STATE OF ALABAMA, DEPARTMENT OF REVENUE, vs. HUNTSVILLE BASEBALL CLUB, INC. Joe Davis Stadium 2033B Airport Road Huntsville, AL Taxpayer,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION DOCKET NO. S. 92-208
BIRMINGHAM BASEBALL CLUB, INC. 100 Ben Chapman Drive Hoover, AL 35216, Taxpayer.	§	DOCKET NO. S. 92-170

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed State sales tax against Birmingham Baseball Club, Inc. for the period April, 1988 through March, 1991, and against the Huntsville Baseball Club, Inc. for the period August, 1988 through July, 1991. The above entities are hereafter referred to separately as "Birmingham" or "Huntsville", respectively, or jointly as "Taxpayers". The Taxpayers appealed to the Administrative Law Division and the cases were consolidated and heard together on September 28, 1993. Tim Bush appeared for Birmingham and Bill Patty appeared for Huntsville. Assistant counsel Wade Hope represented the Department. Bill Patty subsequently withdrew from the case and Huntsville is now represented by Charles Pullen.

The issues in dispute are as follows:

(1) Are advertising revenues received by the Taxpayers from billboard, fence, program, radio, ticket, schedule and promotional

night advertising subject to the public amusement gross receipts tax levied at Code of Ala. 1975, §40-23-2(2).

(2) Are revenues received by the Taxpayers from the rental of stadium suites subject to the above public amusement gross receipts tax. That issue turns on whether the rental of the stadium suites constitutes "rentals of real estate", which is specifically excluded from the definition of "gross receipts" found at Code of Ala. 1975, §40-23-1(a)(8).

(3) Should Huntsville be prohibited from backing out the 4% tax from its admission gross receipts because a sign at the Huntsville stadium failed to separately state that the 4% tax was included in the price of admission as required by Department Reg. 810-6-2-.86.

The facts are substantially undisputed.

The Taxpayers own and operate minor league baseball teams in their respective cities. The Huntsville team is the Huntsville Stars and the Birmingham team is the Birmingham Barons. Both Taxpayers lease stadium facilities in their respective cities in which they provide baseball games open to the public.

The Taxpayers reported and paid sales tax on their gross receipts derived from ticket, souvenir and program sales during the audit period in issue.[1] Those areas are not disputed, except concerning Issue (3) above as to whether Huntsville should be

[1] The concession sales at the stadiums were handled by third-party licensees and are not in issue.

allowed to back-out the 4% tax from total gross ticket receipts. The Department also made some computation or mechanical corrections in its audit that also are not disputed by the Taxpayers. The three disputed issues are discussed separately below.

Advertising Receipts

The Taxpayers sell advertising space on their outfield walls, billboards, programs, tickets, schedules and on radio. They also engage in promotional nights where a sponsor buys the right to give away general admission passes to specific games. The first issue in dispute is whether the gross receipts derived from the above advertising activities are subject to the public amusement gross receipts tax in issue.

Code of Ala. 1975, §40-23-2(1) levies a general sales tax on gross receipts derived from the retail sale of tangible personal property. That tax is levied on the retail consumer, see §40-23-26(c), and is based on the gross proceeds paid by the consumer.

Code of Ala. 1975, §40-23-2(2) levies a second "sales" tax on the gross receipts derived from operating a public place of amusement. This case brings into issue the intended scope of the public amusement gross receipts tax.

The Department argues that because the Taxpayers operate public places of amusement, their gross receipts derived from all sources, including the advertising revenues in issue, are taxable.

I disagree.

The gross receipts tax is levied on taxpayers that operate public places of amusement or entertainment and is based on "an amount equal to 4% of the gross receipts of any such business". See, §40-23-2(2). "Any such business" relates only to the public business or activity engaged in by a taxpayer. Consequently, the tax is levied only on the gross receipts paid for attending or engaging in the public activity or amusement offered by a taxpayer. Just as the true sales tax levied by §40-23-2(1) is levied on the gross proceeds paid by the consumer of tangible personal property, the gross receipts tax levied at §40-23-2(2) is levied only on the gross receipts paid by the "consumer" of the public amusement. Thus, admission fees paid to attend public athletic or entertainment events should be taxed, as should the amounts paid to engage in a specific activity in a public place, i.e., bowling alley fees, pool table fees, video game receipts, etc.

