STATE OF FLORIDA
DEPARTMENT OF REVENUE

IN RE:

TERRY A. RENNA, PHOTOGRAPHER
_____/

Case No. 96-1-DS

DECLARATORY STATEMENT

The Petitioner, Terry Renna, is a commercial photographer. His business address is 601 N.E. 7th Street, Pompano Beach, Florida, 33060. He petitioned the Department of Revenue under section 120.565, Florida Statutes, and Ch. 12-2.010, Florida Administrative Code, to determine whether his charges as a commercial photographer for creating exposed negatives and transparencies and granting his customers a license to use them are subject to sales tax.

This matter originated as a challenge to an audit assessment conducted by the Department. The Department assessed Petitioner for failing to charge and remit sales tax on charges to his customers for the period August 1, 1988, through July 31, 1993. Petitioner timely protested the assessment and requested a section 120.57 administrative hearing. Prior to the hearing, the parties reached a settlement for the years covered by the audit. As to future years, Petitioner filed this petition to determine whether he would be required to charge and collect sales tax in the conduct of his photography business under applicable statutes.

Petitioner first maintains that he does not sell his negatives. Instead, he states that he grants his customers a license to use the negatives and therefore, the fee he charges to create the negatives and allow his customers to use them is not taxable. Secondly, Petitioner maintains that he is only selling his customers a service, and charges for services are not subject to tax.

The Petition requested that the facts be taken from the entire record of the earlier section 120.57 petition along with all exhibits pertaining to that petition. This includes records and documents found during an earlier discovery process, Petitioner's deposition of January 3, 1996, representative copies of his work, and an example of how his negatives, transparencies and photographs are used.

BACKGROUND

The sale of tangible personal property is a common taxable event in Florida. The law defines a sale to include "any transfer of title or possession, or both, exchange, barter, license, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration." Section 212.02(15)(a), F.S. (e.s.). In turn, tangible personal property is defined as being any

personal property which is in any manner perceptible to the senses. Section 212.02 (19). (e.s.). Finally, section 212.02(16), defines sales price as the "total amount paid for tangible personal property, including any services that are part of the sale, without any deduction for the cost of the property sold, the cost of materials used, labor or service cost, or any other expense whatsoever." (e.s.). Finally, section 212.08(13), provides that no transactions shall be exempt from the tax imposed by this chapter except those expressly exempted.

Read together, these statutes mean that unless there is a specific exemption, sales tax applies to any transaction in which some element of tangible personal property, however small, is sold.

An illustration of this is the difference in the tax treatment of a car wash, and a car wash with a wax compound added to it. The charge for a plain car wash using only detergent is not taxable. However, the entire charge for a car wash in which wax, silicones, and the like is added to form a protective film or coating on the car is taxable. See Rule 12A-1.007(16), F.A.C. The car wash with a wax compound is taxable because a small coating of silicones is transferred to the car. Similarly, the alteration of a garment is subject to tax because thread is used and transferred. See Rules 12A-1.006(1) and (7), F.A.C.

STATEMENT OF THE FACTS

As he stated in his deposition in the record, Petitioner is a commercial photographer with a business location in Pompano Beach, Broward County, Florida. He works out of his home, shoots photographs on location, and does not own or rent a photographic studio. Typically, Petitioner is hired to take a picture on location and produce usable negatives or transparencies for his customer. His practice is to keep the negative or transparency and give the customer a contact sheet or proofs for selection of the negatives the customer wishes to use. Normally, Petitioner grants the customer a license to use the negative or transparency for its intended purposes. His clients are mainly commercial businesses. He does not do portraits or weddings, and doesn't sell stock photographs. He creates the photographs on request and his customers generally use them in brochures and advertisements.

In contracting with a commercial client, Petitioner discusses the project to determine what type of final image is desired and the customer's planned use of the photograph. As a result of this discussion, Petitioner can determine whether he will shoot a negative or a transparency. Petitioner then enters into an oral contract with the customer. As part of the contract, the customer has the right to use the negatives, transparencies and photographs shot by Mr. Renna.

Petitioner purchases the type of film depending on the job specifications. He goes to the location specified by his customer, which is often a building, and uses his considerable training, skill, and specialized equipment to expose the negatives in a manner he believes will satisfy his customer.

Petitioner has the film processed, usually by an independent film processing company. He pays for the processing and then passes the cost on to the customer. Sometimes this charge is separately stated and sometimes it is part of a lump sum invoice. It is normally marked-up from the price he pays to the processor.

