TAXATION

By PHILIP MULLOCK*

In this review, I have again endeavored to place the emphasis on the nature of the problem rather than the particular tax involved.

CONTESTING A TAX

Must a taxpayer first pay an assessed tax before litigating his liability therefor? Under the federal income tax law, the answer is now reasonably clear. If he petitions in the Tax Court within 90 days after the date on which the Commissioner mailed the deficiency notice, then payment of the deficiency asserted is not required as a condition precedent to the right to petition.[1] If, however, the taxpayer does not want to follow the Tax Court route, he must first pay the deficiency asserted[2] and bring an action for a refund either in the District Court or in the Court of Claims.[3]

What about ad valorem taxes? In *Trust Investment and Development Co. v. City of Marietta*,[4] the problem was whether a taxpayer who had filed a return and thereby admitted a liability, could contest the city's reassessment without first paying or at least offering to pay the tax liability admitted in the return filed. The court held he could not. The reassessed tax was attacked on the ground that the method of arbitration specified in the city ordinance as the machinery for settling tax disputes was unconstitutional for want of proper notice provisions. As the ordinance stipulated arbitration, an action at law by way of affidavit of illegality was unavailable.[5] Consequently, the taxpayer petitioned in equity to enjoin collection of the reassessed tax. The lower court's action in sustaining the city's general demurrer was upheld on the general ground that "he who would have equity must do equity . . . ,"[6] which in this case meant paying or offering to pay the tax admitted to be due. The position, then, would seem to be this. If the taxpayer attacks the tax itself, pay-

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1. INT. REV. CODE OF 1954, §§6212 (a), 6213 (a).
2. Flora v. U.S., 362 U.S. 145, 80 S.Ct. 630, 4 L.Ed.2d 623 (1960).
3. INT. REV. CODE OF 1954, §§6532 (a), 7422 (a); 28 U.S.C. 1340, 1346, 1491 (1958).
4. 216 Ga. 788, 119 S.E.2d 568 (1961).
5. GA. CODE ANN. §39-1004 (1957 Rev.).
6. GA. CODE ANN. §37-104 (1933).

ment of the amount alleged to be due is not a condition precedent to his right to do so.[7] But if the taxpayer's attack goes to something other than the legality of the tax itself, then, unless the taxing statute or ordinance provides otherwise, payment or at least an offer to pay the tax admitted to be is a prerequisite to the taxpayer's right to litigate his liability to pay an amount other than that which he admits.

In resisting the assessment and levy of sales taxes, there are four alternative courses of action open to the taxpayer.[8] First, he may appeal directly to the superior court within 15 days from the date of assessment;[9] it is not necessary that a protest be filed as a prerequisite thereto.[10] Second, upon notification of assessment, the taxpayer may file a protest in which he may request a hearing or conference with the Commissioner.[11] Thereafter, the Commissioner must make a final assessment from which the taxpayer may appeal to the superior court.[12] Third, the taxpayer may allow the Commissioner to issue and levy a fi. fa.[13] and then file an affidavit of illegality thereto.[14] Fourth, the taxpayer may prefer to pay the tax and sue for a refund.[15] In *Blairsville Hardware & Supply Company v. Oxford,*[16] the Court of Appeals confirmed that, upon the issuance and levy of a fi. fa., the proper method by which to contest the assessment and collection of a sales tax is the filing of an affidavit of illegality thereto.

SELLER'S RIGHT TO RECOVER SALES TAX FROM PURCHASER

The Sales and Use Tax statute is by no means the epitome of the draftsman's art, though its scheme and operation are, for the most part, fairly simple. Both selling and purchasing dealers and also purchasers from selling dealers are liable for the tax,[17] which "as far as practicable" is to be collected by the selling dealer from the purchaser at the time of sale.[18] Each month, dealers must file a return[19] and remit the tax collected (or due) during the preceding month to the

