State and Local Taxation

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I. Priority of State Tax Liens

The general rule continues to be that a state tax lien takes priority over other liens and claims. In recent litigation, however, the courts have explored the application of this rule to situations in which the state tax lien competes against a security interest under the Uniform Commercial Code (UCC), a federal tax lien, and other liens and claims created under state law, such as the lien of a judgment creditor.

During the survey period, the Georgia courts decided cases under statutes[1] in effect prior to the Official Code of Georgia Ann., which became effective November 1, 1982 and which was amended in 1983 to clarify and consolidate more fully the priority rules for specific state taxes.[2] The cases discussed in this Article, therefore, should now be read in conjunction with the current statutory language contained in Official Code of Georgia Ann. section 48-2-56,[3] which became effective July 1, 1983.

A. State Tax Lien Versus UCC Security Interest

A significant question exists concerning whether the priorities provision

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1. Ga. Code. Ann. §§ 92-5707, -5708 (1933), *amended by* 1937-38 Ga. Laws Ex. Sess. 77, 98, *superceded by* Georgia Public Revenue Code, 1978 Ga. Laws 309, 336-37 (effective Jan. 1, 1980), and Georgia Public Revenue Code, 1979 Ga. Laws 5, 12-13 (effective Jan. 1, 1980) (codified at Ga. Code Ann. §§ 91A-252, 91A-1023 (Harrison 1980), O.C.G.A. §§ 48-2-56, 48-5-28 (Michie 1982)); Ga. Code Ann. § 91A-252 (Harrison 1980), O.C.G.A. § 48-2-56 (Michie 1982); Ga. Code Ann. § 91A-1023 (Harrison 1980), O.C.G.A. § 48-5-28 (Michie 1982).

2. 1983 Ga. Laws 1834, 1838-42 (codified at O.C.G.A. § 48-5-56 (Michie Supp. 1983), Ga. Code Ann. § 91A-252 (Harrison 1980)).

3. O.C.G.A. § 48-2-56 (Michie Supp. 1983), Ga. Code Ann. 91A-252 (Harrison Supp. 1983).

of the UCC,[4] as it relates to state tax liens, actually has the effect it appears to have on its face. The problem arises because of the apparent conflict in the rule for the priority of tax liens contained in the tax provisions of the Official Code of Georgia Ann. and the rule contained in the UCC. Prior case law gives some indication that this conflict should be resolved by finding that the later legislative expression impliedly repealed the former.[5]

Without expressly dealing with the conflict between the tax statutes and the UCC, the court of appeals in *Amoco Oil Co. v. G. Sims & Associates*[6] first noted the provision in the tax statutes on the priority of state tax liens but then proceeded to resolve the case before it under a UCC analysis.[7] In *Amoco Oil*, the holder of a properly filed UCC financing statement claimed a perfected security interest in inventory and asserted priority over state sales and use tax, withholding tax, and personal income tax liens represented by later recorded state tax executions.[8]

In effect, the court of appeals assumed, without deciding, that the UCC priority provision controlled. The court concluded on the facts of the case that the UCC creditor did not hold a perfected security interest because the creditor had failed to prove that there was actually an underlying security agreement for the financing statement.[9] The court of appeals expressly ruled that a financing statement alone cannot constitute a security agreement within the requirements of the UCC.[10] Since the UCC creditor did not have a perfected security interest, the court of appeals held that the state tax liens had priority even though they arose and were recorded subsequent to the recording of the UCC financing statement.[11]

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4. O.C.G.A. § 11-9-310 (Michie 1982), GA. CODE ANN. § 109A-9-310 (Harrison 1979).

5. *See* Richards v. Blackmon, 233 Ga. 739, 742, 213 S.E.2d 638, 640 (1975). As of July 1, 1983, the later legislative expression is the provision in the tax title. O.C.G.A. § 48-2-56 (Michie Supp. 1983), GA. CODE ANN. § 91A-252 (Harrison 1980).

6. 162 Ga. App. 307, 291 S.E.2d 128 (1982).

7. *Id.* at 309, 291 S.E.2d at 130.

8. The taxpayer-debtor sold his service station to a third party. As the court of appeals noted, when the purchaser-successor of a retail business fails to obtain a certificate from the State Revenue Commissioner stating that all state sales and use taxes have been paid, the purchaser must place the purchase money in an escrow account or be personally liable for his predecessor's unpaid taxes, interest, and penalties. *Id.* at 307-08, 291 S.E.2d at 129. *See* O.C.G.A. § 48-8-46 (Michie Supp. 1983), GA. CODE ANN. § 91A-4519 (Harrison 1980) (recent amendment adds sales of "equipment" to this provision and clarifies "taxes" to mean sales and use tax, as well as clarifying the amount of personal liability of the purchaser).