In the case of negatives, to allow customer selection, Petitioner creates a viewing format. This format may be a contact sheet containing small developed photographs of all exposures made for the customer, or proof prints which are a bit larger. In the case of transparencies which are essentially slides, Petitioner merely inserts them into cardboard slats.

Petitioner sends the customer either the contact sheet, the proof prints or the color transparencies for the choices to be made.

If the customer requests that a negative be developed into a print, Petitioner will take the negative to a photo lab which will create a finished photo for the customer's use. If the customer wants the negatives or transparency for use in a brochure, flyer, publication or advertising material, he will take the negative to a lab for creation of a reproduction quality print which will then be used by a lithographer and printer. The customer may also have the negative scanned directly into a computer for use by the customer. The negative, photograph, or transparency are not destroyed in the production process by the printer and do not become a component part of any final product. They are normally returned to Petitioner and can be used again.

Petitioner retains the legal title and copyright to all of his photographic product. The customer pays for the right to use the negative or transparency for the customer's chosen purpose. While the customer can pick up a negative and take it to a printer or ad agency, Petitioner usually keeps physical possession of the negative and will send it to the printer or ad agency, usually for an additional charge. The customer also usually pays an additional charge for a final reproduction photograph and is billed separately from the initial invoice. No separate charge is made for scanning a photograph into a computer.

ANALYSIS

Petitioner questions whether the charges to his customers for his photography are taxable since he only gives his customers a license to use the negatives and his charge is really for services. These two questions are considered separately below.

1. LICENSES TO USE TANGIBLE PERSONAL PROPERTY ARE SUBJECT TO TAX

Throughout the record, it is clear that Petitioner's common business practice is to keep the negatives he makes for his customer and allow his customer to use them to have prints, lithographs, or other items

made as needed. The customer uses these items to run magazine ads, newsletters, and brochures to advertise and promote the customer's business.

Petitioner's first argument is that he does not sell his negatives or transparencies, but merely licenses the right to use the images contained in the them. This argument fails for two reasons.

First, the sales tax applies to licenses to use tangible personal property as well as to more common transfers of title and possession. Section 212.02(15)(a), F.S., provides:

> Sale means and includes: any transfer of title or possession, or both, exchange, barter, license, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.

Second, the distinction for tax purposes between licensing the use of the negative and licensing the use of the image on the negative has already been considered and judicially rejected. In Florida Association of Broadcasters v. Kirk, 264 So.2d 437, 438 (Fla. 1st DCA, 1972), involving the rental of television film, the First District held:

> Appellants attempt to distinguish between money paid for the actual physical film and that paid for the right to use the film. The right to use is a license so appellants contend that they are renting intangible personal property rather than tangible personal property. However, as the trial court pointed out, this reasoning is unsound. Every purchase or rental of property is the acquisition of the right to use that property for its intended purposes. Likewise, practically every piece of property subject to rent or sale is a product of someone's original idea and the rental thereof is for the purpose of using it.

The Supreme Court of Tennessee, when confronted with the issue of whether operators of motion picture theaters were liable for sales tax on film rented from producers, stated:

> "There is scarcely to be found any article susceptible to sale or rent that is not the result of an idea, genius, skill and labor applied to a physical substance. . . . If these elements should be separated from the finished product and the sales tax applied only to the cost of the raw material, the sales tax would, for all practical purposes, be entirely destroyed." Crescent Amusement Co. v. Carson, 187 Tenn. 112, 213 S.W.2d 27, 29 (1948).

The court in Kirk ruled that the rental of property included the license to use the property, although the statute did not specifically address licenses then as it does today. The court rejected an attempt to divide a finished product into separate components, including an

idea, genius, skill, or labor on one hand, and raw material on the other. Here, Petitioner cannot successfully maintain that he is only licensing the use of the image on the negative and not licensing the use of the exposed and processed negative, when the image exists only in the negative, and cannot be used without the negative. As Petitioner himself stated on page 39 of his deposition in the record:

> As a photographer, you treat your negatives like they're your babies, because if that's the original, if something happens to it, the only way to get it back is to reshoot it.

Without the negative, neither the Petitioner nor his customer have the image that Petitioner labored to make and the customer paid to use. Thus, Petitioner is clearly selling tangible personal property to his customers.

2. THE EXEMPTION FOR SERVICES INVOLVING SALES OF INCONSEQUENTIAL ELEMENTS OF TANGIBLE PERSONAL PROPERTY DOES NOT APPLY TO PETITIONER'S SALES.

