# TAXATION

*By* PHILIP MULLOCK*

Events in the field of taxation during the period under review for the most part lend themselves more readily to analysis by reference to the nature of the problem rather than to the particular tax involved. For this reason I have departed to some extent from the form followed by my learned predecessor.

## WHAT IS A TAX?

Laymen and no doubt many practitioners resigned as taxpayers to a common and ever increasing burden may be pardoned their surprise (even incredulity) on discovering that there may be limits to the apparently infinite reach of the state's taxing power. Perhaps the only noteworthy feature of *McCallum v. Moore*[1] and *Schaffer v. Oxford*[2] is to remind us of this almost forgotten fact. Quoting *Gunby v. Yates*,[3] the court in *Schaffer* informs us that "A tax is an enforced contribution exacted pursuant to legislative authority for the purpose of raising revenue to be used for public or governmental purposes, *and not as payment for a special privilege or a service rendered.*" While recognizing the difficulty sometimes presented in determining whether a particular governmental exaction constituted a tax, the court saw no such problem in the *Schaffer* case. Fees levied[4] on distilled spirits clearing state warehouses were service charges for the use of state owned or leased property and therefore did not constitute a "tax . . . imposed by law" within the meaning of GA. CODE ANN. §92-8436 (1961 Rev.). As the court pointed out, the state may derive revenue from various non-tax sources including fees for the use of state property.[5] In *McCallum,* it was held that GA. CODE ANN. §78-909 did not attempt to impose a tax for an unauthorized purpose in requiring sums to be paid over to the Peace Officers' Annuity and Benefit Fund out of fines and bond forfeitures collected by the city.

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1. 215 Ga. 705, 113 S.E.2d 202 (1960).
2. 102 Ga. App. 710, 117 S.E.2d 637 (1960).
3. 214 Ga. 17, 19, 102 S.E.2d 548, 550 (1958).
4. Exec. Order June 6, 1955, issued pursuant to GA. CODE ANN. §§58-1013 through 1015 (1958 Supp.).
5. GA. CODE ANN. §92-3501 (1961 Rev.).

CHARITABLE EXEMPTIONS

GA. CODE ANN. §92-201 (1961 Rev.)[6] enumerates the property belonging to a religious institution which is exempt from tax and also provides that none of the profit from the operation of such property can inure to the benefit of any private person. The 1955 amendment further provided that ". . . this exemption shall not apply to real estate or buildings other than those used for the operation of such institution and which is rented, leased or otherwise used for the primary purpose of securing an income thereon . . . ."[7] In *Church of God of Union Assembly v. City of Dalton*,[8] the court addressed itself to whether the 1955 amendment expanded the original exemption so as to embrace property used to make a profit which in turn would be used by the church for church purposes. Holding that it did not, the court stressed that the original section 92-201 ". . . enumerates, defines, and clearly identifies the property, and the only property belonging to a religious institution that is exempted from taxation." Consequently, the court went on, "this identification should not be allowed to become certain because of subsequent provisions in the law concerning income. [*e.g.*, the 1955 amendment]. All such later provisions must relate back to the enumerated exempted property and in no event be construed as introducing into the law additional property for exemption."[9] This meant that

> . . . if the property is used primarily for either profit or purposes other than the operation of the institution, it is not exempt from taxes. The fact that the property is used to make profit which will in turn be given or used by the church for church purposes in no degree confers tax exemption thereupon.[10]

On the basis of this construction of section 92-201 the court concluded that an apartment building used to house visiting church personnel but also rented from time to time, a former dining hall now rented as an apartment and a rented dwelling house were not within the exemption. However, a restaurant in a church building open to the public and used to feed members of the church and people in need was exempt from ad valorem taxation. The criterion is thus the use made of the property.

6. Enacted by virtue of Art. 7, §1, para. 4 of the Ga. Const., GA. CODE ANN. §2-5404 (1958 Supp.).
7. Ga. Laws 1955, pp. 262, 263, GA. CODE ANN. §92-201 (1961 Rev.).
8. 216 Ga. 659, 119 S.E.2d 11 (1961). The case had previously been before the court on the question of whether the church's petition alleged a cause of action. 213 Ga. 76, 97 S.E.2d 132 (1957).
9. *Id.* at 661, 119 S.E.2d at 13.
10. *Id.* at 662, 119 S.E.2d at 13.