9. 162 Ga. App. at 309-10, 291 S.E.2d at 130.

10. *Id.*

11. *Id.*

B. State Tax Lien Versus Federal Tax Lien

In two recent federal decisions,[12] both interpleader actions, the court examined the priority of a Georgia state tax lien with respect to a federal tax lien. *Georgia v. United States*[13] concerned state sales and use taxes, and *J.A. Jones Construction Co. v. Southern Stress Wire Corp.*[14] concerned state withholding taxes. In each decision, the court applied the same analysis and, in principle, reached the same result.

In both cases, the district court declared that state law governs conflicts between lienholders competing for the same property, except that federal law governs when one of the lienholders is the United States.[15] The federal rule concerning conflicts between state and federal tax liens is the common law rule of 'first in time, first in right.'[16] Only 'choate' state liens, however, take priority over federal liens.[17] A state lien becomes choate "when the identity of the lienor, the property subject to the lien, and the amount of the lien are established."[18]

The key question for determination in both cases, then, is whether Georgia state tax liens, which had arisen and attached to the taxpayers' property, became choate before the federal tax liens attached to the same property. After analyzing the Georgia sales and use tax provisions, withholding tax provisions, and the provisions dealing with the priority of state tax liens, the district court concluded in each case that the state tax lien arose and attached to the taxpayers' property, and became choate no later than the date of the state tax assessment.[19] The United States argued unsuccessfully that the state tax liens did not become choate within the meaning of federal law until a court had issued a state tax fi. fa. in one case[20] and had granted an arbitration award in another case.[21]

While the facts of the case did not require a fuller discussion, the district court also indicated in *Georgia v. United States* that the lien technically arises and attaches at the time the taxes become due and unpaid, which is usually on the date the return and remittance are due.[22] In that

12. J.A. Jones Constr. Co. v. Southern Stress Wire Corp., No. C80-1526A (N.D. Ga. Jan. 6, 1983); Georgia v. United States, No. C81-2006A (N.D. Ga. Jan. 28, 1983) (order and final judgment).

13. No. C81-2006A (N.D. Ga. Jan. 28, 1983) (order and final judgment).

14. No. C80-1526A (N.D. Ga. Jan. 28, 1983) (order and final judgment).

15. No. C80-1526A at 5-6; No. C81-2006A at 4.

16. *See, e.g.*, United States v. City of New Britain, 347 U.S. 81, 85 (1954) (originally stated by Chief Justice Marshall in Rankin v. Scott, 25 U.S. (12 Wheat.) 177, 179 (1827)).

17. *New Britain*, 347 U.S. at 84-86.

18. *Id.* at 84.

19. No. C81-2006A at 6; No. C80-1526A at 8.

20. No. C81-2006A at 6.

21. No. C80-1526A at 8.

22. No. C81-2006A at 5.

particular case, however, the State Revenue Commissioner issued a jeopardy assessment prior to the reporting and remittance date; therefore, the lien arose and attached on the date of the jeopardy assessment.[23] Similarly, the district court concluded in each case that the federal tax liens arose at the time the tax assessment was made[24] so that the rule of first in time, first in right, between state tax liens and federal tax liens, generally will be measured by the date of assessment by each taxing authority.

C. State Tax Lien Versus Judgment Creditors and Other Liens, and the 'Circular Priorities' Situation

It often happens that when the state asserts the priority of its tax lien, the holders of various other types of liens also make claims to the same property. This situation arises in a variety of contexts, not only in cases in which a stakeholder has possession of the assets, but also, and more and more frequently today, in cases of bankruptcy by the taxpayer-debtor. In a recent decision, *Tuggle v. IRS (In re Tuggle)*,[25] the United States Bankruptcy Court for the Northern District of Georgia analyzed the priority of Georgia state tax liens as they relate to multiple claimants, both private and governmental, to the same property.

