

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

v.

§

DOCKET NO. S. 85-166

CHIP COOPER
d/b/a Cooper and Associates
15 Country Club Circle
Tuscaloosa, Alabama 35401,

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Taxpayer.

ORDER

This case involves a disputed preliminary assessment of sales tax entered by the Revenue Department (Department) against Chip Cooper, d/b/a Cooper and Associates (Taxpayer). A hearing was scheduled in the matter for 10:00 a.m., March 12, 1987. The Taxpayer was notified of said hearing by certified mail, the return receipt card showing actual receipt of notice by the Taxpayer on January 20, 1987. At the time and location set for the hearing, the Taxpayer failed to appear. The hearing proceeded, with assistant counsel J. Wade Hope representing the Department. Based on the evidence submitted by the Department, the following findings of fact and conclusions of law are hereby made and entered.

FINDINGS OF FACT

The Taxpayer is a professional photographer. The Department audited the Taxpayer for sales tax for the period January 1, 1984 through March 31, 1985. In reviewing the Taxpayer's records, the Department auditor discovered that the sales invoices set out one price for the photography and a separate charge for consultation

services performed in preparation for the actual photography. The Taxpayer had reported and paid sales tax on the photography charges only, and not the consultation fees. The auditor determined that the entire amounts received by the Taxpayer, including the consultation charges, were taxable, as a result of which the preliminary assessment in issue was entered.

CONCLUSIONS OF LAW

The determinative issue is whether the separately set out consultation charges were a part of the gross proceeds of sale, as that term is defined at Code of Alabama 1975, §40-23-1(a)(6). That section provides in part as follows:

EXHIBIT A

(6) GROSS PROCEEDS OF SALES. The value proceeding or accruing from the sale of tangible personal property . . . , including merchandise of any kind and character without any deductions on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid or any other expenses whatsoever

The Taxpayer is in the business of selling photographs. Any fee for consultation or any other activity done in preparation of the final product is merely a part of the "labor or service cost" which, under the above statute, cannot be deducted from gross proceeds. The separation of charges on the sales invoice cannot relieve the Taxpayer from liability. In tax matters, substance over form must govern, and a tax that is otherwise due cannot be avoided by manipulation of the form of the transaction. State v.

Rockaway Corporation, 346 So.2d 444; Boswell v. Paramount TV Sales, Inc., 282 So.2d 892. Accordingly, the consultation fees charged by the Taxpayer constitute a part of taxable gross proceeds.

The case at hand is clearly distinguishable from State v. Harrison, 386 So.2d 460, and the cases cited therein, Haden v. McCarty, 152 So.2d 141; Hamm v. Proctor, 198 So.2d 782; and Crutcher Dental Supply Co. v. Rabren, 246 So.2d 415. In Harrison, the taxpayer was in the business of rendering advertising services.

As a part of that service, the taxpayer also provided the customer with various catalogs and brochures. The total due from the customer included payments for the printed materials, as well as the taxpayer's services (time, consultation, advice and expertise).

The issue was whether the transfer of the printed materials was a sale. The Court of Civil Appeals, per Judge Bradley, held that the transfer of the catalogs and brochures to the customer was not a sale under the sales tax act, but rather, was merely incidental to the professional services rendered by the taxpayer.

Unlike the Harrison case, the Taxpayer in the present case was selling a tangible item, a photograph, and not a professional service. While certain expertise and training may improve the quality of the Taxpayer's finished product, the item being sold is the photograph, and any service costs or charges incurred in creating the final product must be included in the gross proceeds

of sale.

The above considered, the Revenue Department is hereby directed to make final said assessment as entered, with applicable interest as required by statute.

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Done this 13th day of March, 1987.

BILL THOMPSON
Chief Administrative Law Judge