

TAXATION

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Several cases and statutes were added to the field of Georgia Taxation during the survey period. The writer has selected appropriate headings in order to better summarize these developments.

INCOME TAX

House Bill No. 117¹ attempts to clarify the definition of "resident" and amends the definition of "non-resident" by classifying those regularly engaged in employment, trade, business, professional or other activity for financial gain in Georgia as "taxable non-residents." Exception is made of a non-resident whose only activity for gain or profit in Georgia consists of personal services for his employer for 90 days or less during any calendar year. Under prior law, non-resident was defined as one who was not a legal resident or domiciliary of Georgia and who did not spend six months of the tax year in Georgia. In line with these changed definitions, Code section 92-3112 is also amended to provide for methods of determining the amount of the non-resident's income which is subject to Georgia tax. Separate accounting may be employed if the State Revenue Commissioner is satisfied that such method is accurate, but, otherwise, income is to be apportioned in the same manner as is done by corporations.

In *State v. Coca-Cola Bottling Co.*,² the supreme court reversed the judgment of the court of appeals in a matter involving alleged overpayment of income tax. The bottling company contended it was entitled to determine its net income subject to Georgia tax by use of the three-factor ratio formula³ although it had no physical inven-

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1. Ga. Laws 1957, p. 397.

2. 212 Ga. 630, 94 S.E.2d 708 (1956).

3. GA. CODE 92-3113 (4) provides that where income is derived from the sale of tangible personal property, the portion of the net income attributable to property owned or business done within the state shall be taken to be the portion arrived at by determining (1) The ratio of the average monthly inventory of all products held in this state for sale, lease etc. during the taxable year to the average of the total monthly inventories of all products held everywhere for sale, lease etc. (2) The ratio of all salaries, wages, commissions and other compensations paid for Georgia operations to the total of salaries, wages and other compensation paid in connection with the entire business conducted, and (3) The ratio of gross receipts from business done everywhere, Receipts are deemed to have been derived from business done within the state only if received from products shipped to customers in this state, or delivered within this state to customers.

The three ratios, expressed in percentages, are then added and divided by three, the result being the percentage of net income subject to Georgia income tax.

tory, thereby allowing it to divide the total of only two factors by a divisor of three. Prior law⁴ provided for dividing only by the number of factors present, but this provision was omitted when the apportionment law was rewritten in 1950. Although other methods of apportionment are only permitted upon application of the taxpayer⁵ and acceptance by the Revenue Commission, the supreme court had no difficulty in finding a legislative intent to restrict use of the three-factor ratio formula to those businesses possessing all three factors and admonished the bottling company to apportion its income by another method.

The oft heard phrase that "a person has no vested right in statutory privileges and exemptions" was applied in *Fulton Bag and Cotton Mills v. Williams*⁶, another case involving alleged overpayment of income tax. Taxpayer sought to include federal income tax paid as a deduction in computing its net operating loss. While its claim for a refund was pending before the revenue commissioner, the legislature passed an act approved December 18, 1953⁷ depriving taxpayer of this right "effective for all taxable years ending on or after February 15, 1952." Since the court found the right not vested, the action of the legislature was held not violative of the provision of the Georgia Constitution forbidding the passage of retroactive laws.

In *Willams v. Boykin*,⁸ the revenue commissioner sought to have a directed verdict and judgment in favor of the defendant in fi. fa. reversed, after the defendant had filed an affidavit of illegality to a tax execution. In a decision involving largely procedural matters, the court of appeals, Nichols, J., held that (1) where the record is silent it will be presumed that the necessary bond was filed (2) an affidavit of illegality is not voided because filed with the clerk of court rather than with the levying officer where it does not appear that such procedure harmed the plaintiff in fi. fa. and (3) the evidence presented by the defendant demanded the verdict directed. No appearance was made for the plaintiff in fi. fa. in the trial court.

