TAXATION

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During the survey period, there were significant developments in the various branches of state tax law, both in the courts and through statutory change. For the sake of convenience, the various developments are grouped under the heading of the particular tax involved.

SALES AND USE TAX

Two statutory changes were made in the use tax law at the November-December Session of the Legislature. An amendment was added to the section of the Act[1] granting a credit for prior sales taxes paid to other states. Now the credit will be extended only where the seller state would have granted such a credit to Georgia, had Georgia been the seller state.[2]

A "clarifying" amendment was added to the use tax provisions of the law to provide that goods purchased prior to the effective date of the Act are exempt from the use tax, regardless of where the goods were purchased or when the goods were brought into Georgia.[3]

The enforcement of the use tax, and how far the states may go to require out-of-state sellers to act as their agents, was dealt with by the U. S. Supreme Court recently in *Miller Bros. Co. v. State of Maryland.*[4] The facts in that case were as follows: Maryland imposes a sales and use tax on goods sold in Maryland or brought into that state. Delaware does not have a sales and use tax. Miller Bros. Co., a Delaware store, sold goods to Maryland purchasers who crossed into Delaware to shop. Deliveries of the purchases were regularly made in Maryland by the store, either by the store's trucks or by carrier. There were no agents or solicitors within Maryland, nor was there any advertising in Maryland newspapers or over Maryland radio or T-V stations. Telephone orders were not accepted by the store. It was further stipulated that Miller Bros Co. had never filed a suit in Maryland nor had it recently recorded its

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1. Ga. Laws 1951, pp. 360, 371, GA. CODE ANN. § 92-3412a (Supp. 1951).
2. Ga. Laws Nov.-Dec. Sess. 1953, p. 369.
3. Ga. Laws Nov.-Dec. Sess. 1953, p. 378.
4. 347 U.S. 340, 74 S.Ct. 535, 98 L. Ed. 470 (1954).

conditional sales contracts in that state. Under such circumstances, the court held, Miller Bros. Co. could not, under the Due Process Clause, be required to withhold the Maryland use tax. Four members of the court strongly dissented[5], pointing out the competitive disadvantage of the Maryland businesses and the ease with which the use tax could be withheld. The full scope of the *Miller Bros.* case is not too clear in view of the many stipulations and in view of the closeness of the decision. It does appear that a customary practice of receiving telephone orders from the purchaser state will not, of itself, subject the seller to the jurisdiction of the buyer state.[6]

In the state courts, several issues of importance were decided during the period of this survey. It was held that isolated sales not in the course of a "regular" activity were not sales which were taxable under the Act. *Novak v. Redwine*[7]. This case apparently avoids the necessity of the recently passed "business reorganizations" exemption[8] and reverses the opinion of the Attorney General holding administrators' sales taxable[9]. There is also a prior ruling of the Attorney General that sheriffs' sales are taxable,[10] but the *Novak* case may reverse this ruling.[10a]

The definition of "tangible personal property," as defined in the Act,[11] was discussed by the Court of Appeals in *State v. Dyson.*[12] Here the court stated that where personal property is attached to the realty, it loses its status as personal property for sales tax purposes, whether or not it could be removed without material harm. Hence, sales of such property are not taxable.

Sales to an independent contractor engaged in work for a municipality are not exempt from the sales tax, since such sales are not made to the municipality itself. *J. W. Meadors & Co. v. State of Georgia.*[13] If a contractor were appointed purchasing agent for the municipality, the result would probably be different.[14]

5. Mr. Justice Douglas , note 4 *supra*, at 547.
6. See Thompson v. Rhodes-Jennings Furn. Co., 268 S.W. 2d 376 (Ark. 1954).
7. 89 Ga. App. 755, 81 S.E. 2d 222 (1954).
8. Ga. Laws Jan.-Feb. Sess. 1953, p. 301, GA. CODE ANN. § 92-3403a C. (Supp. 1954).
9. See, OPS. ATTY. GEN., Jan. 27, 1953.
10. See, OPS. ATTY. GEN., Sept. 26, 1952.
10a. Although sheriffs' sales are quite "regular," the debtor, upon whose property the sheriff has levied, is the legal seller. As to him, such a sale would not involve a "regular" course of conduct.
11. Ga. Laws 1951, pp. 360, 368, GA. CODE ANN. § 92-3403a M. (Supp.1951).
12. 89 Ga. App. 791, 81 S.E.2d 217 (1954).
13. 89 Ga. App. 583, 80 S.E.2d 86 (1954); See also, Ga. Laws 1951, pp. 360, 366, GA. CODE ANN. § 92-3403a C. (2) (d) (Supp.1951).
14. See Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 74 S. Ct. 403, 98 L. Ed. 313 (1954); *cf.* OPS. ATTY. GEN., March 26, 1954.