7. Pullman Co. v. Suttles, 187 Ga. 217, 199 S.E. 821 (1938), which was distinguished on this ground.
8. The following must be read together: Administration of Taxing Laws, §§ 30, 31, 44, 45, Ga. Laws Ex. Sess. 1937-38, pp. 93, 99-102; 1943 Amending Act, §18, Ga. Laws 1943, p. 206; GA. CODE ANN. §92-3434a, (1961 Rev.) 7301, 8445, 8446. Williams v. Farr, 97 Ga. App. 881, 104 S.E.2d 713 (1958).
9. GA. CODE ANN. §92-8846 (1961 Rev.).
10. Farr v. Williams, 214 Ga. 525, 106 S.E.2d 14 (1958).
11. Administration of Taxing Laws, §30, Ga. Laws Ex. Sess. 1937-38, p. 931.
12. Administration of Taxing Laws, §45, Ga. Laws, Ex. Sess. 1937-38, p. 100-102.
13. GA. CODE ANN. §92-3434a (1961 Rev.).
14. 1943 Amending Act, §18, Ga. Laws 1943, p. 206; GA. CODE ANN. §92-7301 (1961 Rev.).
15. GA. CODE ANN. §92-3434a (1961 Rev.).
16. 105 Ga. App. 483, 125 S.E.2d 89 (1962).
17. GA. CODE ANN. §92-3402a (a), (e) (1961 Rev.).
18. GA. CODE ANN. §92-3404a, 3415a (1961 Rev.).
19. GA. CODE ANN. §92-3424a (1961 Rev.).

Revenue Commissioner.[20] Failure or neglect to collect the tax at the time of sale does not absolve the dealer from liability for the tax nor from the duty to remit it.[21]

The definition of "dealer" has eight categories.[22] The first seven, which "include" certain "persons", are merely illustrative, whereas the eighth, which "means and includes", is thereby all-inclusive. The last clause in the eighth category states: "and no action either in law or in equity on a sale or transaction as provided by the terms of this [statute] may be had in this State by any such dealer unless it be affirmatively shown that the provisions of this [statute] have been fully complied with." The issue in *Drake v. Thyer Manufacturing Corporation*[23]—whether the seller, who had failed to collect the tax from the buyer at the time of sale, but from whom the tax was subsequently collected by the Revenue Commissioner, could recover the tax so paid from the buyer—raised the question of the proper interpretation of the last clause in section 92-3404a (8). Literally, it would seem to be a complete bar to the selling dealer's action. The majority, however, was of the opinion that such an interpretation would be inconsistent with "the ultimate aim"[24] of the statute, *viz.*, payment of taxes to the State. Thus, payment of the tax, whenever made, constituted "full compliance with the law" despite the omission of "certain technical details in the reporting of the tax, or any other preliminary requirements."[25] In other words, even though no return is filed, no tax is collected at the time of sale, and no tax is remitted in the month following the sale, an eventual payment of the tax will constitute full compliance with the statute so as to preserve the tardy dealer's right to recover from the buyer. To support its position, the majority pointed out that the words "as far as practicable" in section 92-3415a "exclude the idea that the tax is always payable at the time of sale."[26] Moreover, the purchaser was equally liable for the tax and was required to pay it to the selling dealer.[27] As the purchaser here had neither paid the tax nor filed a return, he was equally remiss. Consequently, if section 92-3404a (8) barred the seller's action, the purchaser would be relieved of his obligation to pay the tax by the fortuitous circumstance that the Revenue Commissioner chose

20. GA. CODE ANN. §92-3433a (1961 Rev.).
21. GA. CODE ANN. §92-3415a (1961 Rev.).
22. GA. CODE ANN. §92-3404a (1961 Rev.).
23. 105 Ga. App. 20, 123 S.E.2d 457 (1961).
24. *Id.* at 23, 123 S.E.2d at 460.
25. *Ibid.*
26. *Ibid.*
27. Note 18, *supra.*

to proceed against the delinquent seller rather than the delinquent buyer.

The buyer becomes a "dealer" against whom the Revenue Commissioner can proceed directly, (a) if he fails to pay the tax to the seller at the time of a sale within the state,[28] and (b) if he fails to return and remit the tax in the month following importation of goods purchased outside the state.[29] Neither category, however, would seem to catch the buyer who has purchased within the state but is not in business,[30] unless section 92-3402a, (a), (e) be construed as adding another category to section 92-3404a covering such a purchaser. With this possible exception, the buyer will always be equally at fault whenever the tax is not paid in the prescribed manner. To bar the seller from whom the Commissioner has recovered the tax from proceeding against the buyer would, said the court, result in "untold injustices."[31] In other words, if two parties are equally at fault, it would be unjust to prevent the one unfortunate enough to be proceeded against from recovering from his fellow wrongdoer. Yet in the case of joint tort-feasors, contribution is allowed only in the case of a joint judgment.[32] A different result is justified under the tax law, the court seems to say, because the "ultimate aim" of the tax law is the payment of taxes to the state. But in similar vein, the "ultimate aim" of the tort law could be said to be the payment of compensation to the injured party. Analogically, therefore, it could be argued that just as payment of the tax by the seller removes the bar (92-3404a (8)) to recovery from the equally delinquent buyer, so payment of a non-joint judgment by one of two joint tort-feasors removes the bar (105-2012) against contribution by the other. But this would read section 105-2012 out of the Code. Likewise, to hold as the majority does is to read section 92-3404a (8) out of the Code. And to justify such a decision on the ground that the "ultimate aim" of a taxing statute is the payment of taxes to the state, is not particularly helpful.

