STATE AND LOCAL TAXATION

By CARROLL SIERK*

Since the taxation title was omitted from last year's survey and since some important developments occurring after the end of the period being surveyed in the current issue have come to the attention of the writer, this article will cover substantially more than the usual survey period.

PROPERTY TAXES

A matter of both judicial and legislative concern during the period being surveyed is that of the proper percentage of market value to be assessed by the State Revenue Commissioner and/or the local tax assessors. Although Georgia statutes have long provided, "All property shall be returned for taxation at its fair market value,"[1] apparently no effort to compel full-value assessment occurred until 1965 when Alex McLennan filed a petition for mandamus against the then State Revenue Commissioner Hiram Undercofler to compel him to assess public utilities (which unlike other taxpayers file their ad valorem tax returns with the State Revenue Commissioner rather than local officials)[2] at 100 per cent of the full, fair market value. Since Mr. McLennan in another action had obtained a judgment requiring the State Revenue Commissioner to exercise his statutory power[3] to compel uniformity of assessment between the respective counties, a victory in the second case probably would have resulted in a state-wide use of 100 percent of fair market value assessment.[4] In the meantime, however, the General Assembly acted to suspend the commissioner's authority to equalize assessments among counties for one year.[5] Under these circumstances the Supreme Court of Georgia noted that assessing utilities at full market value while other property owners were being assessed at a fraction of the value of their properties would violate the uniformity clause of the Georgia Constitution[6] and the equal-protection clauses of both state[7] and Federal[8] Constitutions, the statutory duty to assess at full value yielding to the constitutional duty to avoid discrimina-

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1. GA. CODE ANN. §92-5701 (1961 Rev.).
2. GA. CODE ANN. §92-5902 (1961 Rev.).
3. GA. CODE ANN. §92-7002 (Supp. 1966).
4. Undercofler v. McLennan, 221 Ga. 613, 146 S.E.2d 635 (1966). The significance of the case is not indicated by the supreme court opinion which merely dismissed the State Revenue Commissioner's appeal on a procedural point. The full story, however, appeared on the front page of The Atlanta Constitution for Friday, January 7, 1966, and in other newspaper accounts of the litigation.
5. Ga. Laws 1966, p. 45.
6. GA. CONST. art. VII, §1, para. 3 (1945); GA. CODE ANN. §2-5403 (1948 Rev.).
7. GA. CONST. art I, §1, para. 2 (1945); GA. CODE ANN. §2-102 (1948 Rev.).
8. U. S CONST., amend. XIV, §1;GA. CODE ANN. §1-815 (1948 Rev.).

tion.[9] A casenote written shortly after publication of the court's opinion observed that the result might well have been different if the General Assembly had not suspended the State Revenue Commissioner's authority to equalize assessments and the writer predicted further litigation in this area.[10] Such further litigation has now materialized.[11]

In June, 1967 a suit filed by three Gilmer County property owners against county tax authorities and the State Revenue Commissioner complaining, among other things, of the tax authorities' failure to enforce Code provisions requiring a full and fair market value assessment of taxable property[12] received state wide publicity when it resulted in a temporary injunction against the State Revenue Commissioner preventing his approving any more county tax digests.[13] On June 30, 1967, Judge Marion T. Pope, Jr., of the Gilmer Superior Court dissolved the temporary injunction in an order which states, among other things: "In view of the fact that the State Revenue Commissioner is in the process of equalizing taxable values among counties at 40 per cent of fair market value, it is not felt that uniformity of taxation could be achieved by continuing in effect the order restraining the State Revenue Commissioner from approving any county tax digests particularly since Bibb [C]ounty has mailed tax bills to its taxpayers and is in fact collecting taxes." The peculiar nature of certain local issues in the case resulted in its being carried over to the October term of the Gilmer Superior Court.[14] At the time of this writing the case is still in that court and not on appeal. To some it may seem that with assessment ratios as between counties already equalized at 40 per cent, a judicial decision requiring full value, 100 per cent, assessment would result in only a few problems of mathematical computation and action by local officials to lower millage rates on the higher valuations to a point where the same revenue would be produced.[15] However, many small homeowners might find the present homestead exemption[16] far less beneficial to them with their prop-