Petitioner maintains that he is performing a service, and as a result, his charge for making the negative is not taxable. The sales tax is measured by the sales price of the property sold. In this regard, section 212.02(17), F.S., (1991) provides, in part:

> (17) "Sales price" means the total amount paid for tangible personal property, <u>including any services</u> that are part of the sale, valued in money, . . . <u>without</u> <u>any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest charged, losses, or any other expense whatsoever</u>. "Sales price" also includes the consideration for a transaction which requires both labor and material to alter, remodel, maintain, adjust, or repair tangible personal property. (e.s.)

As previously mentioned, the statutory definitions which control the imposition of the sales tax are comprehensive. Unless specifically exempted, virtually all transactions which involve some transfer of ownership or use of tangible personal property, however small, for a consideration, are subject to sales tax unless specifically exempted. See also section 212.08(13), F.S. Because the tax is imposed on the sales price, and the sales price, as quoted above, includes all services that are a part of the sale, even transfers of a small amount of property will result in the imposition of the tax on the services associated with the transfer. This is true even in circumstances where, by almost any measure, the service performed far outweighs the property transferred.

Therefore, in this case, since it is clear that licenses to use tangible personal property are subject to tax under Chapter 212, F.S., Petitioner's charge to his customers for creating the negatives and granting them a license to use the negatives is taxable unless the

exemption in section 212.08(7)(v)1, F.S., applies. Section 212.08(7)(v)1., F.S., provides:

> (v) Professional services.-
>
> 1. Also exempted are professional, insurance, or personal service transactions that involve sales as inconsequential elements for which no separate charges are made.

In construing statutory exemptions from tax, the Department is required to follow the fundamental rule established by the Florida Supreme Court which mandates that exemptions from, or exceptions to, taxing statutes are special privileges granted by the legislature and must be strictly construed, "with any doubt being resolved in favor of the state." State v. Dickinson, 286 So. 2d 529 (Fla.1974). See also United States Gypsum v. Green, 110 So. 2d 409 (Fla.1959); Green v. Pederson, 99 So.2d 292 (Fla.1957).

For this exemption to apply, it must be clearly established that Petitioner's negatives are inconsequential, and that the transactions at issue are professional, insurance, or personal services. As discussed below, the negatives created by Petitioner are not inconsequential and therefore, their sale by Petitioner is subject to tax on their full sales price. As a result, it is not necessary to decide whether commercial photography is a professional, insurance or personal service.

There is no statutory definition of the term "inconsequential." However, the dictionary defines inconsequential as inconsequent, "of no consequence, lacking worth, significance or importance." Webster's Third New International Dictionary, (unabridged edition, 1986 copyright, page 1144), which appears to be consistent with the common understanding of the term. Unfortunately, judicial interpretations of the term have not been consistent.

In Green v. Sgurovsky, 133 So.2d 663 (Fla.3rd DCA 1961), an artist received sketches from his customers (which included architects, builders and ad agencies). The artist transposed the sketches onto bristol board, colored the bristol board, and added additional drawings. The art work was transferred to the customers, on bristol board, to advertise and promote their designs. The court rejected the notion that the preparation and delivery of art work to customers was, in essence, a personal service transaction involving the transfer of the ideas, images and artistic talent of the commercial artist, rather than a sale of tangible personal property. The court held:

> Unquestionably personal services of the artist or craftsman furnish or bring about the main value of the product. But is the product which is sold, and the renderer's services without the product would not be of any value to the architect. The sale cannot be said to be "inconsequential." It is comparable to an artist's preparation and sale of a portrait to a customer. The customer buys the resultant

> portrait. It is the product which represents the value, after the services have been performed which bring it into being.

Here, without his negatives and transparencies, Petitioner's services would not be of any value to his customers.

Florida Association of Broadcasters v. Kirk, 264 So.2d 437 (Fla. 1st DCA 1972), cert. denied, 268 So.2d 534 (Fla. 1972), involved the rental of film for television broadcast in Florida. The taxpayer argued that little money was paid for physical possession of the film, while a great deal was paid for the right to use the film. The court rejected the distinction as artificial, stating:

> Every purchase or rental is the acquisition of the right to use that property for its intended purposes. Likewise practically every piece of property subject to rent or sale is a product of someone's original idea and the rental of the property is for the purpose of using it.