CHARITABLE EXEMPTIONS

GA. CODE ANN. §92-201 (1961 Rev.),[33] exempting from taxation the property belonging to "hospitals not operated for the purpose of private or corporate profit," presupposes an institution of "purely

28. GA. CODE ANN. §§92-3402a (a), (e), 3404a (7) (1961 Rev.).
29. GA. CODE ANN. §92-3402a (b), 3404a (2) (1961 Rev.).
30. Because the only categories of GA. CODE ANN. §92-3404 (a) (1961 Rev.), into which a purchaser could be fitted are (7) and (8).
31. 105 Ga. App. 20, 24, 123 S.E.2d 457, 461 (1961).
32. GA. CODE ANN. §105-2012 (1958 Rev.).
33. Ga. Laws 1955, p. 263.

public charity."[34] This does not mean, of course, that a hospital, otherwise a purely charitable institution, will be removed from the exempt category merely because it derives a profit from the patronage of patients who are able to pay, so long as the money earned is reserved for the purpose of carrying out its purely charitable purposes.[35] The criterion is the use made of the property.[36] The petitioner in *Georgia Osteopathic Hospital, Inc. v. Alford,*[37] operated generally for profit. Except in emergencies, patients were not admitted without an order from a staff doctor. The hospital, employing methods customarily used by business institutions, collected whatever it could from its patients; only uncollectable bills were charged off to charity. On these facts, the court concluded that the hospital was operated principally for non-charitable purposes and primarily for the benefit of its staff. The exemption was accordingly denied.

In *Smith v. State,*[38] it was held, *inter alia,* that the Waycross and Ware County Development Authority[39] was an institution of "purely public charity",[40] and all its property and all debentures and revenue bonds issued by it were exempt from all state and local taxation.

Hospital and Housing Authority—Sales Tax Exemptions

It has been said that the sales and use tax is all inclusive, covering everything from the cradle to the grave. Exemptions are the rare exception.[41] One such exception covers " . . . sales to . . . the State of Georgia, or any county or municipality of said State."[42] Was a city hospital authority[43] a "municipality"? The Court of Appeals in *City of Marietta Hospital Authority v. Redwine*[44] felt it was unnecessary to answer that question because the legislative history[45] indicated that the General Assembly clearly intended not to exempt hospital authorities regardless of the source of their revenues and of whether they were

34. Ga. Const., art. 7, §1, para. 4, Ga. Code Ann. §2-5404 (1948 Rev.).
35. Elder v. Henrietta Egleston Hospital, 205 Ga. 489, 53 S.E.2d 751 (1949).
36. Church of God of Union Assembly v. City of Dalton, 216 Ga. 659, 119 S.E.2d 11 (1961); Alford v. Emory, 216 Ga. 391, 116 S.E.2d 596 (1960); United Hospitals Service Association v. Fulton County, 216 Ga. 30, 114 S.E.2d 524 (1960); Mullock, *Taxation,* 13 Mercer L. Rev. 195, 196-197 (1961).
37. 217 Ga. 663, 124 S.E.2d 402 (1962).
38. 217 Ga. 94, 121 S.E.2d 13 (1961).
39. Created under art. 5, §8, para. 1 of the Ga. Const., Ga. Laws 1953, Nov.-Dec. Sess., p. 266, ratified Nov. 2, 1954.
40. Art. 7, §1, para. 4 of the Ga. Const., Ga. Code Ann. §2-5404 (1948 Rev.).
41. Oxford v. J. D. Jewell Inc., 215 Ga. 616, 112 S.E.2d 601 (1960). See also Ga. Code Ann. §92-202 (1961 Rev.).
42. Ga. Code Ann. §92-3403a (C) (2) (d) (1961 Rev.).
43. Created under Ga. Code Ann. §§99-1501 - 1522 (1958 Rev.).
44. 87 Ga. App. 629, 74 S.E.2d 670 (1953).
45. H. R. Jour., Reg. Sess. 1951-1952, pp. 290, 291-308; S. Jour., Reg. Sess. 1951-1952, pp. 351, 368, 369, 568, 751, 758.