9. McLennan v. Undercofler, 222 Ga. 302, 149 S.E.2d 705 (1966). The constitutional duty of taxing uniformly was further emphasized by the Georgia Supreme Court in Undercofler v. Seaboard Air Line R.R., 222 Ga. 822, 152 S.E.2d 884 (1966), which held that for 1966 the State Revenue Commissioner in assessing a railroad's property had to utilize the assessment ratios in fact used by the local authorities in the various counties where the property was located rather than applying a single percentage assessment to all its property.
10. 18 MERCER L. REV. 290 (1966).
11. Kiker v. Hefner, No. 922, Gilmer Sup. Ct. (1967).
12. GA. CODE ANN. §§92-5701 to -5702 (1961 Rev.).
13. For example, stories related to this litigation appeared on the front pages of both The Atlanta Constitution and The Atlanta Journal on Friday, June 30, 1967.
14. Letter from William L. Harper, Georgia Assistant Attorney General, to Carroll Sierk, Sept. 26, 1967.
15. A letter to Carroll Sierk from Joan S. Hunter, Department of Revenue Information Officer, dated Oct. 26, 1967, indicates that this line of thought currently prevails in that department.
16. GA. CONST. art. VII, §1, para. 4 (1945); GA. CODE ANN. §2-5404 (1948 Rev.); GA. CODE ANN. §92-219 (1961 Rev.).

erty valued at 100 per cent of its fair market value. We may illustrate by assuming a homeowner with property having a fair market value of $5,000. With the present 40 per cent of full value assessment method, the taxable value is $2,000. Since the homestead exemption is $2,000, our hypothetical homeowner pays no property tax on his real estate. If, however, his property were assessed at its full value of $5,000 and the homestead exemption remained at $2,000, he would then be paying taxes on $3,000 worth of real estate.[17] Other areas which would be affected by a change to full value assessment include the state's quarter mill tax,[18] the constitutional millage limitation on support and maintenance of education,[19] and the constitutional limitation on county indebtedness.[20] Of course, the homestead exemption could be raised to $5,000, and the education millage and county indebtedness limitations changed by appropriate constitutional amendments and legislative action.

In 1965 the Supreme Court of Georgia decided two cases involving attempts to shift the property tax burden by obviously arbitrary assessment methods.[21] Both attempts were held invalid. In *Champion Papers, Inc. v. Williams*[22] the Wilkes County Board of Tax Assessors raised all valuations on pine timberlands $1 per acre and raised valuations on managed and and controlled pine timberlands (tree farms and lands involved in the pulpwood industry) an additional $1 per acre. The additional $1 was challenged. The defendant taxing authorities admitted that in some instances adjoining controlled and noncontrolled lands had the same value, that the method was used to avoid a general re-evaluation program and not after examination or inspection of the land, and that the only classification used in raising valuations the additional $1 per acre was whether the land was in the controlled and managed pulpwood production category or otherwise. The Supreme Court of Georgia held this method of assessment to be in conflict with the requirement that taxation of all kinds of property of the same class must be uniform and by the same standard of valuation, equally with other taxable property of the same class.[23] *Cross v. Miller*[24] presented what the Georgia Supreme Court opinion calls the anomalous situation of citizens and taxpayers complaining of a plan to reduce taxes. After assessing

17. Credit for first calling this aspect of the full value assessment controversy to my attention should be given to Sidney L. Moore, a senior law student at the Walter F. George School of Law.
18. GA. CONST. art. VII, §1, para. 2 (3) (1945); GA. CODE ANN. §2-5402 (3) (Supp. 1966).
19. GA. CONST. art. VIII, §12, para. 1 (1945); GA. CODE ANN. §2-7501 (Supp. 1966).
20. GA. CONST. art. VII, §7, para. 1 (1945); GA. CODE ANN. §2-6001 (Supp. 1966).
21. Champion Papers, Inc. v. Williams, 221 Ga. 345, 144 S.E2d 514 (1965); Cross v Miller, 221 Ga. 579, 146 S.E.2d 279 (1965).
22. 221 Ga. 345, 144 S.E.2d 514 (1965).
23. The court cited GA. CODE ANN. §92-6911 and several cases for this proposition. Since the requirement is constitutional in origin, it seems peculiar that the constitutional provision, GA. CONST. art. VII, §1, para. 3 (1945); GA. CODE ANN. §2-5403 (Supp. 1966), was not cited.
24. 221 Ga. 579, 146 S.E.2d 279 (1965).

all real property in Walker County at 30 per cent of appraised value, the Board of Tax Assessors determined that this valuation would produce taxes which were too high, especially if the Board of Education's request for the maximum levy of 30 mills were approved, and decided to reduce the assessment ratio to 25 per cent of appraised value. Citing one of its decisions holding a similar attempt to provide additional revenue for educational purposes by increasing the assessment percentage invalid,[25] the supreme court held that the same principle applied here and that the trial court had properly enjoined the Board and the Tax Commissioner from reducing the valuation of property.