Citing Crescent Amusement Co. v. Carson, 213 S.W.2d. 27 (Tenn. 1948), the court also stated:

> There is scarcely to be found any article susceptible to sale or rent that is not the result of idea, genius, skill, and labor applied to a physical substance. . . . If the elements should be separated from the finished product and the sales tax applied only to the cost of the raw material, the sales tax would for all practical purposes, be entirely destroyed. (e.s.)

Southern Bell Telephone and Telegraph Co. v. The Dept. of Revenue, 366 So.2d 30 (Fla. 1st DCA 1978), represents a departure from Green and Kirk. Southern Bell involved sales of speculative art, finished art and stock art to be used in phone book yellow pages. The court held that "when Southern Bell buys speculative and finished art, it is really purchasing the artist's idea and the fact that the idea is transmitted on tangible personal property is an inconsequential element of the transaction." The court reached this conclusion over a dissent that could not reconcile the majority's ruling with the idea that all property contains a design or idea separate from the property in which it is embodied, whether it is a Rembrandt or a simple wheel or lever. In reaching its decision, the majority considered three factors:

1. Whether or not the property to be transferred is already in existence or is produced in the course of services rendered;

2. The value of the individual effort involved in the transaction as compared to the value of the property transferred;

3. Whether or not it is essential to the transaction that specific tangible personal property be created.

Here, it is clear that the negatives Petitioner created for use by his customers were not already in existence and were created or produced in the course of his services rendered. Also, the value of the negatives which were licensed were equal to the value of the effort involved in making the negatives. As the Petitioner stated on page 39 of his deposition, he treats his negatives like babies, because if they are destroyed, he has nothing and must start over. Finally, it should be clear that it was essential to Petitioner's customers that the negatives be created. They required the negatives to send to lithographers and printers for their ads or brochures to be produced. Thus, even under Southern Bell, it can be argued that Petitioner's negatives are not inconsequential.

On the other hand, it can be argued that Petitioner's negatives and the speculative and finished art in Southern Bell are similar. Like the speculative art in Southern Bell, many of Petitioner's negatives may not be accepted by his customers. And, like the finished art, the ones that are accepted can be said to be accepted for the ideas or images they convey, and not for the underlying tangible personal property used to convey the images.

One problem with Southern Bell is that it departs significantly from the exemption statute it seeks to interpret. Section 212.08(7)(v) applies only to transactions that involve sales of inconsequential elements of tangible personal property. Southern Bell asks if the tangible personal property is "essential." It can almost be said that the terms "essential" and "inconsequential" are opposites. Significantly, there is no provision in the statute, express or implied, that asks whether or not it is essential to the transaction that specific tangible personal property be created. The statute asks whether the property is inconsequential, and, if it is of no consequence, and there is no separate charge for the property involved, the transaction is exempt. Here, it can not even be suggested that the negatives are unimportant because, according to Petitioner, if the negatives are lost or destroyed, he must do the job all over again. Also, his customers cannot publish their brochure or advertisement without getting the negative to the lithographer and printer.

Additionally, there is no statutory basis for assigning significance to whether an item of tangible personal property was already in existence, or whether it was produced in the course of the services rendered. This consideration would serve as a basis for the wholesale exemption of almost all custom work. A custom crafted chair, boat, car, suit, or dress would be exempt, while identical prefabricated or inventoried items would be taxable.

Finally, there are both instances where the value of the individual effort involved in the transaction has little to do with the value of the property transferred, and instances where the value of the effort has everything to do with the value of the property transferred.

To illustrate, a Michael Jordan autograph on a sports card may be produced with an effortless flick of a pen and be worth hundreds of dollars. On the other hand, a mechanic will likely charge hundreds of dollars after spending all day removing a transmission to replace a gasket worth a few dollars. Michael Jordan's autograph is worth a hundred dollars because of its relative scarcity, not because of the effort expended in creating it. On the other hand, the installed gasket is worth hundreds of dollars mainly because of the effort expended to install it. Under Florida law, both the sale of the autographed sports card and the installed gasket are subject to tax on their full sales price.

Unfortunately, the majority in Southern Bell did not address the First District's earlier opinion in Kirk, or the Third District's opinion in Green, cited above. Nor did the majority appear to resolve what seems to be obvious doubts regarding the transactions at issue against granting the exemption, as the law requires, and as the Court in Green specifically acknowledged. As a result, the Department cannot logically or consistently apply the majority opinion in Southern Bell to Petitioner's sales as referenced in the record. The decisions in Kirk and Green, cited above, are more on point and, together with the governing statutes, serve as the basis for the conclusions reached in this Declaratory Statement.

