STATE AND LOCAL TAXATION

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Cases and legislation in the state and local taxation area will be treated in this article under three separate categories. Those which can be classified as dealing with property tax will be discussed under that heading and the same will be done under a sales and use tax heading. Finally, cases and legislation which do not come within either of these two categories will be reviewed under a category designated "Other Taxes."

PROPERTY TAX

No survey, even one confined as this is to one state, would be complete without mentioning the landmark decision[1] from the Supreme Court of California dealing with the financing of public elementary and high schools. Procedurally, this case came before the court when the defendants demurred to the plaintiff's petition and the trial court sustained the demurrers with leave to amend. The plaintiffs did not amend their petition and the trial court dismissed it. Without making a final judgment on the merits, the court tentatively concluded that the state's public school financing system denied children equal protection guaranteed them under the fourteenth amendment to the United States Constitution because it results in substantial disparities among school districts in the amount of revenue available for education. In reaching its tentative decision the court first concluded that California's school financing system discriminated on the basis of wealth. It next concluded, relying solely on persuasive authority, that education was a "fundamental interest." Finally the court made a determination that the method used by California in financing its schools did not constitute a "compelling state interest," and therefore concluded that the plaintiffs and others similarly situated were denied equal protection of the law.[2]

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1. Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

2. *Id.* at 623, 487 P.2d at 1263, 96 Cal. Rptr. at ___:

> We, therefore, arrive at these conclusions. The California public school financing system, as presented to us by plaintiff's complaint supplemented by matters judicially noticed, since it deals intimately with education, obviously touches upon a fundamental interest. For the reasons we have explained in detail, this system conditions the full entitlement to such interest on wealth, classifies its recipients on the basis of their collective affluence and makes the quality of a child's education depend upon the resources of his school district and ultimately upon the pocketbook of his parents. We find

Within the past two survey periods, taxpayers have not had much success in attacking the method of assessment used by the board of tax assessors. However, it should be noted that in each of these cases the taxpayers' adverse decision was reached on some basis other than a finding by the court that the board of tax assessors had correctly valued the property in question. Discussed in last year's survey article[3] was *Harding v. City of Decatur*,[4] which held that before an equitable petition to enjoin the collection of taxes can be maintained, the petitioner must make a tender of taxes he admits he owes if taxes are due when he files his petition. In *Grafton v. Turner*[5] the supreme court affirmed the trial court's dismissal of the taxpayer's equitable petition reasoning that there was no basis for this equitable action as he had an adequate remedy of law by way of arbitration. Finally, the complaining taxpayers were guilty of laches and could not complain in 1971 of the method of assessment used in 1967, 1968 and 1969.[6]

These cases illustrate the procedural traps awaiting the unwary taxpayer when he attempts to litigate in this area. First, as in *Harding*,[7] if he files his equitable petition after the taxes become due and payable it will be necessary for him to make a tender of some sort. Obviously, where he is attacking the entire method of assessment, it would be impossible to be precise, for if his suit is successful, presumably all property will be revalued with a corresponding decrease in the millage rate. Therefore, even though he may have some idea as to the value of his property, nevertheless he can't be certain as to what millage rate he should apply to this value. However, no matter what his problems might be, it still is a prerequisite to his maintaining an equitable petition, once the taxes become due and payable, that he make a tender.

The tender problem can be obviated if the taxpayer files his petition prior to the taxes becoming due and payable as was done in *Register v. Langdale*.[8] But even should the taxpayer be foresighted enough to do this, nevertheless he still runs the risk, should his property be revalued,

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that such financing system as presently constituted is not necessary to the attainment of any compelling state interest. Since it does not withstand the requisite "strict scrutiny," it denies to the plaintiffs and others similarly situated the equal protection of the laws. If the allegations of the complaint are sustained, the financial system must fall and the statutes comprising it must be found unconstitutional.

3. Williams, *State & Local Taxation, Annual Survey of Georgia Law*, 23 MERCER L. REV. 291 (1972).

4. 226 Ga. 474, 175 S.E.2d 507 (1970).

5. 227 Ga. 809, 183 S.E.2d 458 (1972).

6. Hillis v. Parrish, 228 Ga. 161, 184 S.E.2d 464 (1971).

7. Harding v. City of Decatur, 226 Ga. 474, 175 S.E.2d 507 (1970).

8. 226 Ga. 82, 172 S.E.2d 620 (1970).

that his petition will be dismissed on the basis that he had an adequate remedy at law by way of arbitration.

This still leaves the factual situation where the taxpayer's property is not revalued but he believes other property is valued lower than his, and he wants the board of tax assessors to raise the value on this other property. Presumably that was the relief the petitioners were seeking in *Harding v. City of Decatur*[9] and presumably had they not filed their petition after the taxes became due and payable their petition would not have been dismissed on the basis that they had an adequate remedy at law by way of arbitration.

