UNION BANK & TRUST COMPANY 60 Commerce Street Montgomery, Alabama 36104,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	§	DOCKET NO. INC. 94-401
v.	§	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	§	

FINAL ORDER

The Revenue Department assessed financial institution excise tax against Union Bank & Trust Company ("Taxpayer") for the year 1993. The Taxpayer appealed to the Administrative Law Division, and the case was submitted on a joint stipulation of facts. Gerald W. Hartley and Pamela P. Swan represented the Taxpayer. Assistant Counsel Claude Patton represented the Department.

The issue in this case, as framed by the parties, is whether sales tax paid by the Taxpayer in 1989, 1991 and 1992 can be carried over as a credit to 1993. The Department concedes that sales tax paid by a financial institution can be claimed as a credit pursuant to Code of Ala. 1975, §40-16-8, but that sales tax paid in one year cannot be carried over or carried back as a credit to any other year.

During the period in issue, the Taxpayer operated as a financial institution in Alabama subject to the financial institution excise tax levied at Code of Ala. 1975, §40-16-1 et seq.

The Taxpayer filed its 1993 Alabama financial institution excise tax return and claimed thereon a credit for sales tax paid

in 1989, 1991, 1992 and 1993. The Department allowed the sales tax paid in 1993 as a credit in that year pursuant to §40-16-8, but disallowed the carryover of the credits from 1989, 1991 and 1992. The final assessment in issue resulted from those disallowed credits. The Taxpayer subsequently appealed to the Administrative Law Division.

This is a case of first impression in Alabama.

Code of Ala. 1975, §40-16-4 levies an excise tax on financial institutions for the privilege of engaging in business in Alabama. The tax is measured by a financial institution's net income in each tax year.

"Net income" is defined as the gross income of a financial institution less various deductions. Code of Ala. 1975, §40-16-1(2). One of the allowed deductions is a deduction for "taxes actually paid within the year . . .". Code of Ala. 1975, §40-16-1(2)a.6.c.

Section 40-16-8 is entitled "Exemptions and credits for other taxes". The first two sentences of §40-16-8 are not relevant to this case. The last sentence of §40-16-8 is relevant, and reads as follows:

> "If any other tax, whether on property (other than ad valorem taxes on real estate), income, business or any element thereof, except license taxes not in excess of those heretofore legally levied and in effect, is hereafter levied by this state or by any political subdivision of this state on any financial institution as in this chapter defined, the amount of such other tax due by such institution shall be credited on account of the

> tax payable pursuant to the provisions of this chapter; provided, that no other tax levied by this title shall be credited against the excise tax herein levied."

As stated above, the Department does not dispute that sales tax paid by a financial institution should be allowed as a credit under §40-16-8, but that the credit cannot be carried to any other year. However, a close reading of §40-16-8 indicates that sales tax paid by a financial institution cannot be allowed as a credit against the financial institution excise tax, even in the year paid.

Section 40-16-8 allows a credit for any other tax "hereafter levied . . . on any financial institution . . .". The Alabama sales tax is not levied on the purchaser. Rather, it is specifically levied on the person engaged in the business of selling tangible personal property at retail in Alabama, i.e., the retailer. Code of Ala. 1975, §40-23-2. Admittedly, the sales tax is presumed to be a tax on the consumer, see, Code of Ala. 1975, §40-23-26(c), but there is no question that the sales tax is levied on the retailer, not the consumer. Sales tax can only be collected by the Department from the retailer, not the consumer.

Section 40-16-8 states that "the amount of such other tax due by such institution shall be credited on account" of the financial institution excise tax. "Due by" indicates a tax owed and payable by a financial institution directly to the Department. Financial institutions do not pay sales tax directly to the Department.

Rather, sales tax is paid by ("due by") the retailer that sells tangible personal property to a financial institution. The above further confirms that a credit can be allowed only for taxes levied directly on and paid directly by a financial institution to the Department. Consequently, sales tax paid by a financial institution cannot be allowed as a credit under §40-16-8. It can only be deducted as allowed at §40-16-1(2)a.6.c.

The last phrase of §40-16-8 provides "that no other tax levied by this title (and presumably paid by a financial institution) shall be credited against the excise tax herein levied". That last phrase clarifies that taxes paid by but not levied on a financial institution, including sales tax, should not be allowed as a credit. It is also illogical that the Legislature would allow a deduction for sales tax at §40-16-1(2)a.6.c., and also a credit for sales tax at §40-16-8.