This factor was emphasized in *Alford v. Emory*,[11] which involved the taxability of university-owned land on which fraternity chapter houses had been erected. In holding that the property came within the exemption of Code section 92-201, the court pointed out that

> . . . these fraternity buildings were built by the university; they are regulated and supervised by the university; they are located in the heart of the campus, upon property owned by the university, required to be so located and to be occupied only by students of the university; adopted as a part of the dormitory and feeding system of the college, and an integral part of the operation of the college.[12]

The charitable exemption, however, presupposes an institution of "purely public charity".[13] In *United Hospitals Service Ass'n. v. Fulton County*,[14] it was held that petitioner was not such an institution, being neither "purely charity" nor "public charity". It operated under contracts calling for only such hospital services as were paid for and nothing more; only those private individuals whose applications and money had been accepted could benefit. The public in general, the poor and needy in particular could be denied the services of petitioner. "This," said the court, "is pure and simple insurance in direct competition with private concerns which are engaged in the same business but enjoy no tax-exemption benefit."[15] Therefore, to the extent that GA. CODE ANN. §99-1018 (1955 Rev.) attempted to confer such exemption on petitioner, it violated the Constitution[16] and was void.

### DOING BUSINESS

Though perhaps inadequate to express the nuances of the U.S. Supreme Court's thinking, "doing business" is a convenient label now familiar to practitioners as a general term of art. The *Stockham Valves* case,[17] upholding GA. CODE ANN. §92-3113 (1961 Rev.)[18] and

11. 216 Ga. 391, 116 S.E.2d 596 (1960).
12. *Id.* at 398, 116 S.E.2d at 601.
13. Ga. Const. Art. 7, §1, para. 4, GA. CODE ANN. §2-5404 (1958 Supp.).
14. 216 Ga. 30, 114 S.E.2d 524 (1960).
15. *Id.* at 34, 114 S.E.2d at 527.
16. *Supra*, n. 10.
17. Williams v. Stockham Valves and Fittings, Inc., decided together with Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 79 S.Ct. 357, 3L. Ed.2d 421, 67 A.L.R.2d 1292 (1959).
18. Imposing a tax on the net income of foreign corporations "doing business in this State" and defining the latter as including "any activities or transactions" carried on within the State "for the purpose of financial profit or gain" regardless of its connection with interstate commerce. To apportion net income, GA. CODE ANN. §92-3113(4) (1961 Rev.) provides a three-factor ratio based on inventory, wages and gross receipts.

permitting the states to tax the net income from the interstate operations of a foreign corporation "provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same,"[19] is now history. So too is the somewhat unseemly haste with which Congress, spurred by the outcry of the business community, reacted in enacting Public Law 86-272[20] which, albeit a "stop-gap" law,[21] nevertheless materially curbs the power of the states to impose net income taxes by permitting a corporation to go or send a representative into another state for the purpose of soliciting orders for the sale of tangible personal property without paying a net income tax to the state of solicitation.

*Stockham Valves,* however, is still "the law of the land" for taxable years ending prior to September 14, 1959.[22] Consequently, the court in *Owens-Illinois Glass Co. v. Oxford*[23] simply relied on *Stockham Valves*[24] to support its holding that the last sentence of Code section 92-3113 defining "doing business in this state"[25] did not violate the Georgia due process clause.[26]

19. Williams v. Stockham Valves and Fittings, Inc., 358 U.S. 450, 452, 79 S. Ct. 357, 359 (1959).
20. 73 Stat. 555 (1959), 15 U.S.C.A. §381-384 (1959 Supp.).
21. The statute provides for the House Judiciary and Senate Finance Committees to "make full and complete studies" and submit their reports and recommendations to Congress by July 1, 1962.
22. The date of enactment of Public Law 86-272.
23. 216 Ga. 316, 116 S.E.2d 293 (1960). The taxable years in question were 1949, 1950 and 1951.
24. The facts were much stronger in the instant case, the taxpayer having engaged, as the court pointed out "in . . . substantial income-producing activities or transactions in this State." These involved the maintenance of an office in Atlanta serving both Atlanta and the whole Southeastern region, which employed 10 full-time employees at an annual payroll cost of $108,000. Sales solicited in Georgia by the Atlanta office were approximately $5,000,000 per annum. In Stockham Valves, the office maintained in Atlanta was the headquarters of one salesman who devoted only a third of his time to solicitation of orders in Georgia.
25. "Every such corporation shall be deemed to be doing business within this State if it engages within this State in any activities or transactions for the purpose of financial profit or gain, whether or not . . . it maintains an office or place of doing business within this State, and whether or not any such activity or transaction is connected with interstate or foreign commerce . . . ." GA. CODE ANN. §92-3113 (1961 Rev.).
26. After noting the taxpayer's substantial income-producing activities in Georgia, the court stated:
"And as we view this case, the simple but controlling question is whether the State has given anything for which it can ask return. Our reply to this is that the State has exerted its power in relation to opportunities given, to protection afforded, and to benefits conferred, including those accorded while its sales representatives were regularly exploiting the markets of this State for the purpose of capturing corporate profits; and having accepted and utilized those valuable State services, the . . . [taxpayer] . . . cannot consistently contend or successfully assert under the facts of this case that its property (the taxes collected) has been taken from it in violation of the due-process clause of Georgia's Constitution . . . ." Owens-Illinois Glass Co. v. Oxford, 216 Ga. 316, 323, 116 S.E.2d 293, 298 (1960).