The taxpayer was dissatisfied with the assessment made upon his real estate, and therefore he filed a notice of arbitration and appointed his arbitrator. The board of tax assessors, instead of appointing their arbitrator, filed a petition in the superior court alleging that the arbitrator chosen by the taxpayer was not qualified to serve. The trial court ordered the petition filed and also ordered that a copy of it be served on the taxpayer. Subsequently, a hearing was held, resulting in the trial court issuing an order requiring the taxpayer to appoint another arbitrator within ten days of the date of the order or lose his right to arbitration. This order was set aside on appeal because the pleadings, on their face, affirmatively show that no claim ever existed against the taxpayer.[10] The appellate court reached this conclusion by reasoning that the petition filed by the board of tax assessors was not part of a pending action because the superior court does not have jurisdiction over arbitration matters, and therefore it would have been necessary for a summons to issue signed by the clerk of the superior court. In the alternative, if the petition be viewed as one seeking an *ex parte* restraining order, such could not be maintained as neither an affidavit nor verified complaint was filed.

In *Harvey v. Lissner*[11] the board of tax assessors was dissatisfied with the arbitration award and appealed to the superior court. The arbitration statute[12] provides that an appeal shall constitute a de novo action and shall be heard at the first term following the appeal. Two terms passed without the case being heard and a motion for summary judgment was granted to the taxpayer resulting in the appeal being dismissed. The trial court's action was upheld on appeal on the basis the appellant was under a duty to take whatever action necessary to con-

9. 226 Ga. 474, 175 S.E.2d 507 (1970).
10. Paine v. Lowndes County Bd. of Tax Ass'rs, 124 Ga. App. 233, 183 S.E.2d 474 (1971).
11. 124 Ga. App. 448, 184 S.E.2d 184 (1971).
12. GA. CODE ANN. § 92-6912 (Supp. 1971).

form to the language of the statute and insure that the appeal from the arbitration award be tried at the first term following the award.

The previous arbitration statute[13] has been repealed in its entirety and has been replaced by an act[14] which provides for a county board of equalization composed of three members and three alternates. With the advent of the board of equalization the parties are relieved of the necessity of the choosing of arbitrators. The right of appeal to the superior court is preserved, however, there is no dollar limitation on this right such as existed in the previous statute.

In *Griffin v. Wormsloe Foundation, Inc.*[15] the tax commissioner of Chatham County issued tax fi. fas. and levied upon certain property of the Wormsloe Foundation. The foundation filed an affidavit of illegality to these tax executions in the superior court and that court granted its motion for summary judgment. The court of appeals reversed the trial court stating that an affidavit of illegality is an unavailable remedy to contest a tax execution for county taxes and that its remedy would be by petition in equity. The taxpayer then filed its petition and the evidence from the trial arising out of the affidavit of illegality was used in the equitable proceeding. It was the foundation's contention that it was a purely public charitable organization, and therefore exempt from ad valorem taxation under the Constitution of the State of Georgia,[16] as well as under a statute[17] enacted pursuant to that constitutional provision. The grant of taxpayer's motion for summary judgment was reversed by the supreme court because it was of the opinion that the constitution required that the property upon which exemption is sought must be "used for the operation of such institution."[18] In other words, a charitable institution itself must be carrying on an operation on its real estate for the benefit of the public or for some other legitimate charitable purpose and this test is not met by merely making the real estate available for use by other public or charitable institutions.

In *Rabun Gap Nacoochee School v. Thomas*[19] Rabun County assessed for ad valorem taxation purposes certain real and personal property of the Rabun Gap-Nacoochee School. The school filed an equitable complaint praying that all its property, both real and personal, located in Rabun County, Georgia, be declared exempt from ad valorem taxa-

13. *Id.*
14. Ga. Laws, 1972, p. 1094.
15. 123 Ga. App. 765, 182 S.E.2d 319 (1971).
16. GA. CONST. art. VII, § I, ¶ IV.
17. GA. CODE ANN. § 92-201 (Supp. 1971).
18. Johnson v. Wormsloe Foundation, Inc., 228 Ga. 722, 187 S.E.2d 682 (1972).
19. 228 Ga. 231, 184 S.E.2d 824 (1971).

tion as it was being used by the school as a purely public charitable institution and as an educational institution. The court of appeals recognized that the school was an educational institution within the meaning of Ga. Code Ann. § 92-201 (Supp. 1971); nevertheless, it held that the property owned by the school which is used to produce income to assist in meeting the expenses of the school would be too remote from the ultimate charitable use to be exempt from ad valorem taxation. Furthermore, it held that the school was not an institution of purely public character but was a seminary of learning and therefore only that property which is actually used as a part of the educational process would be exempt. The effect of this latter conclusion is to make susceptible to taxation those houses occupied by employees of the school whose duties consist of maintaining and operating the physical facilities of the school.