A credit for sales tax paid by a financial institution has been allowed by the Department for years. I am aware that a long-standing interpretation of a statute by the agency in charge of administering it should be given great weight. However, that interpretation must be discarded if erroneous. Boswell v. Abex Corp., 317 So.2d 317 (Ala. 1975). In addition, the overriding rule of statutory construction is that the plain language of a statute must govern. State, Dept. of Transportation v. McLellard, 639 So.2d 1370 (1994); Heater v. Tri-State Motor Transit Co., 644 So.2d

25 (Ala.Civ.App. 1994). The plain language and intent of §40-16-8 is that only taxes levied directly on a financial institution should be allowed as a credit, not all taxes paid by a financial institution.

The above holding is also in accordance with the rule of statutory construction that a deduction, exemption or credit should be strictly construed against the taxpayer and for the Department. A credit, like a deduction or exemption, should not be allowed unless expressly provided by statute. Ex parte Kimberly-Clark Corp., 503 So.2d 304 (Ala. 1983).

The final assessment in issue is based on the disallowed carryover of credits from 1989, 1991 and 1992. However, if a credit should not be allowed at all, the issue then is whether the credit already allowed by the Department for the sales tax actually paid by the Taxpayer in 1993 should still be allowed. Code of Ala. 1975, §40-2A-7(c)(5)d.1. provides that on appeal the Administrative Law Division "may increase or decrease the (final) assessment to reflect the correct tax due".

Department Reg. 810-9-1-.04(3)a. allows all financial institutions to claim sales tax as a credit against the financial institution excise tax. An administrative agency must adhere to its own rules and regulations. Reuters Ltd. v. FCC, 781 F.2d 946 (1986); Romeiro de Silva v. Smith, 773 F.2d 1021 (1985).

In addition, all other financial institutions have in past

years been allowed by the Department to claim sales tax paid during the year as a credit against the excise tax in that year. Consequently, the Taxpayer would be denied equal protection relative to all other financial institutions if the credit for tax paid in 1993 was disallowed retroactively. The United States Supreme Court has also held that a new, unforeseen interpretation of a statute should be applied prospectively only if the decision establishes a new principle of law, and it would be inequitable or unfair to apply the rule retroactively. Chevron Oil Co. v. Huson, 92 S.Ct. 349 (1971); see also, American Trucking Assoc., Inc. v. Smith, 110 S.Ct. 2323 (1990). This Final Order disallowing a credit for sales tax under §40-16-8 is certainly a new rule of law. Consequently, the new interpretation should be applied prospectively only, in which case sales tax actually paid by the Taxpayer in 1993 should still be allowed as a credit in that year.[1]

Because the sales tax credit should be disallowed

[1]A similar result concerning prospective application of a new rule of law was reached in the following cases previously decided by the Administrative Law Division - State v. Arch of Alabama Inc., Docket No. F. 90-173, decided July 22, 1994 (Department's erroneous policy of netting intercompany receivables against payables for franchise tax purposes was rejected prospectively only); State v. American Fructose Decatur Inc., Docket No. F. 94-125, decided December 14, 1994 (Department Reg. 810-2-3-.03 erroneously allowing franchise tax deduction for investments in foreign corporations rejected prospectively only); State v. Cellular Pro Corporation, Docket No. S. 94-303, decided June 14, 1995 (withdrawal provision applied prospectively only to cellular telephones sold at below cost where purchaser required to subscribe to service for which seller obtained a commission).

prospectively only, the original issue is revived as to whether the Taxpayer should be allowed to carryover the 1989, 1991 and 1992 credits to 1993. In my opinion, a credit for sales tax paid in one year cannot be carried over to any other year.

The Taxpayer is correct that this is a case of first impression. The closest analogous situation is the net operating loss allowed for income tax and financial institution excise tax purposes. The financial institution excise tax, like the income tax, is an annual tax based on income and deductions accruing during each tax year. Each year is a separate tax period. Concerning both the income and financial institution excise taxes, a specific statute allows a taxpayer to carry a net operating loss back and forward to other years. See, Code of Ala. 1975, §40-18-15(16), relating to income tax, and Code of Ala. 1975, §40-16-1(2)a.6.k., relating to the financial institution excise tax. Without those specific statutes, a carryover would not be allowed.

There is no specific statute allowing a credit carryover in the financial institution excise tax law. Consequently, without specific statutory authority, a credit can only be claimed in the year in which the sales tax was paid. It cannot be carried over or back to any other year.

Again, this holding is supported by the rule of construction that a credit, like an exemption or deduction, must be construed against the taxpayer and should not be allowed unless expressly

authorized by statute. Ex parte Kimberly-Clark Corp., supra.

The above considered, the Taxpayer should be allowed the sales tax paid in 1993 as a credit in that year. However, the final assessment based on the Department's disallowance of the carryover credits to 1993 is affirmed. Judgment is accordingly entered against the Taxpayer for 1993 financial institution excise tax in the amount of $112,786.00, plus applicable interest.

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

Entered June 16, 1995.

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BILL THOMPSON
Chief Administrative Law Judge