In an interesting review of the Georgia statutes governing the priority of state tax liens in the context of multiple claimants against one fund, the bankruptcy court concluded that Georgia state tax liens are superior to all other liens arising under Georgia law, unless the express conditions of a statutory exception are met.[26] The bankruptcy court reversed its earlier position[27] and concluded that a state tax lien has priority over a previously recorded judgment lien, except in the case of liens arising under the motor fuel tax law.[28] With regard to the issues raised by multiple

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23. *Id.* at 6. *See generally* O.C.G.A. § 48-2-56(a) (Michie 1982), GA. CODE ANN. § 91A-252 (Harrison 1980); Bunge v. State, 149 Ga. App. 712, 714, 256 S.E.2d 23, 26 (1979); State v. Atlanta Provision Co., 90 Ga. App. 147, 150, 82 S.E.2d 145, 147 (1954) for the arising and attachment of a state tax lien on the date the taxes become due and unpaid.

24. No. C81-2006A at 4; No. C80-1526A at 6; *see* 26 U.S.C. § 6322 (1976).

25. No. 81-02272A (Bankr. N.D. Ga. June 15, 1983), *aff'd*, No. C82-2544A (N.D. Ga. June 29, 1983) (order and final judgment).

26. *Id.* at 2.

27. Initially, the bankruptcy court erroneously concluded that under Georgia law a judgment lien was entitled to priority over all state tax liens unless they were recorded prior to the judgment lien. Tuggle v. IRS (*In re* Tuggle), 22 BANKR. 439, 441 (Bankr. N.D. Ga. 1982), *aff'd*, No. C82-2544A (N.D. Ga. Mar. 16, 1983) (order and final judgment). On remand, in the context of further proceedings in the same case, the court correctly modified its prior decision to reach the conclusion set out in the text of this article.

28. *In re* Tuggle, No. C81-02272A at 2-3 (opinion written by Drake, J.). *See also* Bryan v. W.L. Justin & Assoc., Inc. (*In re* W.L. Justin & Assoc., Inc.), No. 81-01379A (Bankr. N.D. Ga. June 14, 1983) (opinion written by Robinson, J.) (expressly rejecting the initial *Tuggle*

claimants to the same assets, the bankruptcy court ruled that judgment creditors take priority over later filed security deed holders;[29] that security deed holders take priority over later recorded state tax liens, pursuant to an express statutory exception;[30] and that when the federal government also asserts a tax lien against the assets, the federal-state rule must be injected into the distribution solution.[31] This problem of multiple lien claimants with interweaving priorities (*A* superior to *B*, *B* superior to *C*, and *C* superior to *A*) has been referred to as a 'circular priorities' problem.[32]

In the case of *In re Tuggle*, the Bankruptcy Court for the Northern District of Georgia decided for the first time how to treat circular priorities under Georgia law.[33] The court developed the rule that the distribution in that type of situation is made as follows: Liens for taxes are to be paid prior to all other liens because of the clear policy of the State of Georgia concerning priority of liens for state taxes;[34] claims based upon security deeds are to be paid prior to liens for state taxes when the tax liens are not for ad valorem taxes assessed against the property that is the subject of the security deed at issue and when the non-ad valorem tax lien has not been recorded prior to the recording of the security deed; and judgment lien holders are to be subordinated to the preceding claims.[35] When state and federal tax liens are also involved, the foregoing order of distribution applies to the amount of funds equal to any liens which are superior to the federal tax lien; and competing federal and state liens are distributed, in general, according to date of assessment.[36]

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decision and thus perhaps influencing the reversal of position in the later *Tuggle* case).

29. *In re* Tuggle, No. C81-02272A at 6.

30. *Id.* (construing O.C.G.A. § 48-2-56(e) (Michie 1982), GA. CODE ANN. § 91A-252(e) (Harrison 1980)).

31. *Id.* at 5.

32. *See generally* W. PLUMB, JR., FEDERAL TAX LIENS 117-19 (3d ed. 1972).

33. *In re* Tuggle, No. C81-0227A2 at 4-8.

34. *Id.* at 6.

35. *Id.* at 6-7. *Compare In re* Holly Knitwear, Inc., 140 N.J. Super. 375, 356 A.2d 405 (1976) (under federal law, a federal lien was inferior only to a particular secured creditor's lien and, therefore, the amount of that secured creditor's lien was set aside first and the United States received payment against its claim from the remainder; as between assignor's landlord and the secured creditor, state law was applied to pay landlord first) *with* Southern Ohio Sav. Bank & Trust Co. v. Bolce, 165 Ohio St. 201, 135 N.E.2d 382 (1956) (similarly, mortgage liens and judgment liens were superior to federal tax liens and so a fund in their combined amounts was set aside; out of that fund, payments were made under state law, first to pay state ad valorem taxes and then to pay the mortgage and judgment lienholders according to their relative priorities under state law; and remainder of total fund at stake was paid toward the federal tax lien).