The General Assembly created a Joint Income Tax Law Study Committee⁹ to study the advisability of revising Georgia income tax laws to conform them as nearly as practicable to federal income tax laws. On recommendation of a similar committee created by the

4. Ga. Laws 1941, p. 218, GA. CODE ANN. § 92-3113 (Supp. 1955).

5. Ga. Laws 1931, Extra Sess. p.36, GA. CODE 1933 §§ 92-3114, 3115.

6. 212 Ga. 783, 95 S.E.2d 848 (1956).

7. Ga. Laws 1953, Nov.-Dec. Sess., p. 316, GA CODE ANN., § 92-3109 (m) (3) (A) (F) (Supp. 1955).

8. 94 Ga. App. 246, 94 S.E.2d 148 (1956).

9. Ga. Laws 1957, p. 362.

1956 General Assembly, the scope of the study was extended to include consideration of conformity not only to federal determination and classification of taxable net income but to federal assessment, collection and refund procedures as well.

PROPERTY TAX

The full fledged feud between Herschel H. Hutchins et al. and the tax officials of DeKalb County cropped up again in *Hutchins v. Williams*,¹⁰ wherein it was charged that named officials had conspired to inflate the tax digest illegally. In upholding denial of a temporary injunction, the supreme court held that the evidence failed to sustain the *allegata*. In the course of the opinion the court pointed out that assessment after arbitration under Ga. Code Ann. Section 92-6912 would not prevent a subsequent change of valuation though no improvements had been made and that the Board of Tax Assessors is not required to use any specified method for arriving at a just and fair valuation. Also present in the case was a charge that the board was not legally constituted owing to the forced inactivity of one member and as a result of reduction in salary and withdrawal of privileges. The court affirmed the principle of majority action in rejecting this contention.

Taxpayer Hutchins was again the loser in *Williams v. Hutchins*¹¹ in which the supreme court held it was error to overrule a general demurrer where the petition seeking to enjoin collection of ad valorem taxes attacked only two of fifteen items of the tax levy and there was no payment or offer to pay the items admittedly valid.

In *Church of God of the Union Assembly v. City of Dalton*¹², allegations of a petition to enjoin a tax execution placed the plaintiff squarely within the constitutional and statutory exemption granted to certain religious organizations and hence it was error to sustain a general demurrer.

The fact that not even a court of equity has any power to authorize a redemption of property sold for taxes after foreclosure of the right of redemption and in the absence of irregularity was again emphasized by the decision of the supreme court in *Boroughs v. Lance*.¹³

No cause of action was stated by the petition in *Martin v. Sudderth*¹⁴ which sought to enjoin tax officials from receiving tax returns and

10. 212 Ga. 754, 95 S.E.2d 674 (1956).

11. 212 Ga. 594, 94 S.E.2d 412 (1956).

12. 213 Ga. 76, 97 S.E.2d 132 (1957).

13. 213 Ga. 143, 97 S.E.2d 357 (1957).

14. 212 Ga. 558, 93 S.E.2d 720 (1956).

taxes from a third party on the ground that plaintiff was the legal owner of the land. And, in a case involving a point of evidence related to taxation,¹⁵ the lower court was upheld in excluding evidence of plaintiff's failure to return for taxes land claimed by him under an oral contract of support since the decedent land owner had reserved a life estate according to the allegations of the petition.

UNEMPLOYMENT COMPENSATION TAX

In an interesting case decided by the court of appeals during the survey period,¹⁶ the commissioner of revenue filed tax executions in an attempt to collect unemployment compensation taxes allegedly owing by defendant builders. The commissioner's theory was that together the defendants constituted an employer subject to the tax and that such tacking was permissible on the theory that one corporation had "acquired the business" of the other within the act. Pointing out that no attack was made upon the corporations as separate entities and that the labor force was the only element in common, the court held that succeeding to the same labor force was not sufficient to constitute an acquisition of the other's business.

