STATE OF ALABAMA,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE
V.	§	ADMINISTRATIVE LAW DIVISION
ANCIENT ARABIC ORDER OF NOBLES OF THE MYSTIC SHRINE ABBA TEMPLE 1056 Government Street Mobile, AL 36604, Taxpayer.	§ § § §	DOCKET NO. S.85-121

ORDER

This case involves two disputed preliminary assessments of sales tax entered by the Revenue Department against the Ancient Arabic Order of Nobles of the Mystic Shrine Abba Temple (Taxpayer) concerning the periods February 1, 1981 through March 31, 1983 and April 1, 1983 through January 31, 1984. A hearing was conducted in the matter by the Administrative Law Division on April 24, 1986. The parties were represented at said hearing by attorney Fred Helmsing, for the Taxpayer, and assistant counsel Eddie Crumbley, for the Department. Based on the undisputed facts of the case, and in consideration of the arguments and authorities presented by both parties, the following findings of fact and conclusions of law were hereby made and entered.

FINDINGS OF FACT

The Taxpayer is a charitable civic organization located in Mobile County. During the periods in dispute, the Taxpayer conducted bingo games and made sales of various concession items. The Revenue Department audited the Taxpayer and entered the assessments in issue based on the Taxpayer's gross receipts derived from the bingo games and concession sales.

The preliminary assessments were entered by the Department on April 5, 1984. After several informal conferences between the Taxpayer's representatives and the Sales and Use Tax Division of the Revenue Department, the Department notified the Taxpayer by letter dated March 25, 1985 of its determination that the total tax, penalty and interest due by the Taxpayer for the periods in issue was $57,154.53. The Taxpayer subsequently made timely notice of appeal to the Administrative Law Division.

There is no dispute that during the assessment periods the Taxpayer was subject to tax on its gross receipts derived from the bingo games and concession sales. The Fraternal Order of Eagles v. White, 447 So.2d 783 (Ala.Civ.App. 1984). However, subsequent to the assessment periods, the Alabama Legislature passed Act 84-739, effective June 11, 1984, presently codified at Code of Alabama 1975. §40-9-13, which reads in pertinent part as follows:

> (a). . . the Annual Shrine Circus as well as all other charitable Shrine amusement and fund raising events, and all real and personal property of the Annual Shrine Circus, . . . are exempt from the payment of any and all state, county and municipal taxes, licenses, fees and charges of any nature whatsoever, including any privilege or excise tax heretofore or hereafter levied by the state of Alabama or any county or municipality thereof. (emphasis added)

CONCLUSIONS OF LAW

The primary issues presented for review are whether the exemption provided by §40-9-13 should be applied retroactively to the periods in issue, and if so, would the release of the Taxpayer

from liability violate Article IV, §100 of the Alabama Constitution of 1901. The Department also argues that Act 84-739 is void as unconstitutional under §§45, 104, 106 and 110 of the Alabama Constitution of 1901.

Concerning the Department's attack on the constitutionality of the exemption statute, it is an established principle that an agency does not have the authority to declare a statute unconstitutional. The Administrative Law Treatise, 2nd Edition, by Davis, at §26:6, addresses the issue of when a statute's constitutionality may be challenged, and states in pertinent part as follows:

> This question differs from the one discussed in §26:4 because an agency may always determine questions about its own jurisdiction but generally lacks power to pass upon (the) constitutionality of a statute. The law has long been clear that agencies may not nullify statutes. Public Utilities Commission v. United States, 355 U.S. 534, 539 (1958); Oestereich v. Selective Service Board, 393 U.S. 233, 242 (Harlan,J., concurring); Johnson v. Robison, 415 U.S. 361, 368 (1974); Weinberger v. Salfi, 422 U.S. 749, 765 (1975); Moore v. City of East Cleveland, 431 U.S. 494, 526 (1977) (Burger C.J. dissenting). No federal court has adopted the California view that an agency may determine the constitutionality of a statute. Southern Pacific Transportation Co. v. Public Utilities Commission, 18 Cal. 3rd 308, 556 P.2d 289 (1976); 90 Harv. Law Rev. 1682 (1977).
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> The question here is whether a court may decide a question the agency has no authority to decide, before the agency has decided questions it has the authority to decide, such as factual issues, the agency's jurisdiction, interpretation of statutes and other nonconstitutional law, and constitutionality of particular action the agency takes or contemplates . . .
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> Consequently, an intra-agency administrative law judge or

hearing officer, like the agency itself, is without jurisdiction to determine the constitutionality of a legislative enactment. However, it is permissible to pass upon the constitutionality of a particular agency action, such as whether the retroactive application of the exemption statute in the present case would violate §100 of the Constitution.