In *Oxford v. Tom Huston Peanut Company*,[27] one of the issues was whether the taxpayer, a Georgia corporation, was doing business outside the state so as to be entitled to apportion its net income under Code section 92-3113 (4).[28] This turned on whether eleven persons, described as "District Sales Managers" were employees of the taxpayer or independent contractors. The only requirement imposed by the taxpayer was that they produce satisfactory sales results and maintain good reputations. As regards methods, procedures and staff they had complete independence and could also sell the products of other manufacturers. Their remuneration, out of which they defrayed all expenses, took the form of commissions on the goods sold in their territories outside the state. In holding the "District Sales Managers" to be independent contractors, the court stressed that the ". . . test . . . lies in whether . . . the employer assumes, the right to control the time, manner and method of executing the work, as distinguished from the right merely to require certain definite results . . . ."[29] Here, the "District Sales Managers" were merely required to do the latter. It followed, therefore, that the taxpayer was not engaged in any substantial activity on its own behalf outside of Georgia and was not entitled to apportion its net income. Little importance was attached to the fact that the taxpayer carried the "District Sales Managers" on its payroll as employees for purposes of social security, old age benefits and income tax withholding. The only activity of the taxpayer outside of Georgia was the delivery of some of the goods sold by the "District Sales Managers" in the taxpayer's own trucks on a "delivered at destination" basis. This, the court said, was insufficient to warrant a finding that the taxpayer was engaged in business outside the state.

Commencing July 1, 1961, a non-resident contractor[30] doing business in Georgia must comply with Law No. 409.[31] This requires him,

27. 102 Ga. App. 714, 118 S.E.2d 204 (1960).
28. Providing for a three-factor ratio based on inventory, wages and gross receipts. GA. CODE ANN. §92-3113 (4) (1961 Rev.).
29. Oxford v. Tom Huston Peanut Co., 102 Ga. App. 714, 727, 118 S.E.2d 204, 212 (1960).
30. Which ". . . includes individuals, partnerships, firms or corporations, or associations engaged in the business of the construction, alteration, repairing, dismantling or demolition of buildings, roads, bridges, viaducts, sewers, water and gas mains, streets, disposal plants, water filters, tanks and towers, airports, dams, water wells, pipe lines, and every other type of structure, project, development or improvement coming within the definition of real property and personal property, including such construction, alteration, or repairing of such property to be held either for sale or rental, and further including all subcontractors so engaged." However, a foreign corporation authorized to do business in the State is exempt from compliance with the provisions of the statute. Ga. Laws 1961, p. 480.
31. *Ibid.* Approved on April 5, 1961.

before entering into the performance of each contract involving more than $10,000, to register with the State Revenue Commissioner and to post a bond[32] conditioned upon payment of all state taxes when due. At the same time, he must appoint the Secretary of State his agent for service of process. Violations are punishable as for a misdemeanor and result also in forfeiture of the right to recover on the contract.

LIQUIDATING DISTRIBUTIONS

In *Carter v. Oxford*,[33] the issue was whether the gain realized by a sole shareholder on a distribution in complete liquidation of his corporation was to be treated as a dividend taxable as ordinary income to the extent of the corporation's earned surplus or as a capital gain. Under the Federal Internal Revenue Code,[34] the answer is clear. Gain at the shareholder level on complete or partial liquidation is taxed at capital gain rates. The question facing the court was whether the same rule obtained under the Georgia tax statute.