However, the public amusement tax does not apply to gross receipts that are not paid by the public to attend or engage in the specific public activity offered by a taxpayer. The sale of advertising time and space by the Taxpayers in this case to third-party advertisers is not a public amusement, and thus the gross receipts derived from those activities are not taxable. The fact that the Taxpayers would probably not have received any of the advertising revenues in question "but for" the public baseball

games is not relevant.

The above holding is consistent with at least two prior decisions rendered by the Administrative Law Division, Docket No. S.91-142 (1991) and Docket No. S. 86-108 (1986).

In S. 91-142, the issue was whether monthly membership dues paid by members of a private golf club were taxable because the club's golf course was also open to the public. The membership fees were held to be not taxable because they were derived from an activity separate and apart from the public amusement offered by the club. Only the amounts paid by the public (non-members) for playing on the golf course were taxed. The opinion states in part as follows:

> The intent of §40-23-2(2) is to tax gross receipts derived from a specific public event, entertainment or activity or from amusement devices. The tax is measured by the "gross receipts of any such business". "Such business" refers only to the specific public activity engaged in by a taxpayer, in this case, the public golf course. The tax does not apply to all other business activities carried on by a taxpayer that are separate and distinct from the public activity and not otherwise taxable under §40-23-2(2).

In S. 86-108, a taxpayer operated a public miniature golf course and driving range. The gross receipts derived from those activities were taxable. However, the taxpayer also gave on-premises golf lessons and clinics. The fees derived from those separate activities were not taxed. The opinion states in part as follows:

> The tax is levied upon the privilege of operating a place

> of amusement, and applies to the gross proceeds derived from charges for specific entertainment activities carried on therein, such as green fees charged at public golf courses, admission fees charged at various sporting events, etc. However, the fact that a portion of a business may be subject to the amusement or entertainment sales tax does not mean that every activity carried on by the Taxpayer is also subject to the tax. Only if the specific activity or event to be taxed constitutes a public amusement or entertainment or is directly related to or constitutes an integral part thereof, should it be subject to the tax. Thus, although the Taxpayer's business does include several taxable activities, the golf lessons, which are a professional service and are not provided for entertainment or amusement within the purview of subsection (2), would not be taxable. The golf lessons are separate and distinct from the Taxpayer's golf amusement center.

The advertising revenues in issue cannot be taxed because they are derived from third-party advertisers and not from the public amusement, the baseball games, conducted by the Taxpayers. The advertising may be a necessary part of the Taxpayers' business, see transcript at page 43, but the gross receipts derived from advertising are not derived from a public amusement and thus are not taxable.

The above conclusion is supported by the rule of statutory construction that a statute which levies a tax must be strictly construed in favor of the taxpayer and against the Department. Misener Marine Construction, Inc. v. Eagerton, 423 So.2d 161 (1982).

The Department cites a Tuscaloosa County Circuit Court case in support of its position. That case, Board of Trustees of the University of Alabama v. State, CV87-1063, held that advertising

revenues derived from ads that appeared on the back of athletic event tickets were subject to the tax. However, the University conceded when arguing the case that advertising revenues in general were taxable, but only relating to billboard and scoreboard advertising in the stadium, not ticket advertising. Thus, the Circuit Court was not required to address the taxability of advertising revenues in general, but only had to decide the specific issue of whether advertising on tickets was different from advertising on billboards or scoreboards. I agree with the Court's holding that there is no difference between the two. However, as discussed above, I disagree with the premise relied on by the Court that advertising revenues in general are taxable.

While advertising revenues derived from third-party advertisers cannot be taxed, the amounts paid by promotional night sponsors can be taxed because those receipts are paid for admission to a game. That is, the sponsor is paying for general admission passes to a particular game, and consequently, the gross receipts paid by a sponsor are derived from the public amusement offered by the Taxpayers and are taxable, even though the sponsor purchases the passes for promotional or advertising purposes.

Stadium Suite Rentals

Both Birmingham and Huntsville sub-leased stadium suites at their stadiums during the audit period. The sub-lessees all signed a sub-lease agreement that allowed them to use the suite for a

designated number of years at a designated price. The sub-lessees could use the suites for other events at the stadium, provided each person attending also had a ticket to the event. They could also use the suite at other times when no event was being conducted at the stadium. However, for security reasons, the sub-lessees could only use the suites during reasonable hours and only after first notifying the Taxpayers. The sub-lessees could themselves sub-lease the suite to another person. In most cases, the sub-lessees also received free tickets, guest passes and free parking spaces for the games.