political subdivisions or instruments of the counties and municipalities. This was not particularly popular, and on April 20, 1959, the Governor passed an executive order suspending the sales and use tax on purchases by hospital authorities for operating expenses and equipment to the extent made from funds contributed by any municipality, county or the State.[46] The order was ratified and approved by legislative resolution.[47] In *Carroll City-County Hospital Authority v. Oxford,*[48] the taxpayer requested that the *City of Marietta* decision[49] be overruled. In refusing to do so, the Court of Appeals pointed out that the legislative approval[50] of the executive order[51] exempting hospital authorities only to the extent that their otherwise taxable purchases were made with funds supplied by State, county or municipality, was further proof of the correctness of its decision. The legislative intent was clearly to exempt hospital authorities only to the extent of the executive order ratified.

The question left unanswered in *City of Marietta*[52] was again raised in *Oxford v. Housing Authority of the City of Barnesville,*[53] this time by a housing authority.[54] The sales and use tax statute defines "person" to include "any . . . group or combination acting as a unit, body politic or political subdivision, whether public or private or quasi-public."[55] The Court of Appeals felt it was implicit in its *City of Marietta* opinion that the Legislature intended to include a housing authority within its definition of "persons" subject to the tax. Even though the Housing Authorities Law clearly and unambiguously stated that both the property of a housing authority and the authority itself were exempt from all taxes,[56] the court was of the opinion that such provision, enacted in 1937, could not be said to manifest a legislative intent to exempt housing authorities from a sales and use tax which did not come into effect until 1951. The court reiterated its view that the

46. The order was retroactive to April 1, 1951, and provided for a credit "which shall be that portion of the sales and use tax paid during [each] such fiscal year [from 1951] by such hospital organization as the contributions made from public funds by any municipality, or county, or the State, or any combination thereof, to the operating expenses and equipment purchases of such hospital organization bears to the total operating expenses and equipment purchases of such hospital organization for [each] such fiscal year."
47. March 17, 1960, Ga. Laws 1960, p. 1066.
48. 104 Ga. App. 213, 121 S.E.2d 387 (1961).
49. Note 44, *supra.*
50. Note 47, *supra.*
51. Note 46, *supra.*
52. Note 44, *supra.*
53. 104 Ga. App. 797, 123 S.E.2d 175 (1961).
54. Created under GA. CODE ANN. §§99-1101-1170 (1958 Rev.).
55. GA. CODE ANN. §92-3403a (A) (1961 Rev.).
56. GA. CODE ANN. §99-1132 (1961 Rev.).

sales tax was all inclusive. Since the statute contained no provision excluding housing authorities, they were not exempt from the tax.

DOUBLE TAXATION OF INTANGIBLES

In *National Linen Service Corporation v. Thompson*,[57] the issue was whether cash and accounts receivable of the Alabama and Texas branches of a Delaware corporation domesticated under the laws of Georgia and having its principal place of business in Atlanta, were subject to the Georgia intangible property tax.[58] As the Supreme Court had ruled that no constitutional question was present, the Court of Appeals viewed its task as one of determining whether there was any provision in the tax law exempting these intangibles from the tax.[59]

Both cash and accounts receivable are specifically made subject to the tax.[60] The only provisions that could exempt them under the circumstances were GA. CODE ANN. §§92-121 - 122 (1961 Rev.). Section 121 was ruled out because it applied only to residents and non-residents, as opposed to domiciliaries: as a domesticated corporation, the taxpayer was a domiciliary. This left section 92-122, which was specifically applicable to domiciliaries. Section 92-122 provides that the tax is not applicable to intangibles which have both (1) acquired a taxable status in another state[61] and (2) are "subjected to tax in another State incident to the conduct of business located in the said other State." Relying on the rule that exemptions must be strictly construed in favor of the State, the court interpreted the second phrase as referring to a property tax rather than to a franchise tax, and was thus able to conclude that payment of Alabama and Texas franchise taxes on the intangibles in question did not relieve the taxpayer of its obligation to pay a tax on those same intangibles in Georgia. This rather legalistic approach enabled the court to avoid committing itself on the situs question and at the same time to assert the dubious proposition that no double taxation was involved because the Georgia