SALES AND USE TAX

In a tax refund suit the taxpayer has the burden of showing his true and correct tax liability. In *Hawes v. Shuman*[20] the taxpayer had lost the sales invoices which he had used to prepare his monthly sales tax returns making it impossible for him to introduce them into evidence. He was relegated to testifying as to the procedure he had followed in preparing the returns and that the returns were correct, *i.e.*, reflected his true and correct tax liability. Based on this evidence, the trial court had found for the taxpayer and the court of appeals, in a split decision, affirmed this judgment. Judge Hall, in a dissenting opinion, argued that the taxpayer cannot prove his true tax liability simply by testifying that the return he prepared correctly set out his tax liability. A writ of certiorari was granted by the supreme court which reversed the court of appeals and adopted Judge Hall's opinion as its opinion.[21]

On remand to the court of appeals a further issue was considered which evidently had not been presented to the court earlier. The taxpayer contended that he had paid taxes in 1956 for a period running back to 1952 which would have been beyond the three-year statute of limitations, and therefore he was entitled to a refund of that portion of his payment which fell outside the period of limitations. The court held that the payment had not been made under duress, making it a voluntary payment of illegal taxes which cannot be recovered.[22]

20. 123 Ga. App. 543, 181 S.E.2d 708 (1971).
21. Hawes v. Shuman, 228 Ga. 101, 184 S.E.2d 178 (1971).
22. Hawes v. Shuman, 125 Ga. App. 117, 186 S.E.2d 582 (1972).

Blackmon v. Coastal Service, Inc.[23] is the third in a series[24] of cases dealing with the aspect of a "tax on tax." The rule of thumb in these cases is that if an excise tax is imposed on a consumer transaction or retail sale then the amount of the tax is not included as a part of the retail sales price upon which a sales tax is computed. In *Blackmon* the two excise taxes involved were a federal cigarette tax and a state cigarette tax. The court held that the federal cigarette tax did not fall upon the retail sale and therefore to include that tax as a part of the retail sales price would not be imposing a "tax on tax." On the other hand, the state's Cigarette Tax Act contemplated that this tax would be paid by the consumer and therefore to include it as a part of the sales price upon which the percentage or bracket would be applied would be imposing a "tax on a tax."

In *Atlanta Hunter-Jumper Classic, Inc. v. Blackmon*[25] a charitable organization which had been granted tax-exempt status by the Commissioner of Internal Revenue contended that the portion of the admission price to its horse show which could be deducted by the purchaser on his federal income tax return as a contribution to charity should be exempt from sales tax. The court stated that this admission versus contribution distinction which formed the basis for the federal income tax deduction does not apply in the sales and use tax area for Ga. Code Ann. § 92-3403a C (1)(c) (Rev. 1961) levies a tax upon the contribution portion of the purchase price as well as the admission portion.

While one still might argue that "casual sales" are exempt under the Sales and Use Tax Act as amended,[26] nevertheless *Newscopters, Inc. v. Blackmon*[27] leaves no room for doubt that it is better to comply to the letter with the Revenue Regulations rather than risk having to find relief in the provisions of the statute itself. The taxpayer, who was engaged in the helicopter charter business, began liquidating his business and in the course of liquidation sold its two helicopters during an interval exceeding thirty days. The pertinent regulation[28] provides that a sale of personal property acquired by the seller for use in his business if made in a complete liquidation of his business, is exempt from sales tax if all assets are sold within thirty days after the first sale unless an extension

23. 125 Ga. App. 28, 186 S.E.2d 441 (1972).

24. State v. Thoni Oil Magic Benzol Gas Stations, Inc., 121 Ga. App. 454, 174 S.E.2d 224 (1970), *aff'd*, 226 Ga. 883, 178 S.E.2d 173 (1970); Undercofler v. Capital Auto. Co., 111 Ga. App. 709, 143 S.E.2d 206 (1965).

25. 125 Ga. App. 38, 186 S.E.2d 434 (1972).

26. GA. CODE ANN. § 82-3401(a) *et seq.* (Rev. 1961).

27. 125 Ga. App. 139, 186 S.E.2d 759 (1971).

28. GA. REV. REG. § 560-12-1-.07 (Rev. 1971).

is granted by the Commissioner. The court held that since an extension was neither applied for nor granted the sales tax should have been collected on the sale of the second helicopter even though it was of the opinion that "casual sales" are still excluded from the Sales and Use Tax Act.