GA. CODE ANN. §92-3120(d) (1961 Rev.),[35] enacted in 1931, provides that a distribution of assets to a shareholder "shall be treated as a sale of the stock . . . and the gain or loss shall be computed accordingly." In 1937, GA. CODE ANN. §92-3002(o)[36] was added including in the definition of dividend "such portion of the assets of a corporation distributed at the time of distribution as would in effect be a distribution of earnings." It was not until 1952[37] that the "ordinary income-capital gain" dichotomy found its way into the Georgia statute.[38] Prior to that time, one dollar of gain was treated the same as any other. In interpreting the 1952 amendment, the State Revenue Commissioner adopted "for all practical purposes the Federal regulations relating to the subject, except in those cases where the laws conflict."[39]

The general rule under the federal statute is that a distribution by a corporation with respect to its stock is taxed at the shareholder level as a dividend at ordinary income rates to the extent it is out

32. *Ibid.* In an amount equal to 10% of the contract price or compensation to be received. If the contract price cannot be determined until after the contract has been performed, the commissioner may permit or require a master bond in an amount not less than $10,000.
33. 102 Ga. App. 762, 118 S.E.2d 216 (1960).
34. INT. REV. CODE OF 1939, §115 (g) (1) and Treas. Reg. 94, Art. 115-19; INT. REV. CODE OF 1954, §331.
35. Ga. Laws 1931, Extra Sess. p. 41.
36. Ga. Laws 1937, pp. 109, 112.
37. Ga. Laws 1952, pp. 405, 408-25.
38. GA. CODE ANN. §92-3119(d) (1961 Rev.).
39. Carter v. Oxford, 102 Ga. App. 762, 767, 118 S.E.2d 216, 219 (1960).

of the earnings and profits of the corporation.[40] As is so often the case under the federal statute there is an exception to the rule. If the distribution is in complete or partial liquidation, any gain realized by the shareholder is taxed at capital gain rates.[41] This preferential treatment is achieved, though the analogy is by no means perfect,[42] by treating a liquidating distribution as the proceeds of a sale of the stock by the shareholder.

Looking at GA. CODE ANN. §92-3120 (d) (1961 Rev.) and the 1952 amendment introducting the capital gain deduction, the two statutes appear to be in harmony. But what about GA. CODE ANN. §92-3002 (o) (1961 Rev.)? Does it by implication repeal so much of §92-3120 (d) as allows sale and therefore capital treatment of assets distributed on liquidation representing accumulated earned surplus? The court held in the negative; the legislature, in enacting §92-3002 (o) could have had no such intention.

In reaching its conclusion as to the legislative intent, the court first reviewed the parallel developments under the state and federal statutes and pointed particularly to the 1956 adoption in GA. CODE ANN. §92-3120 (h) (1961 Rev.) of 26 U.S.C.A. §333, which is an exception to the rule relating to the treatment of liquidating distributions. Under certain conditions a shareholder's gain on complete liquidation may go unrecognized if he and enough other shareholders so elect. Its principal function is to permit a corporation holding appreciated property but having no earnings or cash to be liquidated without recognition of gain to its shareholders. If the corporation has any earnings or if it distributes any cash or securities, the shareholder's gain will be recognized to the extent of his rateable share of the earnings or the cash and securities received, whichever is greater. In such event, any gain recognized will, to the extent of his ratable share of earnings, be taxed as a dividend and the balance, if any, treated as a capital gain. Thus, it may be advantageous for a shareholder to elect to pay a small dividend tax as the price of avoiding a large capital gain. Now, if §92-3002 (o) meant dividend treatment of a liquidating distribution of earnings in any event, this would, the court reasoned, in effect read §92-3120 (h) out of the statute. "There is accordingly" the court said, "valid room for doubt as to whether the legislature intended by the last sentence of Code section 92-3002 (o) to change the plain and unambiguous wording of Code section

40. INT. REV. CODE OF 1954, §§301, 316.
41. INT. REV. CODE OF 1954, §331.
42. See BITTKER, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS 225.

92-3120 (d) . . . ."[43] How then should the doubt be resolved? In such a situation, the court said, it must look to " . . . the contemporaneous practical construction . . . by the department of the State empowered with its administration or supervision. [Such construction] will be given great weight, and will not be disturbed except for weighty reasons."[44]

Prior to 1952, the Commissioner's regulation interpreting GA. CODE ANN. §92-3002 (o) (1961 Rev.) followed the federal statute[45] and also provided that "[a]ny distribution to a shareholder, *except in liquidation,* is to be treated as ordinary gain . . . ."[46] Obviously the "contemporaneous interpretation" given by the Commissioner was to treat a liquidating distribution as a sale in the same manner as required under the federal statute. Could he now change his position because the 1952 introduction of the capital gain deduction made it advantageous for him to do so? The court felt he could not.