In 1966 the General Assembly, exercising authority given it by a constitutional amendment ratified in 1964,[26] acted to provide for the classification of motor vehicles as a separate and distinct class of tangible property for ad valorem tax purposes.[27] The inequalities and hardships resulting from this legislative action gave rise both to litigation[28] and to further legislative action.[29] On the judicial front this statute was quickly challenged in a declaratory judgment action[30] Complaints against the statute and/or its enforcement included the assessment of dealer's motor vehicle inventory at a different percentage of value than the inventory of other merchants and the inclusion of motor vehicles in inventory at the date "ownership" was acquired which could be prior to delivery and even prior to manufacture. Observing that the uniformity required by the Georgia Constitution is uniformity within the same class of property, the Georgia Supreme Court found the first complaint answered by the 1964 constitutional amendment[31] which authorizes "legislation treating any and all motor vehicles . . . as a separate class from other classes of tangible property for ad valorem property tax purposes . . . ."[32] The definition of taxable inventory complaint was held not to present a present justiciable controversy "[a]s it is not alleged that the defendants are attempting to enforce the Act as there stated but is alleged merely that they have been advised as to the method of enforcement contemplated . . . ."[33] The issue which the court left unanswered was answered by the General Assembly in 1967.[34] A 1967 amendment to the 1966 motor vehicles as a separate class of taxable property

25. Green v. Calhoun, 204 Ga. 550, 50 S.E.2d 209 (1948).
26. *Cf.* Ga Laws 1966, pp. 1279-1282. The amendment was No. 8 on the November 3, 1964 ballot. The section amended is codified as GA. CODE ANN. §2-5403 (Supp. 1966).
27 Ga. Laws 1966, p. 517. To coordinate the collection of the property tax on motor vehicles with issuance of license plates for them the motor vehicle licensing statute was amended. Ga. Laws 1966, p. 508.
28. Hawes v. Cordell Ford Co., 223 Ga. 260, 154 S.E.2d 599 (1967).
29. Ga. Laws 1967, p. 91. Ga. Laws 1967 p. 157, and Ga. Laws 1967, p. 459.
30. Hawes v. Cordell Ford Co., 223 Ga. 260, 154 S.E.2d 599 (1967).
31. GA. CONST. art. VII, §1, para. 3 (1945), *as amended* GA. CODE ANN. §2-5403 (Supp. 1966).
32. Hawes v. Cordell Ford Co., 223 Ga. 260, 260-261, 154 S.E.2d 599, 601 (1967).
33. *Id.* at 263, 154 S.E.2d at 602.
34. Ga. Laws 1967, p. 91.

statute supplies special provisions for motor vehicles in dealers' inventories.[35] Among other things, it provides that "[A]ll new motor vehicles in transit and not actually in a dealer's inventory on January 1 of each year shall not be subject to taxation for that year . . ."[36] and "[T]he dealer's assessed value shall be 75 per cent of the assessed value furnished by the State Department of Revenue for other motor vehicles."[37] In view of the Georgia Supreme Court's express language in *Cordell:* "Having once placed motor vehicles in a separate classification of tangible property . . ., all motor vehicles must be assessed uniformly,"[38] it would seem that this latter provision might well be held invalid in later litigation. Two other amendments to the motor vehicle classification statute authorized the Governor to extend the time for return and payment of ad valorem taxes on motor vehicles in 1967[39] and more clearly defined the motor vehicle dealer's taxable inventory by providing that "For the purposes of this Act, motor vehicles which are purchased from a manufacturer by a franchised dealer shall not be deemed to be owned in Georgia until the actual physical possession of the motor vehicle is surrendered to such dealer."[40]

Other property tax cases decided by the Georgia appellate courts during the rather long period being reviewed dealt with such diverse topics as the separate taxability of leasehold estates,[41] redemption of property after tax sale,[42] the exemption of institutions of purely public charity,[43] the effect of arbitrators' valuation of property,[44] and the meaning of "gas company" as used in a statute[45] prescribing that gas companies and certain other public utility companies are to file their annual ad valorem tax returns with the State Revenue Commissioner.[46]

The opinion of the Supreme Court of Georgia in *Henson v. Georgia Indus. Realty Co.*[47] makes it clear that where taxable property is leased both the lessor and the lessee are to return their respective interests separately.[48] In *Lowe v. City of Atlanta*[49] the Supreme Court of Georgia held