The initial question is whether §40-9-13 should be applied retroactively to the assessment period. There if no question that the statute, as amended, does exempt the Taxpayer's activities from sales tax.

The cases are numerous which hold that the retroactive application of a statute is discouraged, and that a statute should be applied prospectively only unless the wording of the statute clearly shows a legislative intent to the contrary. Kittrell v. Benjamin, 396 So.2d 93 (1981); Wilkerson v. State, Ex rel Moran, 396 So.2d 86 (1981); Lee v. Lee, 382 So.2d 508 (1980); and City of Brewton v. White Auto Store, Inc., 362 So.2d 226 (1978). Thus, the question is whether the statutory language exempting the Taxpayer from payment of "any privilege or excise tax heretofore or hereafter levied" expresses a legislative intent to relieve the Taxpayer from all prior tax liability.

The Department argues that to be given retroactive application, the statute should contain certain language as follows: "It is intended that this act be given retroactive

effect". However, there is no requirement that any particular words must be used to express retroactive intent. It is true that the Legislature was summarily short if not flippant in its use of the single word "heretofore" to express its intention that the exemption should apply retroactively. Nonetheless, it cannot be assumed that the Legislature included a word in a statute for no reason, Gulf Coast Media, Inc. v. Mobile Press Register, Inc., 470 So.2d 1211 (1985); Robinson v. State, 361 So.2d 1113 (1978); Wright v. Cutler-Hammer, Inc., 358 So.2d 444 (1978), and the only reasonable explanation for including the word "heretofore" in the statute is that the authors intended to relieve the Shrine from all tax liability, both past and present. As defined by the Administrative Heritage Dictionary, 2nd College Ed., "heretofore" means, "up to the present time, previously". Accordingly, as specified by the clear wording of the statute, the exemption should relate back to the assessment periods in dispute.

The second issue is whether the release of the Taxpayer from liability would violate §100 of the Alabama Constitution. In substance, that section holds that the legislature cannot relieve or forgive a debt or obligation owed the State. The Department cites several early cases in support of its assertion that taxes become an obligation or liability at the time they become due and payable. State v. Alabama Educational Foundation, 163 So. 527 (1935); Union Bank and Trust Company v. Phelps, 153 So. 644 (1934);

State v. Youngstown Mining Company, 121 So. 550 (1929). However, the latest and most persuasive case on point is Alabama Education Association v. Grayson, 382 So.2d 501 (1980). That case holds that §100 does not apply to conditional obligations, but prohibits the release of fixed obligations only.

Alabama Education Association v. Grayson is an income tax case and presented the issue of whether Alabama's three-year loss carryback provision violated §100 of the Constitution. Alabama income tax law, at Code of Alabama 1975, §40-18-45(a), provides that an income tax must be assessed within three years of the return date. Citing that section, the Supreme Court found that an income tax liability remains "open" or contingent for a period of three years from the due date of the return, or until the liability is finally assessed. The Court concluded as follows:

> Thus, the three-year carryback provision (which has long been a part of the federal income tax laws) does not diminish an obligation of the taxpayer because that obligation does not become fixed until three years have expired after the filing of the initial return, or within the three year period, the tax obligation is finally assessed by the Department of Revenue.

Code of Alabama 1975, §40-23-18(b), concerning sales tax, is analogous in substance to §40-18-45(a) in that it requires that sales tax assessment proceedings (notice thereof) must be begun within three years of the due date of the tax. Thus, under the Alabama Education Association v. Grayson rational, a sales tax liability is not finally fixed until after expiration of three

years from the due date of the tax, or, if assessment proceedings are timely begun within that period, until entry of a final assessment (unappealed).

In the present case, the Department timely initiated assessment proceedings within the three years allowed by §40-23-18(b). Obviously, the assessment procedure is ongoing and has not culminated in a final assessment. Accordingly, the liability is still contingent in nature and thus is not covered by the provisions of §100.

Based on the above, it is hereby determined that the §40-9-13 exemption should be applied retroactively to the periods in dispute, as intended by the Legislature. Further, the retroactive application of the exemption is not barred by §100 of the Constitution because the liability is contingent only, and not fixed. Accordingly, the Department is hereby directed to reduce and make final the assessments in issue showing no tax due.

Done this 2nd day of July, 1986.

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BILL THOMPSON
Chief Administrative Law Judge