The Taxpayers argue that the gross receipts derived from the stadium suites cannot be taxed because they are specifically exempted by Code of Ala. 1975, §40-23-1(a)(8). That section specifically excludes from gross receipts the amounts derived from "rentals of real estate".

The Department counters that the suite rentals are not normal real estate rentals because the sub-lessees also receive free tickets and parking passes, and the suites are available only at designated times.

I agree with the Taxpayers that the stadium suite sub-leases constitute the rental of real estate. "Leasing or rental" is defined for lease tax purposes at Code of Ala. 1975, §40-12-220(5) as "a transaction whereunder the person who owns or controls possession of tangible personal property permits another person to

have the possession and use thereof for a consideration and for the duration of a definite or indefinite period of time . . .". "Lease" is also defined by the Uniform Commercial Code at Code of Ala. 1975, §7-2A-103(j) as "a transfer of the right to possession and use of goods for a term in return for consideration, . . .". While the above definitions relate to tangible personal property, they apply equally to real estate leases.

The suite sub-leases in issue clearly constitute the rental of real estate because the sub-lessees are allowed possession and use of the suites for a consideration and for a definite period of time. The fact that the sub-lease is subject to certain restrictions, i.e., access only during reasonable hours, etc., does not make the transaction any less of a lease; nor does the fact that the sub-lessees also receive free tickets, guest passes and parking spaces to the games.

However, only that portion of the gross receipts relating to the leasing of the suites is exempt. The fair market value of the tickets, guest passes and parking passes also provided to the sub-lessees are derived from a public amusement and thus should be taxed. The Department should adjust the assessments accordingly to include only the fair market value of the tickets, guest passes, and parking spaces provided to the sub-lessees. The balance representing receipts from the rental of real estate should be removed from the assessments.

(3) Can Huntsville back out the 4% tax?

Although the tax is based on total gross receipts received by a taxpayer, the Department allows a taxpayer to back out the 4% tax included in an admission price, but only if the amount of the tax is specifically stated on the ticket or on a sign at the gate. The Department's position is set out in Department Reg. 810-6-2-.86, which reads as follows:

> (1) The sales tax due on an admission fee must be collected as a separate item. Where the tax is not stated and collected separately the total amount of the admission price will be used as the measure of the tax to be paid to the State. Where the tax is stated and collected separately, only the amount of the admission price (not including tax) will be used as the measure of the tax.
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> (2) This rule will have been complied with where a sign showing the admission price and amount or amounts of tax due thereon is permanently displayed within view of persons paying such admissions or where the tickets used in connection with such transactions have plainly printed on the face thereof the admission price and, as a separate item, the amount of sales tax due thereon. (Readopted through APA Code effective October 1, 1982).

The above regulation is based on Code of Ala. 1975, §40-23-26(b), which provides in relevant part that "it shall likewise be unlawful . . . to absorb or advertise directly or indirectly the absorption or refund of the amount required to be added to the sales price and collected from the purchaser . . .".

Pursuant to §40-23-26(b), a taxpayer cannot charge a lumpsum admission price and absorb or include the tax in the price. Rather, as required by Department Reg. 810-6-2-.86, the tax must be

specifically stated as a separate item in addition to the price charged for admission. If not, the tax is illegally absorbed in the price and tax is due on the entire admission price.

The next question is whether the Huntsville sign stating only that "price includes tax" is sufficient to comply with the above statute and regulation. I do not believe it is. The regulation properly requires that the amount of the tax must be separately stated from the admission price. The sign at the Huntsville stadium does not do that. Consequently, because the tax was illegally absorbed in the price, Huntsville is liable on the entire amount received for admissions during the audit period.

The above considered, the Department should remove the advertising receipts and suite rental receipts from the assessments and recompute the Taxpayers' liability accordingly. The remaining tax due should be based on the mechanical or computation errors found by the Department, that part of the suite rental receipts equal to the fair market value of the tickets, guest passes, and parking passes provided to the sub-lessees, the promotional night receipts, and, concerning Huntsville, the backed out 4% tax. The Department should notify the Administrative Law Division of the adjusted amounts due, and a Final Order will then be entered. The Final Order when entered may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered on February 23, 1994.

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BILL THOMPSON
Chief Administrative Law Judge