> The original position of the Revenue Commissioner as shown by its [sic] regulations adopted in the language of the Federal statute contravenes no rule of law. It has the advantage of avoiding a repeal by implication of a prior existing unambiguous statute by virtue of an amendment where the circumstances surrounding the amending act show no indication on the part of the legislature to effect such a repeal . . . . We accordingly construe the words of *Code* §92-3002 (o) "such portion of the assets . . . distributed . . . as would in effect be a distribution of earnings" to mean such portion of the assets as would be "essentially equivalent to the distribution of a taxable divdend" under 26 U.S.C.A. §115 (g) and the regulations of the Revenue Commissioner interpreting the Code section.[47]

On the taxpayer's motion for rehearing, the court emphasized that the above interpretation ". . . is a modification and does not operate to repeal *Code* §92-3120 (d)."[48]

### DEDUCTION FOR FEDERAL INCOME TAX

The original Georgia Income Tax statute,[49] while making no specific provision for the deduction of federal income tax, allowed a deduction for taxes paid or accrued within the taxable year, depending on the taxpayer's method of accounting for his net income.

43. Carter v. Oxford, 102 Ga. App. 762, 767, 118 S.E.2d 216, 219 (1960).
44. *Ibid.*
45. INT. REV. CODE OF 1939, §115 (g) (1).
46. Carter v. Oxford, 102 Ga. App. 762, 768, 118 S.E.2d 216, 219 (1960).
47. *Id.* at 769, 118 S.E.2d at 220.
48. *Id.* at 773, 118 S.E.2d at 222.
49. Ga. Laws 1931, Extra Sess. p. 24.

In 1937, GA. CODE ANN. §92-3109(c) (1961 Rev.) was amended to allow a specific deduction for federal income tax but only to the extent it was both due and paid during the taxable year.[50] The section was again amended in 1953 so as to permit the deduction "only in the year in which paid, regardless of the method of accounting used by the taxpayer . . . ."[51] Thus, even an accrual basis taxpayer was required to follow a "cash" basis in so far as federal income tax was concerned. Moreover, in the case of a corporate taxpayer on the accrual basis there was no requirement that the tax be paid on or before the due date.[52]

On August 22, 1955, the taxpayer in *Oxford v. Tom Huston Peanut Company*[53] filed a "tentative" federal income tax return for the fiscal year ended August 27, 1955, together with a check for $525,000. The final return plus a check for the balance of the tax was filed on November 15, 1955. The Revenue Commissioner contended that the federal tax paid on August 22, 1955 could not be deducted on the Georgia tax return for the fiscal year ended August 27, 1955, on the ground, presumably, that it was not actually due when paid. In finding for the taxpayer, the court stated

> . . . under the 1953 act it was the intent of the General Assembly that a taxpayer could deduct Federal income taxes actually paid in the taxable year without regard to whether such taxes were due when paid and without regard to whether they were paid on prior years, the current year, or on future years.[54]

It should be born in mind that under the 1955 amendment[55] to GA. CODE ANN. §92-3109(c) (1961 Rev.), federal income taxes are no longer deductible.

### RELEASE OF TAX LIENS

GA. CODE ANN. §92-5712 (1961 Rev.) permits the owner or the holder of any equity, lien or interest in or on property to pay the taxes assessed against any one or more pieces of such property and requires the tax commissioner to accept the payment and release the property from the lien for such taxes. On September 1, 1959, the petitioner in *Brown v. Nash*[56] purchased real property that had been

50. Ga. Laws 1937, Extra Sess. pp. 150, 155.
51. Ga. Laws 1953, Jan.-Feb. Sess. pp. 274, 275.
52. But an individual accrual basis taxpayer could deduct federal income tax only if paid on or before the due date. *Ibid.*
53. 102 Ga. App. 714, 118 S.E.2d 204 (1960).
54. *Id.* at 731, 118 S.E.2d at 214.
55. Ga. Laws 1955, Extra Sess. pp. 27, 32.
56. 216 Ga. 303, 116 S.E.2d 227 (1960).

assessed for 1959 taxes. Though such taxes were not due until April 1, 1959,[57] the tax lien therefor affixed itself to the property on January 1, 1959.[58] In order to free the property from the lien, the purchaser made a tender of the taxes assessed against it. This was refused by the tax commissioner on the ground that it should also include tax on the grantor's personal property for 1959. The court upheld the commissioner. As liens for both real and personal property taxes of the grantor had already become fixed prior to the purchase of the real property, the purchaser was not, at the time the liens attached, the owner or holder of any interest in the property. Thus, the court stated:

> He bought the property with knowledge of the existence of the lien, covering both the real and personal-property taxes, against the property. He obtained no better title than his grantor had. [Grantor] could not have obtained a release of the real property without payment of the personal property taxes. Neither can his grantee.[59]

