STATE OF ALABAMA DEPARTMENT OF REVENUE,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
v.	§	DOCKET NO. S. 87-179
ROBERTS CAFETERIA, INC. 9213 Parkway East Birmingham, AL 35206,	§	
Taxpayer.	§	

ORDER

The Revenue Department denied four petitions for refund of sales tax filed by Roberts Cafeteria, Inc. ("Taxpayer") for the months of September, October, November, and December, 1983. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on March 9, 1988. The Taxpayer was represented at said hearing by James P. O'Neal, Esq. Assistant counsel J. Wade Hope appeared for the Department. Based on the evidence submitted by the parties, the following recommended findings of fact and conclusions of law are hereby entered.

FINDINGS OF FACT

The relevant facts are undisputed.

The Taxpayer operated the cafeteria at Sanford University from 1968 through the months in dispute, September through December, 1983. The Taxpayer provided all food and service personnel necessary to operate the cafeteria. The University provided the building, appliances utensils, and all utilities. The Taxpayer remitted 5 1/2% of its gross sales back to the University in return for the use of the above items.

The Taxpayer made cash sales to individuals and also sold meals pursuant to two standard meal plans. A 5-meal plan offered breakfast, lunch and dinner on Monday through Friday, and a 13-meal plan offered lunch and dinner Monday through Saturday and lunch on Sunday. The taxability of the meal plan sales is the central issue in this case.

The University offered the meal plans to the students and was paid directly by the students. The Taxpayer was not involved in and had no knowledge of the dealings between the students and the University. No evidence was introduced concerning how much the University charged the students for the meal plans or whether the amount charged had any relation to the amount subsequently paid by the University to the Taxpayer.

The University and the Taxpayer negotiated as to how much the Taxpayer would be paid for each meal plan participant. The University paid the Taxpayer monthly based on the number of students participating in the meal plan program, without regard as to how many meals were actually served. with each payment, the University also notified the Taxpayer of any deletions or additions for the coming month. The meal plan program included some scholarship students who had not purchased a meal plan from the University. The Taxpayer was paid by the University for those scholarship students just as with the other students.

The Taxpayer reported its gross receipts from both cash and meal plan sales, subtracted out the sales tax, and then computed and

paid sales tax to the Department. The Taxpayer agrees that tax is due on the individual cash sales. The only issue in dispute is whether tax is due on the meal plan sales.

The Taxpayer contends that the meal plan sales were tax exempt sales to the University. Conversely, the Department contends that the sales were to the students participating in the plans and thus taxable.

CONCLUSIONS OF LAW

The initial question is whether the meal plan sales were to the participating students or to the University. Upon review, it is clear that the sales were between the Taxpayer and the University.

The Taxpayer negotiated with only the University concerning the meal plans and was paid directly by the University. The Taxpayer had no dealings with the students other than to deliver the meals as directed and required by its agreement with the University. The Taxpayer had no control over or knowledge as to how much the students paid the University for the meal plans.

The above conclusion is confirmed by the fact that some of the meal plan students were on scholarship and did not pay for the meals. The Taxpayer was paid by the University for those scholarship students just as with all other students. It cannot be reasonably argued that the sales were to the scholarship students when those students never negotiated with the Taxpayer and paid nothing for the meals.

The Department argues that the University was only a conduit through which the money paid by the students was passed to the

Taxpayer. But as noted, there is no evidence indicating that the prices charged by the University to the students had any relation to the sales price paid by the University to the Taxpayer. The dealings between the University and the students were separate and apart from the sales in issue by the Taxpayer to the University.

The issue then turns to whether the sales to the University should be exempt, as argued by the Taxpayer. The Department as much as conceded at the administrative hearing that sales to private schools are exempt, see reporter's transcript at pages 14 and 15. However, the Department later in its post-hearing brief (page 8) refused to take a position either for or against the exemption, but rather argued that the exempt status of private schools was not in issue.

The revenue code does not exempt or exclude sales to private schools from sales or use tax liability. The provision coming the closest is §40-23-4(a)(15). That section exempts sales to "county and city school boards, independent school boards and all educational institutions and agencies of the state of Alabama, the counties within the state or any incorporated municipalities of the state of Alabama".

The phrase "independent school boards" as used in the context of subsection (15) cannot be construed to include private schools, especially in light of the fact that all public educational institutions are specifically exempted. The Legislature could have easily included private educational institutions in the exemption

section if it had intended to exempt such institutions from tax. Sanford University is a private school, not an independent school board, and is not exempt by statute from sales or use tax.

The above conclusion is supported by the rule of construction that exemptions from taxation must be strictly interpreted, and any uncertainty in the language must be construed against the exemption. Brundidge Milling Co. v. State, 228 So. 2d 475.

However, Department Reg. 810-6-3-.47.02 unambiguously states that "(Sales to private schools are specifically exempted from sales and use taxes". The Taxpayer argues that the regulation is sufficient to grant the exemption.

A long-standing interpretation of a statute by an administrative agency should be given considerable weight. However, where the interpretation is clearly contrary to the
statute it deems to interpret, or is unsupported by any statutory authority, then the agency's erroneous pronouncement must be overruled. East Brewton Materials, Inc. v. State Department of Revenue, 233 So.2d 751; Boswell v. Abex Corp., 317 So.2d 317; Sand Mountain Bank v. Albertville Nat. Bank, 442 So.2d 13.

Further, the Department cannot be estopped from properly administering the revenue code based on an erroneous interpretation of the law. State v. Maddox Tractor and Equipment Co., 69 So.2d 426. Just as the Department cannot expand the scope of a tax levy or limit an exemption by regulation, it cannot create an exemption from taxation by regulation where there is no

statutory authority for the exemption.

Some cases do hold that an agency must abide by its own rules. Cent. La. Elec. Co. v. La. Pub. Serv. Com'n., 377 So.2d 1188; U.S. v. Nixon, 418 U.S. 683 94 S. Ct. 3090. However, those cases involve either procedural rules or the delegation of authority by the agency. They do not hold that a substantive regulation must be upheld, even if clearly
erroneous.

The above considered, the sales to the University were not exempt from sales tax and thus the refunds requested by the Taxpayer should be denied. This is a recommended order only. The original along with the record and transcript has been forwarded to the Commissioner. The final order issued by the Commissioner may be appealed pursuant to Code of Ala. 1975, §41-22-20.

Entered this 3rd day of January, 1989.