STATE OF ALABAMA DEPARTMENT OF REVENUE,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
v.	§	DOCKET NO. U. 87-232
OXFORD BAND BOOSTER CLUB, INC. P.O. Box 3137 Oxford, AL 36203,	§	
Taxpayer.	§	

ORDER ON APPLICATION FOR REHEARING

The Department has timely filed an application for rehearing relating to the order entered in this matter on April 1, 1988. The Department argues therein that the Taxpayer should be held liable for use tax on the band related items which are the primary subject of the case.

The band items were purchased from out-of-state vendors and delivered directly to the Oxford High School Band. The items were ordered either in the name of the Taxpayer or the school, but were paid for by the Taxpayer. However, the band director at all times controlled and supervised distribution of said band items. The band items were used exclusively by the band members and at all times remained in the possession of either the school or the band members. The Taxpayer never possessed, used or had control over the band items.

Based on the above facts, the Administrative Law Judge determined that the school was the ultimate user of the band items and thus would be liable for use tax thereon, citing Associate Contractors v. Hamm, 172 So.2d 385. However, no tax is due because

the school is exempted from use tax by Code of Alabama 1975, §40-23-62(16).

The Department argues that the Taxpayer "used" the band items when it gave the items to the school and thus allowed the band members to use them. The Department further contends that "[T]he use tax is only applied to the purchaser who makes a retail purchase of tangible personal property from outside the state for storage, use or consumption in Alabama."

The use tax is imposed on the storage, use or other consumption within Alabama of tangible personal property which has been previously purchased outside of the State, see §40-23-61(a). The taxable incidence is the use of the property, and the tax attaches when the property comes to rest in the State. Paramount-Richards Theatres v. State, 55 So.2d 812 (1951); State v. Toolen, 167 So.2d 546 (1964).

The purchaser is generally also the user of the property. However, liability is not necessarily confined to the purchaser or the party that has strict legal title. The party that possesses and actually uses the property when the tax attaches is responsible for the tax.

In Associated Contractors, supra, the taxpayer purchased materials outside of Alabama for use in a furnish and install contract for the federal government. The Supreme Court determined that the taxpayer, as user of the property within Alabama, was thus liable for the use tax even though the taxpayer did not have legal

title to the property. As stated by the Court, at page 387:

> These various provisions do not make it crystal clear as to the exact intention of the parties with respect to technical legal title. However, we are in complete agreement with the trial court in its conclusion that at least insofar as the Alabama Use Tax statute is concerned, the Associated Contractors had sufficient title, control and possession of these various materials when they came to rest in this state to invoke the statute. The language of the statute does not seem to indicate that the legislature intended to predicate the tax upon one who held technical legal title and no other.

In comparing the present case with Associated Contractors, the Department argues as follows:

> It is difficult to rationalize why a contractor under a cost-plus contract with the federal government would have to pay use tax on its purchases but a parent association, such as the Oxford Band Booster Club, Inc., does not have to pay use tax when it donates or allows the school to use the band items purchased by the Taxpayer.

The difference is that Associated Contractors actually used and consumed the materials in question within Alabama, and was thus liable for use tax thereon even though it did not possess legal title to the materials. On the other hand, the Band Booster Club never possessed, used or consumed the band items within Alabama. Rather, the school used the items and was in effect the defacto owner of said items.

As stated, the purchaser most often retains ownership and subsequently uses the property within the State. In fact, §40-23-67 requires the seller to collect the tax from the purchaser on the assumption that the purchaser will use the property in Alabama and thus will be the party liable for the tax.

However, the use tax is clearly levied on the use of property within the State and not on the purchase (or necessarily the purchaser) of such property. The person in possession of and using the property is liable, as emphasized by §40-23-61(d), which states in pertinent part as follows:

> (d) Every person storing, using or otherwise consuming in this state tangible personal property purchased at retail shall be liable for the tax imposed by this article . . . .

Further, "Use., is defined by §40-23-60(8) as "[T]he exercise of any right or power over tangible personal property incident to the ownership of that property, or by any transaction where possession is given . . .". Thus, if the purchaser gives the subject property away, and the donee is in possession of and has control over the property when it comes to rest and the use tax attaches within Alabama, then clearly the donee has "used" the property as envisioned by the use tax statutes.

For example, assume that property is purchased at retail outside of Alabama and is donated to a second party also located outside of the State. If the donee subsequently uses or stores the property within Alabama, then unquestionably the donee would be liable for the use tax thereon, and not the original purchaser.

The only distinction between the above example and the facts in the instant case is that there was no documented gift in the present case. However, as noted, all incidents of ownership, i.e. control, possession, use, etc., were with the school when the band

items were delivered into Alabama.

Finally, the Department argues that if the April 1st order is correct, then any person would be allowed to purchase property, donate it to a tax exempt organization and thereby escape tax. The Department's argument is not necessarily correct and misses the critical point. If the tax exempt organization possesses and exercises control over the property when it is delivered into and comes to rest in the State, then no tax would be due. if the purchaser (non-exempt) is in possession and control of the property when it is delivered into the State, then the purchaser would be liable, regardless of how and by whom the property is subsequently used. The different treatment is a technical distinction, but is clearly mandated by the relevant statutes and case law relating thereto. The above considered, the original order issued in this case is correct and is hereby affirmed.

Done this 28th day of April, 1988.

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BILL THOMPSON
Chief Administrative Law Judge