THE UNDERSTUDY, INC. 228C S. OATES STREET DOTHAN, AL 36301-1637,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 05-1234
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed The Understudy, Inc. ("Taxpayer" or "corporation") for State sales tax for December 1998 through January 2005. The Taxpayer appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. A hearing was conducted on April 11, 2006. David Johnston represented the Taxpayer. Assistant Counsel David Avery represented the Department.

This case involves the sales tax exemption at Code of Ala. 1975, §40-23-4(a)(24). As explained below, that section exempts from sales tax the gross receipts from admissions to any theatrical production, orchestral concert, ballet, or opera presented by a local society, association, group, workshop, etc. The exemption applies only if members of the society, association, etc. actively and regularly participate in the productions.

Before 1998, Ronald Glen Devane and others were involved in staging various amateur theatrical productions in Dothan, Alabama. The productions were in conjunction with the Dothan Area Convention and Visitors Bureau.

An attorney advised Devane to form a corporation, The Understudy, Inc., in 1998. Devane testified that he formed the corporation "just to keep everything straight so it would be a little easier for me since I'm more of an artist than I am a corporation person." (R. 39) Devane is the corporation's sole shareholder and officer.

The Taxpayer operated a dinner theater in Dothan during the years in issue. It staged approximately eighteen dinner theater productions annually. Meals were served at those regular productions. The Taxpayer also staged other special shows, such as *Ain't Misbehavin*, a Fats Waller musical review, and *Wit*, a drama about a woman dealing with cervical cancer that the Taxpayer hosted as a fund raiser for the American Cancer Society. Local bands played at the Taxpayer's leased facility once a month. The bands kept the door admissions on those occasions. The Taxpayer also sometimes hosted and/or organized fund raising events for local charities and social clubs.

Devane scheduled and coordinated the performances. He also performed in many of the productions, and sometimes served as director, producer, lighting director, technician, or in any other needed capacity. Three other local actors also regularly performed in many of the productions.

The Taxpayer charged a lump-sum price for its dinner shows, which included the cost of the meal. The Taxpayer also sometimes sold alcoholic beverages and other drinks to its patrons. The Taxpayer used its admissions and drink proceeds to pay its operating expenses. Devane never received a salary or a dividend from the Taxpayer. He explained that he had other income from rental houses and giving dance lessons, and that he only hoped to break even with The Understudy.

The Department audited and assessed the Taxpayer for sales tax on the gross receipts from its admissions and liquor sales. The audit report was not submitted into evidence. It is assumed, however, that the Taxpayer has never filed sales tax returns. The Department thus assessed the Taxpayer back to December 1998 based on the open-

ended statute of limitations for assessing tax at Code of Ala. 1975, §40-2A-7(b)(2).

The Taxpayer concedes that it owes sales tax on its liquor sales. It argues, however, that the admission charges were exempt pursuant to §40-23-4(a)(24). That section reads as follows:

> The gross proceeds from sales of admissions to any theatrical production, symphonic or other orchestral concert, ballet, or opera production when such concert or production is presented by any society, association, guild, or workshop group, organized within this state, whose members or some of whose members regularly and actively participate in such concerts or productions for the purpose of providing a creative outlet for the cultural and educational interests of such members, and of promoting such interests for the betterment of the community by presenting such productions to the general public for an admission charge. The employment of a paid director or conductor to assist in any such presentation described in this subdivision shall not be construed to prohibit the exemptions herein provided.

The Taxpayer contends that as a corporation, it qualifies as an "association" within the purview of the exemption. It asserts that it was organized for the sole purpose of bringing theatre, concerts, etc. to the public in the Dothan area. It also points out that Devane and several other local actors regularly participate in the productions, as required for the exemption to apply.

