispensed or sold by an individual or entity (corporation) other than the optometrist that prescribed the eyewear, the gross receipts attributable to the tangible personal property, i.e. the frames, lenses, etc., would be taxable. The professional fee paid for the optometrist's professional services in prescribing the eyewear would still not be subject to sales tax if separately stated on the invoice to the customer and on the taxpayer's records.

Applying the above interpretation to this case, the Department properly assessed sales tax on the gross proceeds derived from the sale of eyewear by Optique Boutique, Inc., less the fees paid to the optometrists.

Department Reg. 810-6-1-.60(1) provides that eyewear sold by "opticians and others" (all taxpayers except optometrists and optholmologists) is taxable in full, without deduction for labor or other costs. The above regulation follows the definition of "gross proceeds of sales" and "gross receipts" as defined at Code of Ala. 1975, §§40-23-1(a)(6) and (8), respectively.

The Taxpayer argues that by allowing a deduction for the optometrist fees, the Department has violated the above regulation by allowing a deduction for labor costs. See, Taxpayer's reply brief at page 2. I agree. However, while the $45.00 fees paid by Optique Boutique, Inc. to the optometrists constituted a labor

cost, which is normally not deductible, those specific labor charges for professional services rendered by the optometrists are specifically exempted by §40-23-1(d). The deduction was thus properly allowed. The regulation, insofar as it does not allow a deduction for professional service fees paid to optometrists, should be corrected or clarified by the Department. In any case, I do not understand the Taxpayer's objection because deducting the amounts paid to the optometrists obviously benefits the Taxpayer.

The Taxpayer also argues that if the corporate form must be recognized, which it must, then "no optician, optometrist, or ophthalmologist conducting his business or profession by and through a corporation is responsible for collection of sales tax under the existing statute and regulations." See, Taxpayer's reply brief at page 3. The Taxpayer again is technically correct. However, while the individuals that own a corporation are not personally liable for the corporation's sales taxes, except perhaps through the 100% penalty levied at Code of Ala. 1975, §§40-29-72 and 40-29-73, the corporation itself, the Taxpayer in this case, is liable.

I concede that the interpretation of §40-23-1(d) adopted herein does not strictly follow the language of the statute. However, it is the most reasonable and best interpretation given the vagueness of the statute, especially considering that §40-23-1(d) is an exemption statute, which in case of doubt must be construed for the Department and against the exemption. Ex parte

Kimberly-Clark Corp., 503 So.2d 304. Certainly the Legislature did not intend to exempt eyewear sold by a corporation that was owned either by an optician and another corporation, or entirely by an optician, as was Optique Boutique, Inc. during the period in issue.

The next issue is whether and to what extent is the Taxpayer liable as successor in business to Optique Boutique, Inc.

The sales tax successor in business statute is found at Code of Ala. 1975, §40-23-25, and reads as follows:

> Any person subject to the provisions hereof who shall sell out his business or stock of goods, or shall quit business, shall be required to make out the return provided for under Section 40-23-7 within 30 days after the date he sold out his business or stock of goods, or quit business, and his successor in business shall be required to withhold sufficient of the purchase money to cover the business of said taxes due and unpaid until such time as the former owner shall produce a receipt from the Department of Revenue showing that the taxes have been paid, or a certificate that no taxes are due. If the purchaser of a business or stock of goods shall fail to withhold purchase money as above provided the taxes shall be due and unpaid after the 30-day period allowed, he shall be personally liable for the payment of the taxes accrued and unpaid on account of the operation of the business by the former owner. If in such cases the department deems it necessary in order to collect the taxes due the state, it may make a jeopardy assessment as provided in Chapter 29 of this title.

The Taxpayer argues (1) that it is not liable as successor to Optique Boutique, Inc. because tax had not been assessed when it purchased the business, and (2) if liability does exist, it should be limited to the value of the assets transferred from Optique Boutique, Inc. to the Taxpayer.

The successor in business statute has not been construed by either of Alabama's two civil appellate courts. The statute was,

however, at issue in a prior case before the Administrative Law Division, Docket No. S. 89-202. In that case, this Administrative Law Judge relied on two Tennessee cases and held that a successor is liable for all tax owed by the prior business, even if no or insufficient purchase money is actually paid by the successor. See, Bank of Commerce v. Woods, 585 S.W.2d 577, and A. Copeland Enterprises v. Commissioner of Revenue, 703 S.W.2d 624. As stated in Docket No. S. 89-202, at pages 3-4:

> Section 40-23-25 has not been interpreted by any circuit or appellate court in Alabama. However, courts in other states have ruled that the purpose of a successor liability statute is to ensure the collection of taxes by imposing strict liability on the successor. The clear intent of such statutes is for the tax debt to follow the business and its assets when sold. Further, the direct payment of "purchase money" from the purchaser to the seller is not necessary for the successor to be liable for any delinquent sales tax owed by its predecessor, see Bank of Commerce v. Woods, 585 SW.2d 577; A. Copeland Enterprises v. Commissioner of Revenue, 703 SW.2d 624.

The Taxpayer also is not relieved of liability because the tax in issue had not been assessed when the Taxpayer purchased the business. Section 40-23-25 provides that the successor shall be liable for all "taxes due and unpaid." The fact that the Taxpayer did not know that the taxes were due and unpaid when it purchased the business does not relieve it of liability under §40-23-25.

There is also evidence that the Department may have misled Optique Boutique, Inc. into believing that sales tax was not due on its eyewear sales. However, even if Optique Boutique, Inc. was misinformed by the Department, the Department still cannot be estopped from correctly assessing tax that is properly due.

Boswell v. Abex, 317 So.2d 317; Maddox Tractor and Equip. Co. v. State, 69 So.2d 425.

Finally, the Taxpayer claims that §40-23-1(d) is unconstitutional because it denies equal protection to opticians. The Administrative Law Division cannot address that issue because it is without authority to rule or declare a statute unconstitutional. Curtis v. Taylor, 648 F.2d 946; Dept. of Revenue of Florida v. Young Am. Builders, 330 So.2d 864. However, if the statute is subsequently declared unconstitutional, the exemption statute would be declared void, in which case all eyewear sales, including the sales in issue, would be taxable in full.

The final assessment in issue is affirmed, and judgment is accordingly entered against the Taxpayer for State sales tax in the amount of $92,660.14.

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

Entered on October 4, 1994.

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BILL THOMPSON
Chief Administrative Law Judge