STATE OF ALABAMA DEPARTMENT OF REVENUE,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
v.	§	DOCKET NO. S. 87-130
THE DONOHO SCHOOL 2501 Henry Road Anniston, AL 36201,	§	
Taxpayer.	§	

ORDER

The Donoho School ("Taxpayer") filed a petition for refund of sales tax with the Department on January 28, 1987. The amount involved is $944.15, relating to the period July 1, 1983 through December 31, 1985. The Department denied the petition and the Taxpayer appealed to the Administrative Law Division. The parties were represented in the case by CPA Mitchell Williams, for the Taxpayer, and assistant counsel J. Wade Hope, for the Department. The facts were submitted by joint stipulation. Based thereon, the Administrative Law Judge recommended findings of fact and conclusions of law. After a review of the record, the Commissioner finds as follows:

FINDINGS OF FACT

The entire stipulation of facts, as submitted by the parties, is as follows:

> 1. This case involves the Department of Revenue's denial of the Taxpayer's petition for refund of sales tax in the amount of $944.15. The sales tax in dispute involves the gross receipts received from operating concession stands at football and volleyball games.
>
> 2. The Taxpayer purchased food and drink items tax

> free for resale in the concession stands and paid for the goods with a check. drawn on the school's general fund. The receipts from the concession stand sales were deposited into the school's general fund. The school officials supervised and controlled the operation of the concession stands, the funds collected from concession stand sales and the use of the funds generated by the concession stand sales.
>
> 3. The members of the school's Parents Association actually operated the concession stands. No charges were made for the labor of the parents in operating the concession stands. The concession stands were only operated at home football games and major volleyball games.
>
> 4. All applicable sales tax was deducted from the gross receipts of the concession stand sales before arriving at the taxable measure.

Based on the above, it is determined that the subject concession sales were made by the Taxpayer, which is a private, non-profit institution, and not by the Parents' Association.

CONCLUSIONS OF LAW

Code of Ala. 1975, §40-23-2(l) levies a sales tax on the gross proceeds derived from the sale of tangible personal property.

Code of Ala. 1975, §40-23-2(2) levies a separate tax on "places of amusement" based on the gross receipts derived from any such business. The Department argues that the concession sales in issue constitute a part of the gross receipts derived from athletic contests (football and volleyball games), and thus are taxable under §40-23-2(2). However, as noted, that section levies a separate gross receipts tax on entry fees, green fees, admissions, etc., which is separate and in addition to the tax on sales of

tangible personal property levied at §40-23-2(l). Consequently, the concession sales in issue are not subject to the gross receipts tax levied at §40-23-2-(2). However, such sales are clearly taxable under §40-23-2(l).

Further, sales by private educational institutions are not exempt from sales tax. Section 40-23-4(11) exempts sales to the State, counties and incorporated municipalities. Section 40-23-4(15) exempts sales to county, city and independent school boards and all public educational institutions and agencies of the State, counties and incorporated municipalities. The two sections overlap and in effect exempt all sales to the State, counties and incorporated municipalities within the State, including all public schools and both independent and public school boards. But sales to private schools are not exempt, and certainly not sales by private schools.

The Taxpayer argues that the sales are "casual sales", and thus not subject to sales tax, citing a May 23, 1966 Attorney General's opinion to the Hon. James M. Campbell. The opinion addresses the taxability of various activities, including concession sales, carried on by a Parents' organization affiliated with a private school. The opinion first recognizes that bookstore and vending machine sales conducted by the school constitute taxable retail sales. The gross receipts derived from athletic contests were also found to be taxable under §40-23-2(2). However, the writer concluded that the items involved in all other fund-raising

activities were not carried as part of the school's stock in trade and were not sold in the regular course of business, and thus constituted casual sales.

Only taxpayers in the "business of selling" are subject to sales tax under §40-23-2(l). Casual sales are not taxable. State v. Bay Towing and Dredging Co., 90 S.2d 743. However, the term "casual sale" is not defined by the revenue code.

Code of Ala., §40-23-1(11) defines "business" as all "activities engaged in . . . with the object of gain, profit, benefit or advantage, either direct or indirect Department Reg. 810-6-1-.33 defines casual sales as "isolated sales by persons not engaged in business of selling . . . ". Finally, "casual" is defined by the American Heritage Dictionary, Second College Edition, as "occurring by chance, accidental . . . not planned. . .".