The Department has reached these conclusions aware of the trial court order in The William Cook Agency, Inc. v. Dept. of Revenue, Case No. 91-04036-CA (Fla. 4th Jud. Cir. 1993). However, the First District per curiam affirmed Cook, which does not establish precedent or a point of law. Acme Specialty Corp. v. City of Miami, 292 So. 2d 379 (Fla. 3rd DCA 1974). See also Altman, Meder, Lawrence Hill, Inc. v. Dept. of Revenue, Case No. 95-0653C, (Fla. 13th Cir., April, 1996), where the trial court determined that an ad agency's pre-production creative services were not taxable.

Other jurisdictions are in accord with Florida's Kirk and Green decisions. The Nebraska Supreme Court, in May Broadcasting Co. v. Boehm, 490 N.W. 2d 203 (Neb. 1992), extended the concepts of Kirk and Green by holding that syndicated programming purchased by broadcasters, whether received by video tape or by satellite transmission, was tangible personal property subject to tax. This conclusion was reached despite the fact that the transactions involved the purchase or rental of the intangible right to use.

Also, Nelson v. Olsen, 723 S.W. 2d 621 (Tenn. 1987), concerned advertising props sent to a company which reviewed them to determine if they represented the image the company desired. The props eventually were transferred to a third party which developed the promotional material. The props were held to be tangible personal property subject to sales tax, rather than incidental items to intangible service transactions. Additionally, Columbia Pictures Industries, Inc. v. Tax Commissioner, 410 A2d 457 (Conn. 1979), held that the personal/professional services exemption was not applicable to a motion picture licensing agreement, where the exhibitor's object was to acquire finished film to reproduce it for its own profit,

rather than the services performed in producing the film. Finally, WTAR Radio-TV Corp. v. Commonwealth, 234 S.E. 2d 245 (Va. 1977), held that advertising films created and broadcast by a television station for its customers were not inconsequential elements of an exempt service transaction even though no separate charge was made for the film used in creating the ads, and even though the advertising films were never physically transferred to the customers.

CONCLUSION

The Department concludes that Florida Association of Broadcasters v. Kirk and Green v. Sgurovsky, supra, correctly state the law, and therefore apply to Petitioner's facts in the record. Petitioner's negatives and transparencies are clearly what his customers require and the reason for which he is being paid. The negatives and transparencies are finished products created for his customer's use, and his services are of no value to his customer without them. To repeat the observation of the Court in Kirk in a comment adopted from the Supreme Court of Tennessee:

> "There is scarcely to be found any article susceptible to sale or rent that is not the result of an idea, genius, skill and labor applied to a physical substance....If these elements should be separated from the finished product and the sales tax applied only to the cost of the raw material, the sales tax would, for all practical purposes, be entirely destroyed."

And, as the court held in Green concerning the renderings of an illustrator for an architect:

> Unquestionably, personal services of the artist or craftsman furnish or bring about the main value of the product. But it is the product which is sold, and the renderer's services without the product would not be of any value to the architect. The sale cannot be said to be inconsequential.

Here, Petitioner's services furnish or bring about the main value of the product. But it is the use of negatives and transparencies he creates which he licenses for a consideration. His services without the negatives and transparencies would not be of any value to his customer.

Thus, the negatives are not inconsequential elements of the transaction between Petitioner and customers. Since they are not inconsequential, the exemption in section 212.08(7)(v)1, F.S., cannot apply to Petitioner's charges for creating and licensing their use. As a result, the full sales price of Petitioner's charge for creating and licensing the use of his negatives and transparencies is subject to sales tax.

IT IS THEREFORE SO ORDERED.

Any party to this Declaratory Statement has the right to seek judicial review of the Declaratory Statement as provided in section 120.68, F.S., by filing a Notice of Appeal as provided in Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the Department in the Office of the General Counsel, Post Office Box 6668, Tallahassee, Florida, 32314-6668, and by filing a copy with the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The notice of Appeal must be filed within thirty (30) days from the date this declaratory statement is filed with the Clerk of the Department.

DONE AND ORDERED THIS 6th day of June, 1996.

State of Florida
Department of Revenue

L. H. Fuchs

L. H. Fuchs
Executive Director

Filed with the Agency Clerk of the Department of Revenue and served on the Petitioner this 6th day of June, 1996.

Judy Langston

Judy Langston, Agency Clerk

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