The court also noted that section 54-657 (g) (4) of the act, which sought to allow tacking where related businesses were owned or controlled directly or indirectly by the same interests had been held unconstitutional in *Royal Cigar Co. v. Huiet*.¹⁷

The defendant did not fare as well in *Moore v. Williams*,¹⁸ involving a contention that the tax was not owing because the individuals performing services for defendant were independent contractors and not employees within the act. The case was determined before the judge in the lower court and the court of appeals found sufficient evidence in the record to warrant his finding that those working for defendant building contractor were within the provisions of the act in that they were not in fact free from control or direction over the performance of their duties and, further, that the services performed by them were not outside the usual course of the business for which they were performed.¹⁹

15. *Davis v. Davis*, 212 Ga. 217, 93 S.E.2d 356 (1956).

16. *Williams v. Mar-Lee Builders, Inc.*, 94 Ga. App. 203, 94 S.E.2d 139 (1956).

17. 195 Ga. 852, 25 S.E.2d 810 (1943).

18. 95 Ga. App. 309, 97 S.E.2d 718 (1957).

19. See Ga. Laws 1937, pp. 806-840, GA. CODE ANN. § 54-657 (b) (6) (Supp. 1955).

SALES AND USE TAXES

A procedural oversight deprived the taxpayer of a victory in *Williams v. Lawler Hosiery Mills*,²⁰ the supreme court holding that the State was not bound by a judgment against a named revenue commissioner when, prior to judgment, he had been succeeded in office by another.

Georgia Laws 1957, p. 100, confirmed the executive order of June 10, 1956, suspending sales and use taxes on certain religious publications.

LICENSE, OCCUPATION AND COMMODITY TAXES

The 1957 Legislature amended the General Tax Act²¹ imposing an annual license or occupation tax on domestic business corporations, clarifying the taxable period²² and requiring that the tax be remitted with the return on or before April 15 (or, for a new corporation, on or before the 15th day of the fourth calendar month after incorporation). The act also provides that a penalty of 10% of the tax will be incurred if the tax remains unpaid after due date. Prior law imposed the penalty if the tax remained unpaid 90 days after due date, which was January 1.

Act 462²³ prohibits municipal corporations from levying any license fee or tax on the introduction into the municipality of certain agricultural products if brought into the municipality by the producer and if sold within 90 days.

A blow to the popular belief that tax statutes only raise taxes was rendered by passage of Act No. 140,²⁴ reducing the annual renewal fee for foresters' licenses from \$10.00 to \$5.00.

PROCEDURE

Act No. 473²⁵ provides a method for reducing unsatisfied tax executions to judgments of the superior courts. Where defendant in *fi. fa.* has no known residence, place of business or agent to receive service in the state, service may be had²⁶ on sworn allegations sufficient to show that the defendant engaged in an act or activity within Geor-

20. 212 Ga. 617, 94 S.E.2d 699 (1956).

21. Ga. Laws 1957, p. 107.

22. Calendar year for corporations existing on January 1; from date of incorporation through December 31 for new corporations.

23. Ga. Laws 1957, p. 607.

24. Ga. Laws 1957, p. 169.

25. Ga. Laws 1957, p. 619.

26. (1) By publication (2) By mail, if defendant's address is known and (3) By mail on the Secretary of State where he is agent for a non-resident by virtue of other provisions of law.

gia which gave rise to the tax liability and that the same was "not insubstantial in its quality and nature in relation to the fair administration of law."

Act No. 509²⁷ makes any act or activity within the State which gives rise to tax liability equivalent to appointment of the Secretary of State as attorney in fact for receipt of service²⁸ while such act or activity is being engaged in; and regardless of whether a person, firm, association or corporation is involved.

27. Ga. Laws 1957, p. 654.

28. The Act specifically provides for service of "any notice, demand, proposed assessment, final assessment, direction ruling or order issued by the State Revenue Commission, or other official of the Revenue Department as provided by law." In view of Act No. 473, discussed above, a judgment could not be obtained without sworn allegations that the act or activity of the defendant was not insubstantial.