The prior law regarding the exemption from the sales tax of sales of "industrial materials"[15] was narrowly construed by the Court of Appeals in *State of Georgia v. Cherokee Brick & Tile Co.*[16] In this case, it was held that artificial gas, used to cause physical and chemical changes in clay, was not used "directly in fabricating" bricks.

Finally, it was decided that the lien for sales taxes is effective, except as to innocent purchasers, on the day the sales tax return and remittance is due, not when the fi. fa. is recorded. *State of Georgia v. Atlanta Provision Company.*[17]

INCOME TAXATION

As usual, changes in this area predominantly involved attempts to bring our law of income taxation into line with the Federal law. The net operating loss provisions were amended to "clarify" the intent of the Legislature and to provide, among other things, that certain adjustments in income shall be made both in the year of the loss as well as in the year to which the loss is carried[18]. The amendment purports to be retroactive, but whether this would be constitutional appears doubtful.[19]

A new "business" deduction was added to the income tax law to permit a taxpayer to deduct expenses actually paid for the supervision and care of his or her children under 16, where the expense is incurred in order that the taxpayer might obtain gainful employment.[20] There are several limitations[21] to the appli-

15. Ga. Laws 1951, pp. 360, 365, GA. CODE ANN. § 92-3403a C. (2) (Supp.1951).
16. 89 Ga. App. 235, 79 S.E.2d 322 (1954).
17. 90 Ga. App. 147, 82 S.E.2d 145 (1954).
18. Ga. Laws Nov.-Dec. Sess. 1953, p. 316. On its face the original Act only made the adjustments in the year of the loss. Ga. Laws 1952, pp. 405, 428, GA. CODE ANN. § 92-3109 (m). (Supp.1951).
19. See Townsend, J., dissenting in State of Georgia v. Cherokee Brick & Tile Co., 89 Ga. App. 235, 243, 79 S.E.2d 322, 328 (1953).
20. Ga. Laws Nov.-Dec. Sess. 1953, p. 291.
21. The child must not have attained 16 on or before the last day of the tax year and must be the natural or adopted child, or stepchild, of the taxpayer; the care must be provided in order that taxpayer may be gainfully employed; the deduction may be claimed only by the person who would ordinarily care for the child; the amount of the deduction shall not exceed the taxable gross income from personal services of the person entitled to the deduction; the person to whom compensation is paid cannot be claimed as a dependent by taxpayer, his spouse or certain relatives; where taxpayer is living with husband or wife, the spouse's gross income, less business expenses, must not exceed $4,000.00 plus credit for dependents to which both are entitled; the taxpayer's gross income from sources other than personal services must not exceed $4,000.00 plus credit for dependents to which (he) (she) is entitled. Allowable expenses are only those for supervision care, not those for food, clothing, etc.

cation of this deduction, but, in most respects, our new law is broader than the recently passed Federal law covering this situation.[22]

The head of a household is now allowed a $2,500.00 personal exemption, but a child living with the taxpayer may not be used twice as an exemption or credit for dependent.[23]

Another declaration of the "original intent" of the Legislature is found in the amendment to Section 92-3109(g) of the Code, dealing with the deduction by corporations for contributions to charities.[24] This partially retroactive amendment seeks[25] to apportion the contribution on the basis of the ratio of the corporate income taxable in Georgia, providing special treatment for corporations not using the ordinary method of apportionment.

LICENSE OR FRANCHISE TAXES

Two cases of note, involving license or franchise taxes, were decided during the survey period. In *Kirkpatrick v. City of Conyers*,[26] it was held that the City of Conyers could not impose a license tax on "selling and/or distributing" gas for household heating purposes upon an employee of a company not located in Conyers, where deliveries of the gas were made under a previous arrangement to service customers. Imposing such a license tax under these circumstances, said the court, would violate Section 92-4105 of the Code.[27]

The second case involved the taxation of national branch banks. The Georgia Supreme Court held[28] that the attempt by the legislature to tax national branch banks on "the value of the capital employed in their operations"[29] was abortive, being a violation of the United States Constitution.[30] The power to tax national banks is highly restricted,[31] and although the state has complied with the federal law regarding the taxation of

22. Int. Rev. Code § 214.
23. Ga. Laws Nov.-Dec. Sess. 1953, p. 197.
24. Ga. Laws Nov.-Dec. Sess. 1953, p. 372.
25. See note 19, *supra*.
26. 90 Ga. App. 74, 81 S.E.2d 844 (1954).
27. "The authorities of any municipal corporation shall not levy or collect any tax or license from a traveling salesman engaged in taking orders for the sales of goods where no delivery of goods is made at the time of taking such order."
28. Goodwin v. Citizens & Southern National Bank, 209 Ga. 908, 76 S.E.2d 620 (1953).
29. Ga. Code § 92-2406 (1933).
30. Owensboro National Bank v. City of Owensboro, 173 U.S. 664, 19 S.Ct. 537, 43 L. Ed. 850 (1899).
31. REV. STAT. § 5219 (1875), as amended, 12 U. S. C. § 548 (1946).

national banks themselves, it undertook to impose a forbidden form of taxation upon their branches.