35. Ga. Laws 1967, p. 91.
36. *Id.* at 92.
37. *Id.*
38. Hawes v. Cordell Ford Co., 223 Ga. 260, 261, 154 S.E.2d 599, 601.
39. Ga. Laws 1967, p. 157.
40. Ga. Laws 1967, p. 459.
41. Henson v. Georgia Indus. Realty Co., 220 Ga. 857, 142 S.E.2d 219 (1965).
42. Lowe v. City of Atlanta, 221 Ga. 477, 145 S.E.2d 534 (1965); Herrington v. Old South Inv. Co., 222 Ga. 428, 150 S.E.2d 623 (1966).
43. Presbyterian Center, Inc. v. Henson, 221 Ga. 750, 146 S.E.2d 903 (1966).
44. Whitehead v. Henson, 223 Ga. 329, 155 S.E.2d 391 (1967).
45. GA. CODE ANN. §92-5902 (1961 Rev.).
46. Undercofler v. Colonial Pipeline Co., 114 Ga. App. 739, 152 S.E.2d 768 (1966).
47. 220 Ga. 857, 142 S.E.2d 219 (1965).
48. Some of the court's language in its opinion in Delta Air Lines, Inc. v. Coleman, 219 Ga. 12, 131 S.E.2d 768 (1963) seemed to suggest the contrary. Of course this does not affect the distinction between a leasehold estate and a mere license. A mere license is not taxable property. Henson v. Airways Serv., Inc., 220 Ga. 44, 136 S.E.2d 747 (1964).
49. 221 Ga. 477, 145 S.E.2d 534 (1965).

that where property was purchased under a federal tax levy and sale, redeemed, and then quitclaimed to the purchasers the purchaser took subject to city tax liens even though the federal liens were superior to the city liens. Noting that the purchasers at the federal tax sale had not obtained a deed or title but only a certificate of sale subject to redemption, the court held the Georgia statute providing for a return of title after redemption "subject to all liens existing at the time of the tax sale"[50] was applicable.[51]

In *Presbyterian Center, Inc. v. Henson*[52] the Georgia Supreme Court continued[53] to interpret strictly the statute[54] exempting from taxation all institutions of purely public charity. The institution in question in that case is a non-profit corporation owning real property whereon the southeastern headquarters for the Presbyterian Church (and some related religious agencies) is located. The court noted that religious institutions are not necessarily considered charities for all purposes, examined the constitutional provision[55] on which the statute[56] is based, found specific exemptions for places of religious worship or burial but none for church office buildings or headquarters buildings, and concluded that the property involved was not exempt from ad valorem taxation.[57]

A rather narrow and technical, but interesting, question of statutory interpretation was presented to the court of appeals in *Undercofler v. Colonial Pipeline Co.*[58] The question was whether the Georgia statutes required the pipeline company to file its annual ad valorem tax return with the State Revenue Commissioner or with the tax receiver of each county in which it owned property. GA. CODE ANN. section 92-5902 (1961 Rev.) provides "all persons or companies doing a gas . . . business" shall file with the State Revenue Commissioner. Having charter power to engage in the gas business, the pipeline company is a gas company.[59] However, since it handles liquid petroleum products exclusively it is not engaged in the gas business. The court of appeals found GA. CODE ANN. section 92-5902

50. GA. CODE ANN. §92-8302 (1961 Rev.).
51. In Herrington v. Old South Inv. Co., 222 Ga. 428, 150 S.E.2d 623 (1966), the court held that in a proceeding to redeem property sold under a tax execution GA. CODE ANN. §92-8313 (1961 Rev.) requires, as an absolute prerequisite to the action, that the redemption price be paid to the owner of the property at the time of the action, not just anyone in the chain of title subsequent to the tax sale.
52. 221 Ga. 750, 146 S.E.2d 903 (1966).
53. This strict interpretation policy was manifested a little earlier in Camp v. Fulton County Medical Soc'y, 219 Ga. 602, 135 S.E.2d 277 (1964) and has been applied quite recently in Historic House Museum Corp. v. Camp, 223 Ga. 510, 156 S.E.2d 361 (1967).
54. GA. CODE ANN. §92-201 (Supp. 1966).
55. GA. CONST. art. VII, §1, para. 4 (1945); GA. CODE ANN. §2-5404 (Supp. 1966).
56. GA. CODE ANN. §92-201 (Supp. 1966).
57. Meanwhile the General Assembly was adding new exemptions. Ga. Laws 1967, p. 603 exempts dual control driver education vehicles by declaring them to be "public property." Ga. Laws 1967, p. 629 exempts air and water pollution eliminating or reducing facilities from all ad valorem property taxes.
58. 114 Ga. App. 739, 152 S.E.2d 768 (1966).
59. Southland Steamship Co. of Delaware v. Dixon, 151 Ga. 216, 106 S.E. 111 (1921).

