

UNION BANK & TRUST COMPANY
60 Commerce Street
Montgomery, Alabama 36104,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NO. INC. 94-401

v.

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

§

FINAL ORDER
ON APPLICATION FOR REHEARING

The Taxpayer in this case claimed sales taxes paid in 1989, 1991, 1992 and 1993 as a credit on its 1993 Alabama financial institution excise tax return. The Department allowed the taxes paid in 1993 as a credit in that year, but disallowed the claimed carryover credits from other years. The final assessment in issue is based on the disallowed credit carryovers.

A Final Order was entered on June 16, 1995 holding that sales tax should not be allowed as a credit under Code of Ala. 1975, §40-16-8. However, the ruling was applied prospectively only. The Final Order then concluded that sales tax actually paid in 1993 should be allowed in that year, but that Alabama law does not allow for a carryover of the credit for taxes paid in any other year. The final assessment in issue based on the disallowance of the carryover credits was accordingly affirmed.

The Taxpayer timely applied for a rehearing on June 30, 1995. The Alabama Bankers Association filed an amicus curiae brief on July 17, 1995. The Department responded on July 31, 1995.

On the issue of whether sales tax paid in one year can be carried over or back as a credit to another year, the Final Order is affirmed for the reasons stated therein. A

carryover or carryback of sales tax as a credit from one year to another is not provided for by statute, and thus cannot be allowed.

On the larger issue of whether sales tax should be allowed as a credit in any year, after careful review, I now agree that sales and use taxes paid by a financial institution should be allowed as a credit under §40-16-8.

Code of Ala. 1975, §40-23-2 provides that "[T]here is hereby levied, . . . a privilege or license tax against the person on account of the business activities . . . as follows: (1) Upon every person . . . engaged or continuing within this state, in the business of selling at retail . . .". My prior ruling that sales tax is levied against the retailer and not the consumer was based on the specific wording of the above statute. It is also incongruous that a tax can be deemed to be levied against an entity or person, the consumer, against whom the tax cannot be assessed and collected by the Department.

However, a statute means what Alabama's appellate courts say it means. Because sales tax is required to be collected from and is presumed to be on the consumer, Alabama's appellate courts have ruled that the sales tax is actually levied against the consumer. See generally, Calhoun Publishing Co., Inc. v. State, 513 So.2d 643 (Ala.Civ.App. 1987); State v. T. R. Miller Mill Co., 130 So.2d 185 (1961). Based on that authority, sales tax paid by a financial institution must be treated as a tax levied against the financial institution, and thus must be allowed as a credit against the financial institution excise tax pursuant to §40-16-8.

The use tax law at Code of Ala. 1975, §40-23-60, et seq., does not include the term "levied" as does §40-23-2. If the sales tax is considered to be levied against the

consumer, notwithstanding the express wording of §40-23-2, then clearly the use tax, which can be assessed and collected from the consumer/user, is also levied against the consumer/user and should thus also be allowed as a credit under §40-16-8.

The above considered, the Final Order is affirmed in that sales tax paid in one year cannot be carried over as a credit to another year. The final assessment and judgment entered against the Taxpayer in the amount of \$112,786.00, plus applicable interest, is accordingly upheld. However, the Final Order is amended to reflect that sales and use tax paid by a financial institution should be allowed as a credit against the financial institution excise tax in the year paid pursuant to §40-16-8.

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

Entered August 1, 1995.

BILL THOMPSON
Chief Administrative Law Judge