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Honorable Berry H. (Nick) Tew, Jr.
State Geologist and Oil and Gas Supervisor
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Oil and Gas Board – Geological
Survey – Public Records – Sales Tax
– Publications

Geological Survey of Alabama
publication sales are not subject to
Alabama sales tax.

Dear Mr. Tew:

This opinion of the Attorney General is issued in response to your request on behalf of the Geological Survey and State Oil and Gas Board of Alabama.

QUESTION

Does A.G. Opinion No. 2008-36, requiring the Alabama Historical Commission to collect and remit sales tax on the proceeds of sales of gift shop items, apply to the Geological Survey of Alabama/State Oil and Gas Board?

FACTS AND ANALYSIS

Your request states as follows:

The Geological Survey of Alabama ("Survey") was established in 1849. The State Oil and Gas Board of Alabama ("Board") was established in 1945. These agencies are located in the same buildings in Tuscaloosa. The State Geologist also serves as Supervisor of the Board. In performing their duties, the Survey and Board operate a Publications Office, which collects revenues for copying records of the Survey and Board and for sales of their publications. Approximately 85 percent of the revenues collected in this Office are derived from recouping costs of copying records. The other 15 percent is from the sale of publications of the Survey and Board.

Section 9-4-2 of the Code of Alabama sets out the statutory duties of the State Geologist. Section 9-4-2(d) states that "[h]e shall also from time to time prepare or cause to be prepared monographs, special reports or bulletins of the geology and varied resources of the state which shall be printed and published." ALA. CODE § 9-4-2(d) (Supp. 2001). In accordance with this statutory duty, the Survey has since its inception published hundreds of books, reports, and bulletins on the state's natural resources.

In an opinion dated August 5, 1948, Attorney General A. A. Carmichael addressed the question whether the Survey could collect a charge for publications. Opinion to Honorable Walter B. Jones, State Geologist, dated August 5, 1948. That opinion stated that the "Survey may require a nominal charge for the issuance of publications of such agency." *Id.* at 1. The *Jones* opinion did not state that sales tax should

be collected. We note that the Alabama sales tax was enacted prior to that opinion.

In allowing this agency to charge a nominal fee for its publications, the *Jones* opinion stated that “it cannot be said that the proceeds hereunder consideration represent a net profit or net gain realized from an investment of capital.” *Id.* at 4. Based on that opinion, the Survey charges a fee for the sale of its publications. The fee is merely for the purpose of recouping costs associated with the printing of the publication.

On January 3, 2008, this Office stated that “the Alabama Historical Commission is required to collect and remit sales tax on the gross proceeds of sales of gift shop items to the state, counties, or municipalities in accordance with section 40-23-2(1) of the Code of Alabama.” Opinion to Honorable Frank W. White, Executive Director, Alabama Historical Commission, dated January 3, 2008, A.G. No. 2008-036, at 3. Section 40-23-2(1) provides that sales tax is levied “[u]pon every person, firm, or corporation, (including the State of Alabama . . .) engaged or continuing within this state, in the *business* of selling at retail any tangible personal property whatsoever.” ALA. CODE § 40-23-2(1) (Supp. 2009) (emphasis added).

The Alabama Supreme Court has explained the sales tax levy in the context of a business license tax for leasing under a city ordinance. *Scott & Scott, Inc. v. City of Mountain Brook*, 844 So. 2d 577 (Ala. 2002). In reading *Scott*, this Office has observed as follows:

In *Scott*, the Court incorporated into its analysis the definition of “business” found in section 40-23-1 of the Code of Alabama. *Scott*, 844 So. 2d at 592. Section 40-23-1 defines “business” as “[a]ll activities engaged in, or caused to be engaged in, *with the object of* gain, profit, benefit, or advantage . . .” ALA. CODE § 40-23-1(11) (2003). As a result, the Court concluded that the phrase “engaged in the business of leasing” means “an act or acts of leasing, *accompanied by the intent* to derive a

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gain, profit, benefit, or advantage from such action or actions.” *Scott*, 844 So. 2d at 592.

Opinion to Honorable Micky Hammon, Member, House of Representatives, dated August 15, 2006, A.G. No. 2006-129, at 4 (emphasis added).

This Office has considered whether the probate judge is a taxpayer that could be audited by the Alabama Department of Revenue. Opinion to Honorable Harry D’Olive, Probate Judge, Baldwin County, dated June 16, 1992, A.G. No. 92-00327. In concluding that the judge is not subject to sales tax because the judge is not a “business” under section 40-23-1(11), this Office reasoned as follows:

The probate court is a constitutional office of the State of Alabama. See § 152 of the 1901 Constitution of Alabama as amended by Amendment No. 328 and 364. The person filling the office of probate court is styled the probate judge, and has only such duties and jurisdiction as are specified by statute.

The “business” of the probate court, and the probate judge, qua probate judge, does not involve the sale of tangible personal property with the object of gain, profit, benefit or advantage, either direct or indirect. Thus, a probate judge functioning within the parameters of this jurisdiction would not be subject to audit as a taxpayer by the sales tax division of the State Department of Revenue. . . .

Id. at 2-3 (emphasis added).

This Office has stated that the Alabama Historical Commission has statutory authority to purchase, produce, sell, and distribute historic souvenir items. Opinion to Honorable Lee H. Warner, Executive Director, Alabama Historical Commission, dated March 28, 2003, A.G. No. 2003-114, *citing* ALA. CODE § 41-9-249(19) (2000). In contrast, as you correctly state, the Legislature has placed a mandatory duty on the Geological Survey of Alabama to issue publications. Therefore, unlike the Alabama Historical Commission, which has chosen to exercise its

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authority to establish retail shops to engage in selling souvenir items for gain, profit, benefit, or advantage, the Survey engages in creating and issuing publications to discharge its statutory obligation. The payment of a nominal fee to recoup the Survey's printing costs is unrelated to the purpose of the publication activity in which the Survey is engaged. It is the opinion of the Attorney General that sales by a governmental agency that is merely discharging its statutory obligation are not subject to state sales tax.

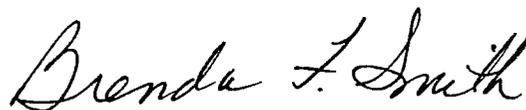
CONCLUSION

Geological Survey of Alabama publication sales are not subject to Alabama sales tax.

I hope this opinion answers your question. If this Office can be of further assistance, please contact Ward Beeson of my staff.

Sincerely,

TROY KING
Attorney General
By:



BRENDA F. SMITH
Chief, Opinions Division

TK/GWB

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