(1961 Rev.) to be a logical, but erroneous, interpretation of Section 9 of the General Tax Act of 1935.[60] Section 9 refers both to gas companies and to persons doing a gas business and could be read as requiring gas companies, doing a gas business, to file with the State Revenue Commissioner. However, the court determined that such was not the legislative intent, that the intent was that both gas companies and persons doing a gas business should file with the State Revenue Commissioner.

Sales and Use Taxes

A substantial volume of litigation and legislation during the period under review has dealt with such sales and use tax questions as the subject matter of the tax,[61] the measure of the tax,[62] exemptions from the tax, and methods of contesting a tax assessment.

The Georgia statute treats a lease of tangible personal property as a taxable sale, the lessee being "liable for a tax thereon at the rate of 3 per cent of the gross lease or rental charge therefor" to be paid to the lessor who is to remit to the State Revenue Commissioner.[63] In *Undercofler v. Whiteway Neon Ad, Inc.*[64] the court of appeals held that this statute applied to the rental of an illuminated sign, even though such sign was built to the specifications of the lessee, even though "a large part of the rental . . . represents an amount paid for the repair and maintenance of such sign . . ."[65] and even though "the intrinsic worth of the raw materials . . . is relatively small."[66]

The measure of the Georgia sales tax is the "sales price."[67] The term "sales price" is defined to exclude "the amount charged for labor or services rendered in installing, applying, or remodeling or repairing property sold . . . ."[68] In *Undercofler v. Thompson Indus., Inc.*[69] the court of appeals held that this exclusion applied to charges made for modifying tooling (used to manufacture stamped bright metal parts) sold to and owned by customers.

In May, 1965, the Georgia Court of Appeals held that the federal manufacturers excise tax on automobiles[70] is part of the sales price upon which retailers must collect a three per cent sales tax.[71] Statutory provisions ex-

60. Ga. Laws 1935, pp. 11, 64.
61. Ga. Code Ann. §92-3402a (1961 Rev.).
62. Ga. Code Ann. §92-3402a (a) (1961 Rev.). In the case of property purchased at retail outside the state, the measure is "the cost price or fair market value . . . whichever is the lesser." Ga. Code Ann. §92-3402a (b) (1961 Rev.).
63. Ga. Code Ann. §92-3402a (c) (1961 Rev.).
64. 114 Ga. App. 644, 152 S.E.2d 616 (1966).
65. *Id.* at 645, 152 S.E.2d at 618.
66. *Id.*
67. Ga. Code Ann. §92-3402a (a) (1961 Rev.).
68. Ga. Code Ann. §92-3403a (E) (Supp. 1966).
69. 114 Ga. App. 497, 151 S.E.2d 844 (1966).
70. Int. Rev. Code of 1954, §4061.
71. Undercofler v. Capital Auto. Co., 111 Ga. App. 709, 143 S.E.2d 206 (1965).

cluding federal excise taxes from the Georgia sales tax base[72] were held to apply only to federal excise taxes imposed upon sale to the ultimate customer, not those imposed upon the manufacturer.[73] The effect of this decision was suspended by executive order by Governor Carl Sanders on February 19, 1966, which executive order was ratified by the General Assembly on April 1, 1967.[74] However, no further executive or legislative action having been taken in 1967, the *Undercofler v. Capital Auto Co.* decision is effective since April 1, 1967.[75]

In January, 1967, the court of appeals again had a tax base problem to resolve.[76] This time the use tax was involved. The taxpayer, Colonial Pipeline Company, had contracted with various out-of-state steel companies for delivery of steel pipe to be used in Georgia. Colonial paid a use tax on the pipe but deducted the estimated transportation cost of the pipe from the amount paid the suppliers, paying the State Revenue Commissioner 3 per cent of the balance. The Revenue Commissioner made a deficiency assessment for the amount of 3 per cent of the "transportation cost." The opinion of the court reviews the applicable sections of the Georgia Code and the stipulations as to the agreements between the taxpayer and its steel pipe suppliers, suggests that the transportation costs could have been excluded from the use tax base had the parties contracted with specific reference thereto, finds that the parties apparently contracted only on a delivered price basis, and concludes that the taxpayer failed to rebut the prima facie correctness of the assessment.[77]

While the General Assembly was busy adding new specific sales and use tax exemptions in both its 1966[78] and its 1967[79] sessions, the appellate courts interpreted the traditional general "purchase for resale"[80] exemption in numerous cases. In *Atlanta Americana Motor Hotel Corp. v. Undercofler*[81] the Georgia Supreme Court held that the carpeting, furniture, linens, blankets, towels, soap, paper, television sets, etc. purchased by a