The decision has already been effectively criticized elsewhere;[60] we may accordingly confine ourselves to the legislative response manifested in the enactment of GA. CODE ANN. §92-5713 (1961 Rev.)[61] which purports to eliminate the problem raised by the decision. The statute provides that a purchaser of one or more parcels of real property between the date on which the tax lien vests and the due date for the tax may pay the pro rata tax thereon and obtain a release of the property purchased regardless of whether the taxes assessed against any other property, real or personal, of the transferor have been paid. The release, however, cannot be required after a *fi. fa.* has been recorded on the general execution docket in the particular county. Nor can the commissioner be required to release the last or only remaining lot or parcel until all the personal property taxes of the owner at the time the lien became affixed have been paid. It has been suggested that the latter proviso specifically limit the "last remaining lot or parcel" to "that portion of the realty which is necessary to secure the payment of the personal property taxes."[62]

REAL ESTATE INVESTMENT TRUSTS

By the simple device of adding a new sub-paragraph (m) to GA.

57. GA. CODE ANN. §92-6201 (1961 Rev.).
58. GA. CODE ANN. §§92-5708, 6202 (1961 Rev.).
59. Brown v. Nash, 216 Ga. 303, 305, 116 S.E.2d 227, 228 (1960).
60. 12 MERCER L. REV. 425 (1961).
61. Ga. Laws 1961, p. 160.
62. 12 MERCER L. REV. 425, 428 (1961).

CODE ANN. §92-3105,[63] §856-858 of the federal income tax statute[64] have been incorporated by reference into the Georgia income tax act. These sections, sometimes referred to as subcharter M,[65] adhere to the irritating form so popular today[66] of a statement of the rule followed by an exception to the rule. In a word, it is a statute in which the difficulties presented by the subject matter are compounded by the complexities in the drafting. A comprehensive treatment is obviously beyond the scope of this review. Nevertheless, insofar as it may constitute a trap to the unwary, the statute merits a certain amount of attention here.[67]

The real estate syndicate has long been favored by wealthy individuals desirous of pooling resources in ventures calling for large sums of capital. By operating as a partnership,[68] the so-called "double" taxation[69] consequent upon the corporate form of doing business has been avoided. However, the minimum capital contribution required by most syndicates has effectively barred the small operator. Subcharter M thus reflects a desire on the part of Congress to permit small operators to pool their resources, avoid corporate taxation and get the benefits of accelerated depreciation in the early years of the venture.[70] From the economic standpoint, it was considered desirable to encourage the small man to participate in large projects and thereby tap supposedly new sources of capital for construction purposes.[71]

The basic scheme of the statute involves the "pass through" to the investor of a "passive" type of income from real estate without tax at the corporate level.[72] The terms in which a R.E.I.T. is defined[73]—

63. Ga. Laws 1961, p. 180.
64. 74 Stat. 1003, §10 (a) (1959).
65. *Id.* at 1003, Part II.
66. *E.g.*, INT. REV. CODE OF 1954, §302 (c).
67. For a more detailed survey, see Eisenstein, *Real Estate Investment Trusts*, 13TH ANNUAL VIRGINIA CONFERENCE ON FEDERAL TAXATION (1961); Roberts & Shapiro, *Real Estate Investment Trusts*, N.Y.U. 19TH INST. ON FED. TAX. 1047 (1961); Rustigan, *Effect of Regulation Definitions on Real Estate Investment Trusts*, N.Y.U. 19TH INST. ON FED. TAX. 1065 (1961); Silverman, *The Real Estate Syndicate*, N.Y.U. 18TH INST. ON FED. TAX. 1 (1960); Aronsohn, *Syndicates*, N.Y.U. 18TH INST. ON FED. TAX. 63 (1960); Ablon, *Real Estate Investment Trusts and Alternative Forms of Investment*, 7 PRAC. LAW. 13 (Feb. 1961); Hershman, *The Why and How of Real Estate Syndications*, 5 PRAC. LAW. 49 (March 1959).
68. Which is a mere tax accounting entity. INT. REV. CODE OF 1954, §701.
69. *I.e.*, INT. REV. CODE OF 1954, §11 at the corporate level, with no deduction for dividend distributions; and §§1 and 2 at the shareholder level. See §61 (a) (7).
70. H. REP. No. 2020, 86 Cong., 2d Sess. (1960). As to the importance of the depreciation deduction, see the interesting discussion on Kratter Corp. in the Wall Street Journal, Monday, July 17, 1961.
71. *Ibid.*
72. *Ibid.*
73. INT. REV. CODE OF 1954, §856; H. REP. No. 2020, 86 Cong.,2d Sess. (1960).