INTANGIBLE TAXATION

The most discussed change during the survey period was the enactment of a new Intangible Property Tax Act.[32] This Act is extremely difficult to follow because of its negative wording and numerous back and cross-references. It is beyond the scope of this article to discuss in detail the many problems which may arise under this law; and the writer will merely give a brief summary of the contents of the Act.

The Act is divided into three major parts. Section 1.(a) of Part I imposes a tax of ten cents per thousand dollars on property classified as intangible property. Section 1.(b) deals with exemptions from the tax and also reserves the taxation of long term notes secured by real estate, corporate bonds, and stocks in foreign corporations and certain domesticated corporations for later sections. Sections 1.(c) and (d) provide that accounts and notes receivable, not secured by real estate, shall be taxed at $3.00 per thousand during 1954 and 1955; at $1.00 per thousand during 1956; and at ten cents per thousand for 1957 and later years.

Section 2.(a) of Part I imposes a tax of $1.00 per thousand on the bonds of all corporations and a tax of $1.00 per thousand on the stock of foreign corporations and domesticated foreign corporations which do not pay all taxes imposed by the State of Georgia.

Section 2.(b) imposes a tax of 25 cents per thousand dollars on the "fair market value of all loans held by any broker, and representing credits extended in connection with the purchase or sale of stocks, bonds or other securities of like character held as collateral security for such loans."

Section 3 through 11 and 13 through 15 of Part I deal with the taxation of secured "long term notes" (i.e. notes secured by real estate any part of the principal of which note falls due more than three years from the date of the note or the date of the security instrument creating the encumbrance). The rate of taxation is $1.50 per five hundred dollars, or fraction thereof, of the face amount of the note.

The Act provides that the security instrument shall be recorded in the superior court of the county in which the real property is located, and that the clerk of such courts shall be the agents of the state for the collection of the tax. Provision

32. Ga. Laws Nov.-Dec. Sess. 1953, p. 379.

is made in Section 9 for the situations where the security instrument embraces property in more than one county (pay in county where first recorded), or where property both within and outside Georgia is included in one deed (give oath as to market value of Georgia property and pay only on that amount). Holders of long term notes secured by real estate located outside Georgia are, under Section 10, required to make periodic returns to the State Revenue Commissioner. Failure to pay the tax shall constitute a bar to the collection of the debt, to foreclosure, or to the exercise of a power of sale (Section 11).

Section 12 of the Act provides that short term notes secured by real estate are taxed under Section 1.(a) (at ten cents per thousand dollars), and exempts banks, building and loan and savings and loan associations, and other institutions[33] from taxation on such short term notes.

The only case during the survey period construing this Act held that, despite the wording of Part III,[34] federal savings and loan associations must pay the tax on secured long term notes.[35] However, the payment of the tax on long term notes relieves the holder from any further taxation on such notes.[36]

Parts II and III of the Act deal with the taxation of building and loan and savings and loan associations. This tax is based on the "net worth" of such associations. The intention of the Act was to impose a form of taxation similar to the tax on the shares of national banks.[37] As stated above, the payment of the tax on long term notes secured by real estate would remove these notes from the net worth of the association. Also, where the real property is taxed, the value thereof is likewise deducted from the net worth.[38]

Miscellaneous Developments

At the November-December Session the legislature made a change in the law of the priority of tax liens. Now an ad valorem, specific or occupation tax will not prevail over a security deed where the tax represents an assessment upon property not included in the security deed.[39]

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33. Charities; Federal, State and local governments, etc. See Ga. Laws 1937-38, Ex. Sess. p. 156 *et seq.*, GA. CODE ANN. § 92-114 (Supp. 1951).
34. § 1. ". . . and all Federal savings and loan associations . . . shall have the same immunities and exemptions as national banks . . ."
35. Fulton County Federal Savings & Loan Association v. Simmons, 210 Ga. 621, 82 S.E.2d 16 (1954). This overrules in part OPS. ATTY. GEN., Feb. 1, 1954.
36. Ga. Laws Nov.-Dec. Sess. 1953, pp. 379, 386 (§ 13).
37. Note 35 *supra*, at 625.
38. Pt. III, § 2, Ga. Laws Nov.-Dec. Sess. 1953, pp. 379, 389.
39. Ga. Laws Nov.-Dec. Sess. 1953, p. 168.