72. GA. CODE ANN. §§92--3403a (d) (3) (Supp. 1966), 92-3441a (1961 Rev.).
73. With regard to federal excise taxes imposed on manufacturers of other products, the same conclusion was reached in three opinions of the Attorney General of Georgia dated March 26, 1954, February 15, 1955, and February 21, 1956, respectively.
74. Ga. Laws 1967, p. 278.
75. P-H STATE & LOCAL TAX SERV. (GA.) §21, 319.5.
76. Colonial Pipeline Co. v. Undercofler, 115 Ga. App. 58, 153 S.E.2d 592 (1967).
77. GA. CODE ANN. §92-3432a (1961 Rev.).
78. Ga. Laws 1966, p. 211 (certain property furnished to a contractor by a government agency), Ga. Laws 1966, p. 507 (certain sales to private schools), Ga. Laws 1966, p. 537 (exemption of manufacturing machinery provision amended to remove requirement that such machinery increase employment).
79. Ga. Laws 1967, p. 282 (sales of food to private secondary schools to be consumed on the premises by pupils and employees), Ga. Laws 1967, p. 283 (sales of water by Georgia incorporated water associations), Ga. Laws 1967, p. 286 (sales of machinery and equipment to be incorporated into an air or water pollution eliminating facility).
80. GA. CODE ANN. §92-3403a (c) (1) (Supp. 1966).
81. Atlanta Americana Motor Hotel Corp. v. Undercofler, 222 Ga. 295, 149 S.E.2d 691 (1966).

hotel for the use of transients occupying its rooms were not purchased for resale but the hotel "itself used the property to make its rooms livable, and thus rentable to guests."[82] In *Undercofler v. Macon Linen Serv., Inc.*[83] the Georgia Court of Appeals applied the principles of the *Atlanta Americana* case in holding that cabinets and dispensers purchased by the linen company and placed without extra charge on the premises of its customers for use in connection with the rental of linens and towels were not purchased for resale.[84] In *Colonial Stores, Inc. v. Undercofler*[85] the supreme court, reversing the court of appeals,[86] held that premium merchandise to be used to redeem trading stamps was purchased for resale.[87]

In *Undercofler v. Foote & Davies, Inc.*[88] a commercial printer sued to recover sales and use taxes assessed on lithoplates used in filling customers' orders. The printer, who had collected and remitted the sales tax on every taxable printing order sold to its customers, contended that although the lithoplates were not separately billed to customers they were in fact purchased for resale and sold to customers. The facts indicated that the lithoplates were reusable only in printing the particular order of the customer and that they were normally stored for six months for use in reorders, longer than six months if the customer requested, or delivered to the customer upon request. The court of appeals affirmed a trial court decision in favor of the taxpayer finding its ruling in *Superior Type, Inc. v. Williams*[89] directly applicable.

Early in 1966 the Supreme Court of Georgia decided a trio of cases involving both the purchase for resale exemption[90] and the interstate commerce exemption.[91] In *Undercofler v. Eastern Air Lines,*[92] which controlled the disposition of the other two cases, the court ruled (1) that the statute[93]

82. *Id.* at 300, 149 S.E.2d at 695.
83. Undercofler v. Macon Linen Serv., Inc., 114 Ga. App. 231, 150 S.E.2d 703 (1966).
84. The court also found that the "container" exception, GA. CODE ANN. §92-3403a (c) (2) (Supp. 1966), did not apply.
85. Colonial Stores, Inc. v. Undercofler, 223 Ga. 105, 153 S.E.2d 549 (1967).
86. Undercofler v. Colonial Stores, Inc., 114 Ga. App. 466, 151 S.E.2d 794 (1966).
87. Since the sales tax regulations relating to trading stamp companies, OFFICIAL COMPILATION RULES AND REGULATIONS OF THE STATE OF GEORGIA 560-12-2.85, provide that such companies are to be treated as buying premium merchandise for resale and are to collect the tax from the person surrendering stamps in exchange for merchandise "based on the total value of the stamp book and any cash paid," it is a little hard to see how the Colonial Stores case arose. Probably the fact that the retail merchant there was acting as its own trading stamp company gave rise to the problem.
88. 115 Ga. App. 341, 154 S.E.2d 454 (1967).
89. 98 Ga. App. 89, 105 S.E.2d 14 (1958).
90. GA. CODE ANN. §92-3403a (c) (1) (Supp. 1966).
91. GA. CODE ANN. §92-3406a (1961 Rev.). This section as it was during the years before the court appears in the bound volume. The section as subsequently rewritten appears in the 1966 supplement.
92. 221 Ga. 824, 147 S.E.2d 436 (1966). The other two cases are Undercofler v. Delta Air Lines, Inc., 221 Ga. 836, 147 S.E.2d 444 (1966), and Undercofler v. Southern Airways, 221 Ga. 836, 147 S.E.2d 444 (1966).
93. GA. CODE ANN. §92-3406a (1961 Rev.).