57. 103 Ga. App. 786, 120 S.E.2d 779 (1961).
58. Ga. Laws 1937-1938 Ex. Sess., pp. 156-172, Ga. Laws 1953, Nov.-Dec. Sess., pp. 379-390; GA. CODE ANN. §§92-114 - 185 (1961 Rev.). The references in section 92-121 and 122 to "sections 92-116 to 92-122" are rather misleading.
59. GA. CODE ANN. §§92-5404, 92-101 (1961 Rev.).
60. GA. CODE ANN. §§92-116, 92-161 (d) (1961 Rev.).
61. This aspect is discussed in Note, *Constitutional Law—State Taxation of Intangibles*, 24 GA. B. J. 541 (1962). Though the court discussed the situs rule at length, its careful avoidance of any constitutional question makes its remarks purely dicta. It seems fairly clear from the discussion, however, that the court did not feel there was any constitutional barrier to taxing a Georgia domiciliary on intangibles which were also taxed elsewhere.

intangibles tax was a property tax whereas the Alabama and Texas levies were excise taxes.

The method of allocating and apportioning the income of corporations "doing business" or owning property in Georgia is set out in GA. CODE ANN. §92-3113 (1961 Rev.).[62] Income from intangible property is to be apportioned according to "taxable situs": only that proportion of the income from intangibles as the gross receipts from intangibles in Georgia bear to the total gross receipts from intangibles, is taxable.[63] Intangible property of a domestic corporation or of a foreign corporation having its principal place of business in Georgia, is deemed to have a "taxable situs" in Georgia.[64] An amendment has been added[65] to the effect that intangible property of a foreign corporation derived from business done in another state and held outside of Georgia " . . . shall not be deemed to have a taxable situs in Georgia by reason of officers or directors of such corporation residing in Georgia, corporate meetings being held in Georgia, or corporate records kept in Georgia."

LIQUIDATING DISTRIBUTIONS

In *Oxford v. Carter*,[66] 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,[67] the answer is clear. Gain at the shareholder level on complete or partial liquidation is taxed at capital gain rates. The problem was whether the same rule should obtain under the Georgia income tax statute. In affirming the Court of Appeals,[68] which in effect followed the federal rule, the Supreme Court confined itself to the narrow question of whether GA. CODE ANN. §92-3002 (o) (1961 Rev.),[69] was open to construction. As it was, the Court of Appeals was correct in looking to the intent of the legislature in enacting the statute, and was also correct in the conclusion reached as to that intent.[70]

GA. CODE ANN. §92-3002 (o) (1961 Rev.), enacted in 1937, enlarged

62. Ga. Laws 1950, p. 299.
63. GA. CODE ANN. §92-3113 (3) (1961 Rev.).
64. *Ibid.*
65. Ga. Laws 1962, p. 455. This amendment takes the form of a further proviso in GA. CODE ANN. §92-3113 (3) (1961 Rev.).
66. 216 Ga. 821, 120 S.E.2d 298 (1961).
67. INT. REV. CODE OF 1939, §115 (g) (1) and Treas. Reg. 94, art. 115-19 (1939); INT. REV. CODE OF 1954, §331.
68. 102 Ga. App. 762, 118 S.E.2d 216 (1960).
69. Ga. Laws 1937, pp. 109, 112.
70. See Mullock, *Taxation*, 13 MERCER L. REV. 195, 200-202 (1961).

the definition of "dividend" to include " . . . such portion of the assets of a corporation distributed at the time of dissolution as would in effect be a distribution of earnings." This was of no particular significance at the time, where there was a gain to the shareholder, because one dollar of gain was treated the same as any other. But when the capital gains provisions were introduced in 1952 by the enactment of section 92-3119 (d),[71] a question mark was placed by section 92-3002 (o) against section 92-3120 (d), enacted in 1931,[72] which provided that a distribution of assets to a shareholder " . . . shall be treated as a sale of the stock . . . and gain or loss shall be computed accordingly." "Accordingly" now meant at capital gain rates unless section 92-3002 (o) by implication repealed so much of section 92-3120 (d) as allowed sale and therefore capital gain treatment of assets distributed on liquidation which represented accumulated earned surplus. The majority of the court sensibly took the position that not only did section 92-3002 (o) need construing, but that it should be construed *with* sections 92-3120 (d) and 92-3119 (d). A literal interpretation[73] would either render it meaningless or result in repeal of section 92-3120 (d) by implication; alternatives equally undesirable and to be avoided. Construing the three statutes in *pari materia* entailed that the definition of "dividend" in section 92-3002 (o) should not be applied in the case of a bona fide liquidation distribution and therefore such a distribution should be treated as a sale of the shareholder's stock and any gain taxed at capital gain rates under section 92-3119 (d).