A corporate officer cannot escape the long arm of the Commissioner simply by not having any control over the collection and payment of sales and use taxes. If he willfully attempted to evade or defeat the tax, then, in spite of his lack of control, he is liable for the tax under Ga. Code Ann. § 92-3451a (Rev. 1961). In *Blackmon v. Mazo*[29] the treasurer and secretary of Savannah Inn and Country Club, Inc. had no control over the collection or payment of sales and use taxes; however, after an assessment was made for sales and use taxes, they participated in the transfer of corporate assets to other creditors. This act was sufficient to bring them within the terms of the statute, thereby making them liable for the corporate assessment.[29]

OTHER TAXES

The two Snyder brothers had operated as an equal partnership for a number of years when in 1957 they transferred all the assets of the partnership to a newly organized Georgia corporation known as Snyder Brothers Company. This corporation assumed the liabilities of the partnership and issued capital stock having a par value of $100,000.00 plus six percent subordinated debentures in the principal amount of $140,000,000.00. Subsequently the corporation deducted the interest payments made on the subordinated debentures but this deduction was disallowed by the State Revenue Commissioner primarily on the basis of a case[30] involving this same point in the federal income taxation field, which had been decided adversely to the corporation. The Fifth Circuit Court of Appeals had held that a combination of creating a debt relationship between the sole stockholders and the corporation with a subordination of the debenture to other creditors resulted in no creation of an "indebtedness" within the meaning of Section 163 of the Internal Revenue Code of 1954. While the Georgia Court of Appeals reversed the trial court's granting of a motion for summary judgment for the taxpayer, it did not accept the reasoning followed by the fifth circuit.[31]

29. 125 Ga. App. 193, 186 S.E.2d 889 (1972).

30. United States v. Snyder Bros. Co., 367 F.2d 980 (5th Cir. 1966), *cert. denied*, 386 U.S. 956 (1967).

31. State v. Snyder Bros. Co., 125 Ga. App. 91, 186 S.E.2d 474 (1972).

The state court of appeals thought the criteria for determining whether or not a deductible indebtedness was created would be whether there was a "thin incorporation" or an absence of business purpose for the creation of the subordinated debentures or whether the value of the property transferred to create the debt was less than the debt created. Since the true value of the assets transferred from the partnership to the corporation had not been established in the motion for summary judgment, then, for that reason, it reversed the trial court's granting of the motion.

DeKalb County has had two of its ordinances stricken during the survey period on the basis that they were unconstitutional because they imposed a tax rather than a license. In the first instance the ordinance required an applicant to pay, in addition to the regular charges for building permits, an additional fee of $120.00 for each family unit and this additional fee was allocated to the county board of education. The county contended that the fee was nothing more than a part of the building fee and therefore a license. However, the court concluded that it was a measure to raise revenue since it was in addition to the regular building permit fee, and therefore a tax which the county did not have either the constitutional or statutory authority to levy.[32] DeKalb County also had an ordinance which required all telephone, telegraph, gas and electric companies doing business in the unincorporated area to obtain a license to exercise this privilege. The court first found that this ordinance did not purport to regulate the companies involved and probably could not do so since these companies were already regulated by the Georgia Public Service Commission. The logical conclusion from this finding would be that the ordinance did not have as its purpose the regulation of these companies but the raising of revenue. The court so found and held the ordinance void as the county did not have the authority to impose a tax of this nature.[33]

Ga. Code Ann. § 92-123 (Rev. 1961) grants an exemption from payment of the tax on all intangible personal property owned by a trust exempt from federal income taxes under Section 501(2) of the Internal Revenue Code of 1954. In *Warestores, Inc. v. Nash*,[34] Warestores, Inc. had borrowed money from two of its employee pension trusts, giving the respective trusts long term promissory notes secured by real property. When these security instruments were presented to the clerk of the superior court in the county where the land lay, he demanded that the

32. DeKalb County v. Brown Builders Co., 227 Ga. 777, 183 S.E.2d 367 (1971).
33. DeKalb County v. Atlanta Gas Light Co., 228 Ga. 512, 186 S.E.2d 732 (1972).
34. Warestores, Inc. v. Nash, 125 Ga. App. 210, 186 S.E.2d 806 (1972).

intangible property tax required under Ga. Code Ann. § 92-164 (Rev. 1961) be paid before he would record them. Warestores, Inc. paid the tax under protest, claiming that the pension trusts were exempt under Section 501(a) and that therefore no intangible tax had to be paid. The court distinguished an annual tax on intangibles as provided under Ga. Code Ann. § 92-123 (Rev. 1961) from a one-time assessment under Ga. Code Ann. § 92-164 (Rev. 1961), and held that the exemption provided under Section 92-123 applied only to the annual tax.