expressly, if not very clearly, exempted from tax, fuel and parts brought into Georgia for use and actually used in interstate commerce, and (2) that while meals purchased to be served to passengers on interstate flights after the Georgia line is passed are purchased for resale, the meal is purchased by the passenger, not after the Georgia line is passed, but at the time he buys his ticket in Georgia, and the cost of the meal is subject to Georgia sales tax. On the fuel and parts issue the court avoided passing on constitutional issues by finding that the statute as it read during the tax years before the court provided an express exemption and manifested an election by the General Assembly "*not* to exhaust its full power to tax."[94] In 1965, after the close of the tax years before the court, the General Assembly amended the statute to provide that it did intend "to exercise its full and complete power to tax . . . except to the extent prohibited by the Constitutions of the United States and of Georgia and to the extent of specific exemptions provided elsewhere in this Act."[95] It would seem that the constitutional issue will have to be faced should the question arise again.

In *Undercofler v. American Legion Post No. 69*[96] the court of appeals reasserted its position that illegal activities are not exempt from sales and use taxes.[97] In *Undercofler v. Hospital Auth. of Forsyth County*[98] the Georgia Supreme Court held that a 1964 statute giving hospital authorities the same tax exemptions as cities and counties was effective to exempt hospital authorities from the sales and use tax.[99]

Alternative methods of contesting a sales and use tax assessment were reviewed by the court of appeals in *Undercofler v. Ernhardt*.[100] In this case the taxpayer had elected to proceed by appeal,[101] rather than by affidavit of illegality[102] or by suit for a refund,[103] and had failed either to give bond or show that he owned real property in Georgia having a value in excess of the amount of tax in dispute as required by statute.[104] The "bond or real estate" requirement being jurisdictional, the court found it had no alternative but to reverse the trial court's judgment denying the Commissioner's motion to dismiss the appeal.

Strange as it may seem, a case not decided by the Georgia courts and to which neither the State of Georgia nor any of its public officials was a party may have a substantial effect on the enforcement of the Georgia

94. 221 Ga. 824, 830, 147 S.E.2d 436, 441 (1966).
95. Ga. Laws 1965, p. 13, 15.
96. 112 Ga. App. 27, 143 S.E.2d 684 (1965).
97. *Cf.* Undercofler v. V.F.W. Post 4625, 110 Ga. App. 711, 139 S.E.2d 776 (1964).
98. 221 Ga. 501, 145 S.E.2d 487 (1965).
99. GA. CODE ANN. §88-1803 (Supp. 1966).
100. 111 Ga. App. 598, 142 S.E.2d 317 (1965).
101. GA. CODE ANN. §§92-3434a, 92-8446 (1961 Rev.).
102. GA. CODE ANN. §92-7301 (1961 Rev.).
103. Oxford v. Shuman, 106 Ga. App. 73, 126 S.E.2d 522 (1962).
104. GA. CODE ANN. §92-8446 (1961 Rev.).

use tax.[105] On May 8, 1967, the Supreme Court of the United States held an Illinois statute requiring an out-of-state mail order house "soliciting orders within this State from users by means of catalogues or other advertising"[106] to collect the Illinois use tax from its customers unconstitutional.[107] Prior to May 8, 1967, Georgia was enforcing a statute almost identical to the one held invalid by the United States Supreme Court.[108]

INCOME TAXES

In the area of Georgia Income Taxes the only significant developments appear to be legislative. In 1966 the General Assembly acted to disallow depreciation deductions on "property used as gambling devices or for violating the gambling laws of this State,"[109] to allow a $1,200 exemption to taxpayers for each physically handicapped or mentally retarded dependent under 21 years of age and not a ward of the state rather than the usual $600 exemption,[110] to allow a $1,200 exemption for each college student dependent regardless of the amount of such student's gross income,[111] and to exclude from taxation the combat pay (up to $2400 per annum in the case of officers) of members of the United States Armed forces.[112] In 1967 the employee withholding tax provisions were again[113] liberalized to require quarterly return and payment only when the tax owing or withheld equals or exceeds $50 or the fourth calendar quarterly return is due.[114]

OTHER TAXES

During the period under review two court of appeals decisions[115] and two acts of the General Assembly[116] have dealt with the motor fuel tax.[117] Both cases interpreted GA. CODE section 92-1403 (e) as clearly granting an exemption from tax where the fuel is sold for a non-highway use. One