Deductions for Losses

Oxford v. Chance[74] is perhaps best viewed as a hard case which makes bad law. Ga. Code Ann. §92-3109 (d) (1961 Rev.),[75] allowing a deduction for losses not compensated for by insurance, is roughly equivalent to Int. Rev. Code of 1954 §§165, 267. No deduction is allowed for losses arising from sales to members of the taxpayer's family. In the federal statute, the word "family" is defined to include the taxpayer's " . . . brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants. . . . "[76] Though no such definition is included in the Georgia statute, the Revenue Commissioner's regulation adopts the federal definition verbatim. In the *Chance* case, the taxpayer claimed a deduction for a loss sustained

71. Ga. Laws 1952, pp. 405, 408-425.
72. Ga. Laws 1931, Extra Sess. p. 41.
73. Favored by the three dissenting justices.
74. 104 Ga. App. 310, 121 S.E.2d 825 (1961).
75. Ga. Laws 1935, p. 126.
76. Int. Rev. Code of 1954, §267 (c) (4).

from the sale of realty to his brother, a resident for many years in another state and not a member of the taxpayer's household. The Court of Appeals upheld the lower court's decision in favor of the taxpayer.

To reach this result, the court first decided that the Commissioner's regulation was entitled to no weight at all, and then proceeded to construct a definition based on Webster's Dictionary, Century Dictionary and other sources of doubtful relevancy. As a result of these labors, the court concluded that any definition of the word "family" as used in section 92-3109 (d) must include the notions either of unity of living in one household or dependency of one member on another. So construed, the taxpayer's brother could not be considered a member of his family, and insofar as the Commissioner's regulation held otherwise, it was void.

No one, of course, denies the importance of the "plain meaning" rule. But to limit inquiry to such a source when dealing with the income tax statute is rather naive. The policy underlying INT. REV. CODE OF 1954 §267 (and the equivalent portion of GA. CODE ANN. §92-3109 (d) (1961 Rev.)) is clear enough. In the usual intra-family sale, the evidence necessary to establish the fact that it was not made in good faith is almost wholly within the knowledge of the person claiming the deduction.[77] But the evidentiary problem was not the only one Congress intended to meet. Code section 267 states an absolute prohibition—not a presumption—against the allowance of losses on any sales between the members of certain designated groups. The one common characteristic of these groups is that their members, although distinct legal entities, generally have a near-identity of economic interests. Even legally genuine intra-group transfers were not thought to result, usually, in economically genuine realizations of loss and accordingly were not deemed appropriate occasions for the allowance of deductions.[78] By rejecting the definition set out in section 267 (c) (4) and adopted in the Commissioner's regulation, the Court of Appeals has chosen to ignore the policy considerations underlying section 267. To impute a similar choice to the Georgia Legislature can hardly be warranted by the mere omission to insert the definition set out in section 267 (c) (4) in the body of section 92-3109 (d).

77. H. REP. No. 1546, 75th Cong., 1st Sess., (1939), 1 CUM. BULL. (Part 2) 704, 722-723 (1939).

78. McWilliams v. Commissioner, 331 U.S. 694, 699, 67 S.Ct. 1477, 1480, 91 L.Ed. 1750, 1754 (1946).

CORPORATE FRANCHISE TAX ON UNREALIZED APPRECIATION

GA. CODE ANN. §92-2401 (1961 Rev.)[79] levies an annual franchise tax for the privilege of doing business in corporate form, based on "net worth, including issued capital, paid-in surplus and earned surplus." In *Oxford v. Macon Telegraph Publishing Company*,[80] the appraised value of the corporation's assets was considerably in excess of book value. In order that its balance sheet more properly indicate to prospective lenders the security they might look to, the corporation recorded the appreciation in value by making appropriate charges to the relevant asset accounts and corresponding credits to capital surplus and capital stock. The issue was whether this surplus, created by recording the unrealized appreciation in asset values, was properly includable in net worth for purposes of the corporate franchise tax. On the dubious authority of an accounting textbook, the Court of Appeals held that it was.