Devane clearly enjoys acting and the arts. His primary motive in incorporating The Understudy, Inc., and thereafter organizing and staging theatrical productions and concerts was not for personal profit. Rather, it was to provide entertainment to the public, and also to provide himself and the other actors that regularly performed with a creative outlet for their talents. Unfortunately for the Taxpayer, notwithstanding the civic good achieved by its activities, it did not qualify for the sales tax exemption provided at §40-23-4-(a)(24).

I agree that the events staged by the Taxpayer were theatrical productions, concerts, etc. within the scope of §40-23-4(a)(24). I cannot find, however, that the Taxpayer, as a for profit corporation, was a "society, association, guild, or workshop group" within the scope and intent of the statute.

An unincorporated entity such as an association may elect to be taxed as a corporation for federal income tax purposes. See, 26 CFR 301.7701-3. However, that does not mean that a corporation is also an association for purposes of the §40-23-4(a)(24) exemption, as argued by the Taxpayer's representative. "Association" is defined by the American Heritage College Dictionary, Fourth Ed. at 87, as "[a]n organized body of people who have an interest in common; a society." An association thus by definition must have more than one member. The Taxpayer is solely owned by Devane, and has no other "members." Also, even for an association to elect to be taxed as a corporation, it must have at least two members. See again, 26 CFR 301.7701-3(a).

The §40-23-4(a)(24) exemption was intended to apply to volunteer civic organizations whose members stage performances for the public. However, the Taxpayer, as a for-profit corporation, not only organized and staged the theatrical performances, concerts, etc., but also sold meals and alcoholic beverages. The Taxpayer (or Devane) may not have profited from the activities, but it certainly could have, and may do so in the future if managed differently. The §40-23-4(a)(24) exemption thus does not apply. The above finding is supported by the rule of construction that an exemption must be construed strictly for the Department and against the exemption. *Bean Dredging Corp. v. State of Alabama*, 454 So.2d 1009 (Ala. 1984).

Even if the Taxpayer was an exempt organization pursuant to §40-23-4(a)(24), the exemption would apply only to admissions charged by the Taxpayer. "Admissions," in the context of the exemption, refers only to the amount charged to attend or view a show or production.[1] All other receipts or proceeds from the sale of the meals and beverages would be taxable. The Taxpayer has acknowledged as much because it concedes that its liquor sales are taxable. Likewise, the gross proceeds for the meals would also be taxable.

The Taxpayer charged a lump-sum for the dinner shows. Consequently, again assuming that the admissions were exempt, the Department would still be justified in taxing the entire lump-sum amounts because the Taxpayer failed to keep records showing the charge for the exempt admissions and the taxable meal. When a taxpayer fails to keep records separately showing taxable and nontaxable receipts, i.e., the charge for the meal and the charge for admission, the taxpayer must suffer the consequences and pay tax on the receipts not properly documents as exempt or non-taxable. *State v. Ludlum*, 384 So.2d 1089 (Ala. Civ. App.), cert. denied 384 So. 1094 (Ala. 1984); *State v. Levey*, 29 So. 129 (1949).

Devane and the other individuals that are actively involved in the productions may form a voluntary association, society, etc., and thereafter stage theatrical productions tax-free pursuant to §40-23-4(a)(24). The members must "regularly and actively" participate in the performances. If the group also sells or provides meals and/or beverages, it must collect sales tax on the sales and keep records distinguishing the taxable sales and non-taxable admissions. The gross receipts derived from band appearances and other shows

[1] "Admissions" is defined in the American Heritage College Dictionary, Fourth Ed. at 18, as "[t]he price required or paid for entering."

performed exclusively by non-members would also be subject to tax, even if the gate proceeds went to those performers.

The tax and interest assessed by the Department is affirmed. The penalty of $3,479.70 is waived for reasonable cause under the circumstances. Judgment is entered against the Taxpayer for tax and interest of $16,796.19. Additional interest is also due from the date the final assessment was entered, October 31, 2005.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered June 6, 2006.

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BILL THOMPSON
Chief Administrative Law Judge