GREGORY W. MIMS VEGGIES TO GO 8811 TARA LANE AUBURN, AL 36830-8247,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. S. 05-971
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed Gregory W. Mims ("Taxpayer"), d/b/a Veggies to Go, for State sales tax for September 2001 through August 2004. 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 March 1, 2006. Daniel Lindsey represented the Taxpayer. Assistant Counsel Margaret McNeill represented the Department.

The issue in this case is whether the Taxpayer is liable for Alabama sales tax on food he sold at retail to students at a private school in Lee County, Alabama during the period in issue.

The Taxpayer operated several restaurants in the Auburn/Opelika, Alabama area during the subject period. The headmaster at the Lee-Scott Academy, a private school in Lee County, Alabama, contacted the Taxpayer in mid-2001 concerning the food program at the school. The headmaster was dissatisfied with the program, and asked the Taxpayer if he would be interested in taking over the program.

The Taxpayer decided to take over the food program because he wanted to help the school. His oldest child attended the school, and his youngest child was entering the school's pre-kindergarten program in the Fall of 2001. The Taxpayer thought that if he took

over the program, his wife could work in the school cafeteria and be close to their children.

The Taxpayer testified that he and the headmaster agreed that he would only charge the students enough to pay for the food, the employees needed to operate the cafeteria, and any other necessary expenses, including a $1,000 per month rent payment to the school. The Taxpayer consequently charged the students approximately $3.50 for a full meal, although he charged $6.50 - $7.00 for the same meal at his restaurants.

The Taxpayer grossed approximately $20,000 per month in sales during each school year, which came close to offsetting his total costs for food, employees, and other expenses. He had five full time employees at the school, including his wife, who was paid $1,000 a month.

The Taxpayer had a separate bank account concerning the cafeteria. He deposited his sales proceeds into the account, and then used the money to pay related expenses. He also used the school account to make the $684 monthly payment due on his wife's personal vehicle. He testified, however, that overall he lost money on the venture, and was required to deposit $3,000 - $5,000 a year into the school account to break even.

The Taxpayer claims that he contacted the Revenue Department's District Office in Opelika before taking over the food program, and was told that his sales at the school would be tax exempt. He consequently did not charge the students sales tax on the meals.

The Department audited the Taxpayer and assessed him for sales tax on the meals. The Department also made other adjustments that are not disputed.

Sales of tangible personal property to students at public or private schools are not

statutorily exempt from Alabama sales tax.[1] Dept. Reg. 810-6-1-.101 provides, however, that "[l]unches sold within school buildings, not for profit, to school children are exempted from the sales tax." The regulation applies to both public and private schools.

The "exemption" provided by Reg. 810-6-1-.101 has no basis under Alabama law. That is, there is no statutory exemption for lunches (or any other food) sold to children in public or private school buildings, whether the sales are for profit or "not for profit," however that phrase may be interpreted.

One possible rationale for the regulation is that it was intended to explain that meals sold by public or private schools to its own students are not subject to sales tax (as opposed to being exempt from sales tax) because the schools are not in the business of selling meals at retail. Only taxpayers "in the business of selling at retail" are liable for sales tax. See, Code of Ala. 1975, §40-23-2(1). Arguably, schools that sell meals to their students at cost, i.e., not for profit, are not in the business of selling at retail, in which case the sales are "casual sales," and thus not subject to sales tax.

There is no rationale, however, that would exempt a third-party retail business that sold food to school children from liability for sales tax on the sales, even if the business either intentionally or unintentionally failed to make a profit on the sales. For example, if Lee-Scott Academy periodically allowed Pizza Hut or McDonald's to sell its students meals for lunch, those sales would clearly be subject to sales tax. The same applies to the

[1] Sales directly to public or private schools are exempt. See, Code of Ala. 1975, §40-23-4(a)(15). That statute exempts sales to "independent school boards," which the Department interprets to mean private schools.

Taxpayer, even though the Taxpayer prepared the meals on-site.

The Taxpayer in this case operates a for profit retail business that is clearly subject to sales tax. His sales to the Lee-Scott Academy students were only an expansion of that business. The fact that he agreed to sell the food and otherwise operate the school's food program at cost does not exempt his sales from sales tax.

The Taxpayer's motive in taking over the school's food program was clearly to help the school. It also allowed his wife to be more involved in their children's lives, which is also a commendable motive. Unfortunately for the Taxpayer, his retail sales to the students were subject to Alabama sales tax. That is not altered by the fact that the Taxpayer may have been informed by an unidentified Department employee that the sales were not taxable. Alabama law is clear that the Department cannot be estopped from collecting the correct tax from a taxpayer, even if the taxpayer received incorrect advice or information from a Department employee. *Community Action Agency of Huntsville, Madison County, Inc. v. State*, 406 So.2d 890 (Ala. 1981).

The final assessment includes a penalty of $1,167.58. Under the circumstances, that penalty is waived for reasonable cause.

The final assessment, less the penalty, is affirmed. Judgment is entered against the Taxpayer for sales tax and interest of $25,963.23. Additional interest is also due from the date the final assessment was entered, July 28, 2005.[2]

[2] The Taxpayer's Food Service Contract with the Academy allows the Taxpayer to adjust his prices from year to year "to accommodate any customary price changes, market conditions, and reasonable profit." It is assumed that the Taxpayer may incrementally increase his prices for a period to recoup the amount he is required to pay in this case.

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

Entered April 25, 2006.

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BILL THOMPSON
Chief Administrative Law Judge

bt:dr
cc: Margaret Johnson McNeill, Esq.
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