The doctrine of realization is firmly embedded in the federal income tax law: to be subject to the income tax, an economic enhancement must be "realized".[81] Mere accretion in value is not enough; there must have been some change in the form or extent of the taxpayer's investment.[82] As the United States Supreme Court has pointed out, the doctrine is "founded on administrative convenience"[83] and serves many purposes. In particular, it restrains the hand of the tax gatherer while there is serious doubt about whether a gain is more hope than fulfillment and while the calculation of its amount is difficult. If the federal income tax requires a doctrine of realization, the same could be said of any tax based upon annual variations in net worth, including the Georgia corporate franchise tax. The mere fact of an appraisal, not empirically verified by some transaction which could properly be considered a taxable event, does not evidence a change in the form or extent of the taxpayer's investment of such a nature as to merit recognition for tax purposes. As a result of this decision, taxpayers will record upward appraisals at their peril. On the other hand, the informed taxpayer may reduce his franchise tax by having any fall in value independently appraised and recorded. And if he chooses to ignore the ups and downs in market values, he cannot be compelled

79. Ga. Laws 1951, p. 167, as amended by Ga. Laws 1952, p. 373, Ga. Laws 1953, p. 292, Ga. Laws 1957, p. 108.
80. 104 Ga. App. 788, 123 S.E.2d 277 (1961).
81. Eisner v. Macomber, 252 U.S. 189, 67 S.Ct. 1681, 91 L.Ed. 1915 (1920); Helvering v. Bruun, 309 U.S. 461, 80 S.Ct. 631, 84 L.Ed. 864 (1940); Helvering v. Horst, 311 U.S. 112, 61 S.Ct. 144, 85 L.Ed. 75 (1940).
82. *Ibid.*
83. Helvering v. Horst, 311 U.S. 112, 116, 61 S.Ct. 144, 146, 85 L.Ed. 75, 78 (1940).

to do otherwise. Merely to state such a "multiple-choice" tax basis is to condemn the decision giving rise to it.

Savings and Loan Associations—Net Worth Tax

In lieu of the tax imposed upon intangibles,[84] federal savings and loan associations are required to pay a tax on their net worth.[85] The real property of such associations is taxed in the normal manner[86] and a deduction is allowed in computing net worth in the amount at which it is returned for real property taxation.[87] The issue in *Pelham Federal Savings & Loan Association v. Williams,*[88] was whether the association, which had returned its real property for ad valorem taxation at $12,500, could deduct $50,000 in its net worth tax return because the latter figure was also included in the ad valorem return as being the market value of the real property. In finding for the Collector, the court pointed out that the taxpayer's contention would have the effect of putting $37,500 of its net assets beyond the scope of either tax. Though the amount of $50,000 had been "returned", only $12,500 had been "returned for taxation" as required by the statute and only the latter could be deducted. The statutory expression "value at which it is returned for taxation" was unambiguous and clearly manifested a legislative intent to remove from taxation as net worth the exact amount which was taxed as real estate.

Ad Valorem Equalization

Ga. Code Ann. §92-6911 (1961 Rev.) imposes upon county boards of tax assessors the duty to see that all property is assessed and returned at its just and fair valuation and that valuations as between individual taxpayers are fairly and justly equalized so that each taxpayer pays only his proportionate share of taxes. In *Brooks v. Carter,*[90] the assessors, following a mass meeting at the courthouse, agreed to an "across-the-board" increase in the assessable values of all real and personal property for the purpose of liquidating the indebtedness of the board of education. The increases were not based on any actual reappraisal survey, but only 12 out of 2094 taxpayers contested the assessors' action. On these facts, the Supreme Court held that the trial

84. Ga. Code Ann. §§92-113 - 92-161 (1961 Rev.).
85. Ga. Code Ann. §§92-179 - 184 (1961 Rev.). "Net worth" is defined as "all surplus, undivided profit and reserves exclusive of the minimum statutory federal insurance reserve."
86. Ga. Code Ann. §92-184 (1961 Rev.).
87. *Ibid.*
88. 216 Ga. 730, 119 S.E.2d 578 (1961).
89. Ga. Laws 1937, p. 519.
90. 216 Ga. 836, 120 S.E.2d 332 (1961).

court's refusal to grant an injunction to the 12 dissidents was not an abuse of its discretion.

