

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

v.

§

DOCKET NO. U. 87-232

OXFORD BAND BOOSTER CLUB, INC. §
P.O. Box 3137
Oxford, AL 36203, §

§

Taxpayer. §

§

ORDER

The Department assessed State and City of Oxford use tax against the Oxford Band Booster Club, Inc. ("Taxpayer") for the period January 1, 1984 -through March 31, 1987. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on March 1, 1988. The Taxpayer's representative, Mr. Mitchell Williams, presented written arguments prior to the hearing and consequently did not appear. The Department was represented at the hearing by assistant counsel J. Wade Hope. Based on the evidence presented in the case, the following findings of fact and conclusions of law are hereby made and entered.

FINDINGS OF FACT

The Taxpayer is a non-profit organization formed to provide financial aid and other assistance to the Oxford High School Band. members are the parents of the band members. The Taxpayer engages in various fund-raising activities, such as candy sales, concession sales at school athletic events, a "Band Day Competition" and a "Miss Oxford" contest. The funds raised by the Taxpayer are used to purchase various "band items" for use by the band.

During the subject period, the Taxpayer maintained an Alabama sales tax license and remitted sales tax to the Department on its concession sales and admission receipts.

The Department subsequently audited the Taxpayer, cancelled the Taxpayer's sales tax license, and entered the use tax assessments in issue. The Taxpayer's sales tax number was cancelled based on an Attorney General's opinion dated May 23, 1986 which held that concession sales by school-related organizations are exempt from sales tax as casual sales.

The use tax assessments in issue are based on the out-of-state purchases of various band items, i.e. sheet music, band instruments, band uniforms, instrument repair parts, etc. The band items are used by the band members during the school year and returned to the school at the end of the year or when the student otherwise leaves the band. The band director has custody of and supervises distribution of the band items.

The band items in issue were ordered by the band director and invoiced either to the Taxpayer or directly to the school. All items were delivered directly to the school and the Taxpayer paid all invoices. No evidence was presented indicating that the school had legal title to the subject items.

The assessments also include candy which was purchased by the Taxpayer and subsequently resold by the band members. The proceeds from the candy sales were deposited in the Taxpayer's checking account and used to purchase the above-referenced band items.

The audit was conducted from a review of the Taxpayer's purchase invoices and bank records. No tax was assessed if the purchase invoice indicated that tax had been charged and the bank records verified that tax had been paid. The assessments include only those out-of-state purchases on which no tax has been paid.

CONCLUSIONS OF LAW

The Alabama use tax is levied on the storage, use or consumption of tangible personal property that is purchased at retail outside of the State. Paramount-Richards Theatres v. State, 55 So.2d 812 (1951). Like the sales tax, the use tax is a consumer tax and is levied against the ultimate consumer (user). State v. Toolen, 167 So.2d 546 (1964); State v. Aigernon Blair Indus. Contractors, 362 So.2d 248, cert denied, 362 So.2d 253 (1978).

The candy in issue was purchased at wholesale outside of Alabama and resold at retail within Alabama by the band members, as implicit agents for the Taxpayer. Consequently, the Taxpayer would be liable for sales tax on the candy sales, and not use tax.¹ The

¹The Taxpayer should be reissued a sales tax number and any future candy sales should be reported on the Taxpayer's monthly sales tax return along with all concession sales and admission

use tax applies only to property purchased at retail outside of the State. State v. Marmon Indus., Inc., 456 So.2d 798 (1984); State v. Toll Gate Garmnet Corp., 352 So.2d 1361 (1977).

The Department argues that the candy sales were casual sales and thus exempt from sales tax. The Department then concludes that the candy was subject to use tax when brought into Alabama by the Taxpayer. However, as noted, sales tax and not use tax would be applicable because the candy was sold at retail within Alabama.

Further, if the sales were casual, as argued by the Department, then not even sales tax would be due. But as pointed out in footnote 1, the candy sales were not casual sales. The candy was purchased for resale, was sold on a regular planned basis, albeit randomly by individual band members, and thus was subject to sales tax. Unlike the candy sales in issue, a casual sale would

receipts. The Attorney General's opinion relied on by the Department to cancel the Taxpayer's sales tax number is incorrect in holding that concession sales and admission receipts are not subject to sales tax.

generally be defined as the isolated sale of property that was not originally acquired or intended for resale.

Concerning the band items, the taxable event was the use of those items in Alabama.² The Department contends that the Taxpayer "used" the band items by giving the items to the school for use by the band members. The Department further argues that the Taxpayer is liable for use tax because legal title was never transferred to the school.

The evidence is unclear on the question of legal title, but it is clear that the items were delivered directly to the school and that the school had exclusive possession, control and use of the items.

²The evidence is vague as to when and where the sales actually occurred. If the sales were consummated within Alabama, then sales tax would be due, see State v. Dees, 333 So.2d 818, cert. denied, 333 So.2d 821 (1976). With no evidence to the contrary, it is assumed that the sales occurred out-of-state and consequently that use tax is the proper tax.

In effect, the property belonged to the school.

The use tax is on the, ultimate user. State v. Algernon Blair Indus. Contractors, supra. The use tax statutes do not require that the tax must be levied on the party with technical legal title to the property. The Alabama Supreme Court, in Associated Contractors v. Hamm, 172 So.2d 385, at 387, stated as follows:

These various provisions do not make it crystal clear as to the exact intention of the parties with respect to technical legal title. However, we are in complete agreement with the trial court in its conclusion that at least insofar as the Alabama Use Tax statute is concerned, the Associated Contractors had sufficient title, control and possession of these various materials when they came to rest in this state to invoke the statute. The language of the statute does not seem to indicate that the legislature intended to predicate the tax upon one who had technical legal title and no other.
(emphasis added)

As noted in the above case, the term "Use" is defined at Code of Ala. 1975, §40-23-60(8) as "[T]he exercise of any right or power over tangible personal property incident to the ownership of that property, or by any transaction where possession is given . . .". Further, "Purchase" is defined by Code of Ala. 1975, §40-23-60(9) as "[A]cquired for a consideration, whether such acquisition was effected by a transfer of title, or of possession or of both, or a license to use or consume; . . .". Clearly under the above definitions, actual legal title is not required for the use tax to apply.

The band items in issue were ordered by the band director and

delivered directly to the school. The school at all times had exclusive possession, control and use of the property. The school was clearly the ultimate user and thus the school, and not the Taxpayer, would be liable for the use tax thereon.

However, Code of Ala. 1975, §40-23-62(16) in pertinent part exempts from the use tax all tangible personal property used, stored or otherwise consumed by any educational institution operated by the State or its political subdivisions. Consequently, the use of the property in question by the school would be exempt from use tax.

The above considered, the Department is hereby directed to reduce and make final the use tax assessments in issue in the amount of zero.

Done this 1st day of April, 1987.

BILL THOMPSON
Chief Administrative Law Judge