36. No. C81-02272A at 4.

II. Property Tax

The area of ad valorem taxation of real property continues to be a popular field for litigation. There were more property tax decisions during the survey period than there were decisions regarding any other particular type of tax. These cases, however, created little new law.

A. *Procedure and Proof*

In *Board of Tax Assessors v. Clary*,[37] the court of appeals reaffirmed the well-established rule that an individual taxpayer has no right to challenge the factual decision of the State Revenue Commissioner in equalizing the digests of various counties,[38] nor has he the right to challenge the Commissioner's decision concerning the property assessment of railroads and utilities.[39] Similarly, the court of appeals ruled that it was error to admit evidence on the assessed value of property in another county, since a taxpayer cannot challenge intercounty uniformity.[40]

The court in *Clary* addressed the issue of who may file an appeal on behalf of a taxpayer and concluded that an attorney filing an appeal to the court of appeals is presumed to have the authority to do so.[41] In *DeKalb County Board of Tax Assessors v. Kendall, Inc.*,[42] the court of appeals found no error in the fact that taxpayers' nonlawyer tax service had filed the initial notice of appeal with the Board of Tax Assessors.[43] The significance of the ruling, however, is in its ratio decidendi. The court of appeals held that the Board of Tax Assessors cannot raise the question of the sufficiency of the notice of appeal for the first time in the superior court.[44] The rule is the same for both the Board of Tax Assessors and taxpayers;[45] new arguments may not be raised for the first time in the superior court. The Board of Tax Assessors, therefore, is estopped to argue improper notice of appeal to the Board of Equalization after the

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37. 161 Ga. App. 828, 290 S.E.2d 110 (1982).

38. *Id.* at 830, 290 S.E.2d at 112. *See, e.g.*, Chilivis v. Kell, 236 Ga. 226, 229-30, 223 S.E.2d 117, 120 (1976), *appeal dismissed*, 429 U.S. 891 (1976). Only a county may bring this challenge, and judicial review is limited to whether the commissioner acted beyond his discretionary powers, abused his discretionary powers, or acted arbitrarily or capriciously with regard to an individual's constitutional rights. Strickland v. Douglas Co., 246 Ga. 640, 642, 272 S.E.2d 340, 342 (1980).

39. 161 Ga. App. at 830, 290 S.E.2d at 112. *See, e.g.*, Butts County v. Briscoe, 236 Ga. 233, 235-36, 223 S.E.2d 199, 201 (1976).

40. 161 Ga. App. at 830-31, 290 S.E.2d at 113.

41. *Id.* at 828, 290 S.E.2d at 111.

42. 164 Ga. App. 374, 295 S.E.2d 345 (1982).

43. *Id.* at 374, 295 S.E.2d at 346.

44. *Id.* at 375, 295 S.E.2d at 346.

45. *Id.* at 375-76, 295 S.E.2d at 346-47.

Board of Tax Appeals has certified the appeal to the superior court.[46] In addition, when a taxpayer raised only a challenge to valuation in the appeal to the Board of Equalization, he cannot raise the new ground of lack of uniformity in the superior court, even if the Board of Equalization actually considered the uniformity ground.[47]

Once the appeal from the Board of Equalization is properly before the superior court, the burden of proof in the de novo trial lies with the party appealing.[48] At trial, questions of valuation are treated like other fact questions, and in determining uniformity, real and personal property may be valued by different methods.[49]

B. Taxability and Collection

In two decisions the court determined what type of property is exempt from taxation.[50] The court of appeals considered the 'public purpose' exemption in *Clayton County Board of Tax Assessors v. City of Atlanta,*[51] and the court ruled that the city of Atlanta's interest in the Atlanta Airport, which was outside the city's territorial limits satisfied the statutory requirements for exemption from ad valorem taxation.[52] In that case, however, the same court reached the opposite result on the issue of a lease of certain airport property from the city to a private corporation for the purpose of providing inflight meal service.[53]

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46. *Id.* at 374, 295 S.E.2d 346. The proper approach is for the Board of Tax Appeals to refuse to certify the appeal until the notice is properly amended. *Id.* at 376, 295 S.E.2d at 347.

47. *Id.* at 375, 295 S.E.2d at 346-47.