INCOME TAX CREDIT FOR SALES & USE TAXES—MACHINERY IN NEW AND EXPANDING INDUSTRIES

A new subsection, (b),[91] has been added to GA. CODE ANN. §92-3111 (1961 Rev.), providing for a credit against income tax equal to the sales and use tax paid on the purchase or lease of "machinery for new and expanded industry or agriculture." The latter expression is defined in a new subsection, (q),[92] added to GA. CODE ANN. §92-3002 (1961 Rev.), and covers:

1. Machinery used for the first time in Georgia in the manufacture of tangible personal property.
2. Machinery purchased or leased for new farming operations.
3. Machinery purchased or leased for expanding existing farming operations, provided substantially increased employment results.
4. Replacement machinery for any of the above, intended to substantially expand production and increase employment, to the extent that its normal production capacity exceeds that of the machinery replaced.

The sales and use tax paid on the purchase or lease of such machinery is to be allowed as a credit against income tax over the following six years. No more than one-third of the credit may be used in any one year.

FEDERAL INCOME TAX—DEDUCTION FOR GEORGIA SALES AND USE TAX

Generally speaking, taxes are deductible for federal income tax purposes only by the person upon whom they are imposed.[93] Prior to the 1960 amendments[94] of the sales and use tax statute,[95] the apparent conflict between section 2,[96] imposing a tax "upon every person who engages in the business of selling tangible personal property at retail," and section 12(a),[97] providing that "it is the purpose and intent of this [Act] that the tax . . . is a levy on the purchaser," was re-

91. Ga. Laws 1962, p. 705.
92. Ga. Laws 1962, p. 703.
93. INT. REV. CODE OF 1954, §164(a); Treas. Reg. 1-164-1 (1957).
94. Ga. Laws 1960, pp. 153-158.
95. Ga. Laws 1951, pp. 360-387.
96. Now codified, GA. CODE ANN. §92-3402a (1961 Rev.).
97. Now codified, GA. CODE ANN. §92-3415a (1961 Rev.).

solved in *Williams v. Bear's Den.*[98] There, the Supreme Court held that "it was the intent and purpose of the legislature to levy the tax against the dealer."[99] As a result of this decision, the U. S. Treasury Dept. ruled[100] that the Georgia sales and use tax was deductible by the dealer[101] rather than the purchaser. In 1960, the Legislature amended the Sales and Use Tax Act with the express purpose of making it clear that the tax is imposed upon the purchaser.[102] Accordingly, the U. S. Treasury has now ruled[103] that, as from March 1, 1960, the Georgia sales and use tax is a tax imposed upon and therefore deductible by the purchaser.[104]

MUNICIPAL TAXATION—EXEMPTIONS

GA. CODE ANN. §92-4105 (1961 Rev.),[105] exempting travelling salesmen from municipal taxation provided no delivery of goods is made at the time of taking orders, has been amended[106] by extending the exemption to merchants or dealers whose business situs "is elsewhere", and their employees, and who deliver goods wholesale or retail on orders taken previously thereto.

PROFESSIONAL ASSOCIATIONS

As a corollary to the Georgia Professional Association Act,[107] the definition of "corporation"[108] for income tax purposes has been amended to include professional associations.[109]

98. 214 Ga. 240, 104 S.E.2d 230 (1958).
99. *Id.* at 243, 104 S.E.2d at 233.
100. REV. RUL. 59-66, CUM. BULL. 1959-1, 51.
101. Who was also required to include the amounts collected from vendees in his gross income.
102. Ga. Laws 1960, pp. 153, 154.
103. REV. RUL. 62-76.
104. If an individual elects the standard deduction or optional tax table, no deduction will be allowed unless the tax is attributable to a trade or business carried on by him. INT. REV. CODE OF 1954, 62 (1). As the dealer is no longer allowed a deduction, he is no longer required to include collections of sales tax in his gross income except to the extent of amounts retained as fees for acting as collecting agent.
105. Ga. Laws 1896, p. 36.
106. Ga. Laws 1962, p. 596.
107. Ga. Laws 1961, p. 404. On the subject of professional associations, see Thrower and Cohen, *Professional Associations under the Georgia Act—Some Tax Aspects and Considerations of Legal Ethics,* 24 GA. B. J. 163 (1961); Comment, *Federal Income Tax Advantages for Professionals—The Georgia Professional Association Act,* 12 MERCER L. REV. 388 (1961); Bittker, *Professional Associations and Federal Income Tax: Some Questions and Comments,* 17 TAX L. REV. 1 (1961); Treas. Reg. §301.7701 (1960).
108. GA. CODE ANN. §92-3002 (d) (1961 Rev.).
109. Ga. Laws 1962, p. 454.