In State v. Bay Towing And Dredging Company, supra, the Supreme Court found that the incidental sale of used barges by a company engaged in hauling oil by barge constituted a casual sale. The company did not purchase the barges for resale, and did not sell the barges on a planned, regular basis. See also State v. GM & O Land Co., 275 So.2d 687.

In the present case, the concession items were purchased by the Taxpayer specifically for resale on a regular basis. The items were carried as part of the Taxpayer's stock of items sold at specific athletic events. Consequently, the school was operating

a regular, planned business activity involving the sale of concession items. Although a school's primary function is education, it may also conduct an ancillary retail business such as a bookstore, vending machines or a concession stand, on which sales tax must be collected.

Two appellate court cases are also cited by the Taxpayer in support of its position, City of Anniston v. State, 91 So.2d 211, and State v. Monk and Associates. Inc., 328 So.2d 306.

In City of Anniston, the Department assessed the city on its gross receipts derived from five municipal swimming pools and a golf course. The statute involved was the gross receipts amusement tax levied at §40-23-2(2) (then §753(b), Title 51, Code 1940). That section then, as now, included a parenthetical clause indicating that athletic contests

conducted by any state, county or municipal educational institution would be taxable. Citing the above parenthetical clause, the Supreme Court held that the city was not liable for collection of the gross receipts amusement tax except relating to the specifically listed athletic events. AS stated by the Court, at page 213:

> On the other hand, in subsection (b) of the section last referred to, we find language which we think clearly demonstrates that it was not the legislative purpose for the tax to be collected by cities except in regard to athletic contests, such as wrestling matches, prize fights, boxing and wrestling exhibitions, football and baseball games. We have

> reference to the language included in the parenthetical clause of subsection(b) of §753, Title 51. If it had been the legislative purpose to require municipalities to collect the tax in all respects, there would have been no need for the language included in the parenthetical clause.

In Monk, the taxpayer sold candy to various public school related organizations for resale. The Department argued that the sales were not wholesale, but retail. The Taxpayer countered that the sales were at wholesale, and if not wholesale, were sales to schools which are exempt from paying sales tax.

The Court of Civil Appeals first noted that the organizations were so controlled by the schools that in effect the sales were by the schools themselves. The Court next noted that the schools were not licensed retail merchants and that under normal circumstances a sale for resale to an unlicensed merchant constituted a taxable retail sale. Finally, the Court held that the exemption found at §786(34)(m) (now §40-23-4(15)) was inapplicable because it exempted only sales to schools for use or consumption by the schools and not sales for resale.

However, the Court then decided that no tax was due because §786(3) of Title 51, Code 1940 (now §40-23-2) did not require schools to collect sales tax on their sales, citing City of Anniston v. State, supra. Holding that the sales tax is on the ultimate consumer and that the retailer is merely the collector, the Court considered that the candy company "cannot be liable for failing to collect tax from an unlicensed retailer (school) which

is exempt from collecting the tax from the ultimate consumer." The ruling applied only to the company's sales to public schools. Similar sales to independent PTA organizations were held to be taxable.

As noted, the City of Anniston case involved the gross receipts amusement tax levied at §40-23-2(2). The decision was hinged on the presence of that specific parenthetical clause within §40-23-2(2) which taxed certain athletic contests. All other city sponsored events (specifically swimming pools and a golf course) were held to be non-taxable.

But Monk involved the sales tax levied at §40-23-2(1). That section is different from §40-23-2(2) in that it does not contain the parenthetical clause (or similar language) on which the City of Anniston case was based. Thus, the deciding rationale in City of Anniston relating to §40-23-2(2) would not apply to the sale of tangible personal property taxable under §40-23-20(1). A clear reading of §40-23-2(1) indicates that all sales of tangible personal property, included sales by the State, etc., are taxable.

In any case, the City of Anniston case relates only to activities conducted by a city, and the Monk decision relates only to sales by public schools. Neither case provides authority for the Taxpayer's position that sales by private schools should be exempt from sales tax.

The Department also argues that the subject petition for refund should have been a joint petition involving both the Taxpayer and

its concession customers/purchasers. Department Reg. 810-6-4-.16 does require the filing of a joint petition, unless the Department is satisfied that the vendor (Taxpayer) never collected the tax from the consumer/purchaser. No evidence was introduced indicating whether sales tax was collected on the concession sales in issue. Without such evidence, no decision can be made as to whether a joint petition should have been filed.

The above considered, it is hereby determined that the petition for refund should be denied.

This order constitutes the final order for purposes of review under Code of Ala. 1975, §41-22-20.

Done this 21st day of January, 1988.

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BILL THOMPSON
Chief Administrative Law Judge