105. A letter to Carroll Sierk from Georgia Department of Revenue Information Officer Joan S. Hunter, dated October 26, 1967, indicates that the National Bellas Hess case has had no substantial effect on Georgia's tax revenue because our Department of Revenue has not attempted to compel Georgia sales tax collection by out-of-state sellers having as little connection with Georgia as National Bellas Hess had with Illinois. Nevertheless, the case does affect us in that it closes the door on possible future extension of Georgia's taxing jurisdiction in this sales and use tax area.
106. ILL. REV. STATS. (1965), c. 120, §439.2.
107. National Bellas Hess, Inc. v. Dep't of Rev. of State of Ill., 385 U.S. 809 (1967).
108. GA. CODE ANN. §92-3404a (8) (1961 Rev.). As indicated in footnote 105, *supra*, Georgia's enforcement apparently has not been as extensive as that of Illinois.
109. GA. CODE ANN. §92-3110 (g) (Supp. 1966).
110. GA. CODE ANN. §92-3106 (m) (Supp. 1966).
111. GA. CODE ANN. §92-3106 (d) (Supp. 1966).
112. Ga. Laws 1966 p. 523.
113. The 1964 liberalizing amendment is discussed in 16 MER. L. REV. 248, 251.
114. Ga. Laws 1967, p. 780, *amending* GA. CODE ANN. §92-3305b (a). Under the 1964 amendment, the amount was $12.50 instead of $50.
115. Haynes v. Twin Tanks Oil Co., 112 Ga. App. 425, 145 S.E.2d 603 (1965); Undercofler v. Standard Oil Co., 111 Ga. App. 592, 142 S.E.2d 298 (1965).
116. GA. CODE ANN. §93-1403 (Supp. 1966).
117. GA. CODE ANN. §§92-1401 to -1421 (1961 Rev.).

statute amends section 92-1403 so as to, among other things, provide for taxation of fuels not commonly measured by the gallon.[118] The other removed storage capacity requirements from Code section 92-1403 (j) relating to the partial refund of taxes on gasoline purchased for use in watercraft.[119]

In the area of occupational taxes, a municipal tax on persons practicing law and certain other professions was held valid[120] and GA. CODE ANN. section 56-1310 (2) (a) was amended to increase municipal power to tax life insurance companies.[121]

Two 1967 statutes make numerous changes in the cigar and cigarette tax provisions.[122] One[123] amends prior law in several particulars to make it clear that while the tax is an excise tax imposed on the ultimate consumer to the extent that it is in fact passed on to him, the tax is due and payable to the State Revenue Commissioner upon the first taxable transaction within this state whether or not it involves the ultimate consumer, thus securing the tax for the state even though the cigars or cigarettes are later lost or stolen, to provide clearly that the tax is to be collected only once upon the same cigars or cigarettes, and to provide that the Commissioner may at his election collect the tax on cigars through a "reporting" system in lieu of the "stamp" system.

Another 1967 statute[124] authorizes the State Revenue Commissioner and various other state and local tax officials to exchange tax return and report information with taxing officials of the United States, other states and their political subdivisions, and the District of Columbia and further authorizes such officials to enter into agreements for such exchanges.[125] Still another statute imposes a tax on real estate transfers[126] to be effective January 1, 1968, when the federal tax on real estate transfers expires.[127]

In two cases decided during the period under review the Georgia Supreme Court applying the "clean hands" doctrine, has reaffirmed its reluctance to grant equitable relief to parties involved in tax avoidance schemes.[128]

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118. Ga. Laws 1966, p. 61.
119. Ga. Laws 1966, p. 319.
120. Brown v. City of Atlanta, 221 Ga. 121, 143 S.E.2d 388 (1965).
121. Ga. Laws 1967, p. 631.
122. Ga. Laws 1967, p. 563, 577.
123. Ga. Laws 1967, p. 563.
124. Ga. Laws 1967 p. 577.
125. Ga. Laws 1967, p. 537. Georgia is reported to be one of the only seven states not having an agreement for tax cooperation with the Federal Internal Revenue Service. P-H FEDERAL TAXES REPORT BULLETIN §60,491 (October 26, 1967).
126. Ga. Laws 1967 p. 788.
127. *Cf.* Excise Tax Reduction Act of 1965 §401, 79 Stat. 136, *amending* INT. REV. CODE of 1954, §4361.
128. Whitley v. Whitley, 221 Ga. 140, 143 S.E.2d 634 (1965); Daniell v. Collins, 222 Ga. 1, 148 S.E.2d 295 (1967). This was the second trip to the supreme court for the Whitley case. The first is reviewed in Sierk, *Business Associations,* 17 MERCER L. REV. 23, 24 (1965).