requiring some 700 or so words—fall into three categories. First, as to organization and ownership, it must be an unincorporated trust or an association otherwise taxable as a domestic corporation,[74] managed by one or more trustees,[75] beneficial ownership being in at least 100 persons,[76] five or less of whom cannot own over 50%,[77] and evidenced by transferrable shares or certificates.[78] Second, as to gross income, basically 90% of the gross income must be passive and from real estate, only the balance of 10% being unrestricted as to nature and source.[79] Third, as regards assets, there is a prohibition against the holding at any time of property primarily for sale to customers in the ordinary course of trade or business.[80] The core of the statute is the concept of "rents"; the notion of passive income from real estate.[81] But not all rent is "rent".[82] And as the requirement of passiveness will normally entail placing the maintenance of the property in the hands of an independent contractor, there are special rules covering independent contractors.[83]

Assuming the entity survives the foregoing tests, we may now consider the tax consequences. As regards the trust itself,[84] the corporate tax will be levied only on retained earnings[85] provided a timely distribution of 90% of the trust's ordinary income is made.[86] Any retained capital gains will be taxed at 25%.[87] At the shareholder level, the usual rules relating to corporate distributions apply except that capital gains "pass through" to the shareholders.[88] However, shareholders receive no exclusion or credit for dividends received.[89]

The applicability of other corporate provisions is not made clear in subchapter M; the regulations tell us they apply to the extent they are "not inconsistent".[90] In considering whether to adopt subchapter

74. INT. REV. CODE OF 1954, §§856 (a), 856 (a) (3).
75. INT. REV. CODE OF 1954, §856 (a) (1).
76. INT. REV. CODE OF 1954, §856 (a) (5).
77. INT. REV. CODE OF 1954, §§856 (a) (6), 542 (a) (2).
78. INT. REV. CODE OF 1954, §856 (a) (2).
79. INT. REV. CODE OF 1954, §856 (c) (2).
80. INT. REV. CODE OF 1954, §856 (a) (4).
81. INT. REV. CODE OF 1954, §856 (d).
82. See Proposed Treas. Reg. 1.856-4 (b), 26 CFR 603, 607.
83. INT. REV. CODE OF 1954, §856 (d) (3).
84. Treas. Reg. 301.7701 indicates that if a syndicate operates as a general firm under a law similar to the Uniform Partnership Act, then it will always lack the corporate characteristics of continuity of life, centralized management, limited liability and free transferability of interest. Thus it will always be classified as a firm; there will be little danger of it being classified as an "association" taxable as a corporation.
85. INT. REV. CODE OF 1954, §857 (b) (2).
86. INT. REV. CODE OF 1954, §857 (a) (1).
87. INT. REV. CODE OF 1954, §857 (b) (3) (A).
88. INT. REV. CODE OF 1954, §857 (b) (3) (B).
89. INT. REV. CODE OF 1954, §857 (c).
90. See Proposed Treas. Reg. 1.856-1 (e), 26 CFR 603, 605.

M, taxpayers should not overlook the non-tax problems with which they may be faced.[91] And it should be borne in mind that failure to qualify under subchapter M will result in the trust being taxed fully as a corporation on all its income. In the majority of situations taxpayers will probably fare just as well using the partnership form of syndicate.

### AD VALOREM TAXATION

Law No. 71,[92] authorizes the State Revenue Commissioner to aid counties desiring to undertake a program of property re-evaluation and ad valorem tax equalization.[93] The Commissioner, in conjunction with the Presidents of the County Commissioners Association and the Georgia Municipal Association, will decide which counties may receive this aid. However, the extent of the aid is to be determined solely by the Commissioner. After this determination has been made, the Commissioner will distribute state funds to the qualifying county under a contract calling for repayment in five equal annual installments.[94] Limitations on millage will not apply to any levy imposed by the county for the purpose of paying such installments.

The legislature, in Law No. 334,[95] amended GA. CODE ANN. §92-40 (1961 Supp.)[96] so as to authorize municipalities to expend funds for the purpose of "mapping, platting, cataloging, indexing and appraising . . . taxable properties . . ."[97] and to make re-evaluations of taxable properties, search out and appraise unreturned property or purchase such information from any county or political subdivision of the state.

Annexation statutes typically provide that annexed property shall be exempt from stated amounts of ad valorem tax for various services until such services are furnished. In *Parker v. Mayor, etc. of Savannah*,[98] such a provision[99] was attacked on the ground, *inter alia,* that it violated the constitutional requirement that "All taxation shall be

91. *E.g.,* Rule against Perpetuities, GA. CODE ANN. §85-707 (1955 Rev.); Blue-sky laws, GA. CODE ANN. §§97-103, 104 (1955 Rev.); S.E.C. regulations.
92. Ga. Laws 1961, p. 107. Approved on Feb. 28, 1961.
93. The statute emphasizes it is "not intended for the purpose of defraying the ordinary or recurring expenses of property tax administration within the counties . . . ." *Ibid.*
94. The contract must also provide that whenever any installment payment is in default, the State Revenue Commissioner may require the State Treasurer to make such repayments from funds available to the defaulting county for road construction and maintenance purposes.
95. Ga. Laws 1961, p. 435. Approved on April 5, 1961.
96. Relating to municipal tax assessors and boards of tax appeals.
97. Other than those assessed by the Ga. Dept. of Revenue.
98. 216 Ga. 210, 115 S.E.2d 555 (1960).
99. Ga. Laws 1960, pp. 2213-20.

uniform upon the same class of subjects within the territorial limitations of the authority levying the tax, . . ."[100] This contention was held to be without merit because the provision in question ". . . does not injure the plaintiffs if they are entitled to the millage credit provided; and if they are not entitled to the tax credit, they pay taxes equally with other taxpayers receiving like services."[101]

INCOME TAX AMENDMENTS

The Current Income Tax Payment Act of 1960[102] authorizing the withholding of income tax from all remuneration paid to employees for their services,[103] was amended on February 23, 1961[104] ". . . to more clearly prescribe procedures" relating to employee refunds and credits. Refund checks not pesented for payment by taxpayers within 180 days after the date of issuance will be void and the related claims deemed to have been abandoned. In the case of refund checks returned undelivered, the Commissioner is required to publish the names of the taxpayers concerned. If such refund checks are not claimed within 90 days after publication, the related claims will also be deemed to have been abandoned.

Law No. 521,[105] covers several topics. The proviso in GA. CODE ANN. §92-3109 (f) (1961 Supp.) ". . . that after cost . . . recovered . . . through depreciation . . . no further deduction shall be allowed . . ." has been eliminated and the depletion provisions of the 1954 Federal Income Tax Code[106] adopted in place of those of the 1939 Code. A new subsection (o) has been added allowing a deduction for intangible drilling costs[107] incurred after December 31, 1959, if the taxpayer has elected to deduct such costs for federal income tax purposes.[108]

The schedule of allowable deductions for medical and dental care in GA. CODE ANN. §92-3901 (k) (1961 Supp.) is completely re-written.

100. GA. CODE ANN. §2-5403.
101. Parker v. Mayor, etc., of Savannah, 216 Ga. 210, 215, 115 S.E.2d 555, 559 (1960).
102. Ga. Laws 1960, p. 7. See generally, McKenna, *The Current Income Tax Payments Act* of 1960, 23 GA. B.J. 47 (1960).
103. And also requiring persons not employees to estimate and pre-pay their income taxes.
104. Ga. Laws 1961, p. 53.
105. Ga. Laws 1961, p. 565. Approved on April 6, 1961.
106. INT. REV. CODE OF 1954, §§611 through 614.
107. Which ". . . includes all expenditures, otherwise chargeable to the capital account, incident to and necessary for the drilling of wells and the preparation of wells for the production of oil and gas except expenditures for those items which in themselves have a salvage value or the cost of which is recoverable through depreciation." This has necessitated excepting intangible drilling costs from GA. CODE ANN. §92-3110 (b) (1961 Rev.).
108. Under INT. REV. CODE OF 1954, §263 (c).

The lower limit is 3% of gross income less business deductions. Ceilings are set at $2,500[109] multiplied by the number of exemptions allowed under GA. CODE ANN. §92-3106 (1961 Rev.), subject to a maximum of $5,000 for a single taxpayer, $10,000 for a married taxpayer, $15,000 for a disabled taxpayer aged 65 and $30,000 for man and wife both disabled and aged 65.

A new subsection 92-3109(p) allows for the ratable deduction over a period of 60 months of the organizational expenditures of a corporation. These are defined as ". . . any expenditure which is (1) incident to creation of the corporation, (2) is chargeable to the capital account and (3) is of a character not otherwise subject to depreciation or amortization."

### REMITTANCES

GA. CODE ANN. §92-8428 (1961 Rev.) has been amended[110] to authorize the Commissioner to issue a *fi. fa.* for the collection of any tax (except property taxes) or license fee shown to be due or payable on a return or application filed with him.

109. Formerly $1,250.
110. Ga. Laws 1961, p. 445. Approved on April 5, 1961.