48. Stoddard v. Board of Tax Assessors, 163 Ga. App. 499, 500, 295 S.E.2d 170, 171 (1982).

49. *See* Ayers v. Douglas County Bd. of Tax Assessors, 162 Ga. App. 224, 225-26, 291 S.E.2d 84, 85 (1982), in which the court of appeals ruled that the trial court in a nonjury trial properly had resolved conflicting evidence on how the uses of various property affected the valuation of the parcels in issue; Dougherty County Bd. of Tax Assessors v. Burt Realty Co., 250 Ga. 467, 468-69, 298 S.E.2d 475, 476, *cert. denied,* 51 U.S.L.W. 3919 (1983), in which the Georgia Supreme Court ruled that there was no uniformity violation and remanded on the valuation fact question.

50. Clayton County Bd. of Tax Assessors v. City of Atlanta, 164 Ga. App. 864, 298 S.E.2d 544 (1982); Roberts v. Ravenwood Church of Wicca, 249 Ga. 348, 292 S.E.2d 657 (1982).

51. 164 Ga. App. at 864, 298 S.E.2d at 544.

52. *Id.* at 867-69, 298 S.E.2d at 550. *See* O.C.G.A. § 48-5-41 (Michie 1982), GA. CODE ANN. § 91A-1102 (Harrison 1977); O.C.G.A. § 6-3-20 (Michie 1982), GA. CODE ANN. § 11-201 (Harrison 1977). In essence, the court of appeals ruled that an 'airport' encompasses all property reasonably and uniformly used for the public convenience and welfare to facilitate the effective operation of the air transportation facility, and thus the city's interest came within the statutory exemption.

53. 164 Ga. App. at 869-71, 298 S.E.2d at 549. The decision concerning taxability of this item of property turned upon the court of appeals' conclusion that, although the service of

In *Roberts v. Ravenwood Church of Wicca*,[54] the Georgia Supreme Court construed the exemption for 'places of religious worship'.[55] Four justices concluded that the activities of the taxpayer 'church' of witches and warlocks, did constitute religious worship, thus exempting certain of their property.[56] In a strong dissent, Chief Justice Jordan argued that a prerequisite to 'religious worship' is belief in God, rather than "belief in some strange supernatural force which permeates the world."[57]

In a case of first impression on the collection of taxes,[58] the supreme court ruled that the statute[59] authorizing the superior court to allow interim collection of taxes before the digest is approved by the State Revenue Commissioner also allows the superior court to establish the actual millage rate for the temporary collection.[60] In *Georgia Presbyterian Homes, Inc. v. City of Decatur*,[61] the court of appeals appeared by implication to approve the collection by contractual agreement of a negotiated sum in lieu of city ad valorem taxes on a retirement home, even though the court, under traditional contract principles applicable to city governments, found that no legal contract existed in the case before it.[62]

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providing inflight meals could be reasonably necessary to the effective facilitation of airport operations, nevertheless in this case the lease allowed the private party to contract with any airline it chose. *Id.* at 870, 298 S.E.2d 549. The court of appeals, therefore, concluded that the public was deprived of its "rightful, equal, and uniform use thereof." *Id.* at 871, 298 S.E.2d at 550. O.C.G.A. §§ 6-3-25(3), 6-3-20 (Michie 1982), GA. CODE ANN. §§ 11-205(c), 11-201 (Harrison 1980).

Another issue in that case resulted in a ruling by the court of appeals that a 15 year lease by the city to a private company as part of a concession agreement conveyed a usufruct only and thus was not taxable. 164 Ga. App. at 864-67, 298 S.E.2d at 547.

54. 249 Ga. 348, 292 S.E.2d 657 (1982).

55. *Id.* at 351-52, 292 S.E.2d at 659-60.

56. *Id.* at 351, 292 S.E.2d at 660.

57. *Id.* at 352, 292 S.E.2d at 660 (Jordan, J., dissenting).

58. *In re* Board of Twiggs County Commr's, 249 Ga. 642, 292 S.E.2d 673 (1982).

59. O.C.G.A. § 48-5-310 (Michie 1982), GA. CODE ANN. § 91A-1449.1 (Harrison 1980).

60. 249 Ga. at 643, 292 S.E.2d at 674.

61. 165 Ga. App. 395, 299 S.E.2d 900 (1983).

62. *Id.* at 397, 299 S.E.2d at 902. Contrary to the implication in this case, the state constitution does not allow disparate treatment of taxpayers by contract or otherwise. GA. CONST., art. VII, § 1, para. III, GA. CODE ANN. § 2-3703 (Harrison 1983) (uniformity provisions); 1974 Op. Att'y Gen. 374, 376.

One other property tax case was decided during the survey period. In Salem v. Tattnall County, 250 Ga. 881, 302 S.E.2d 99 (1983) the supreme court affirmed the constitutionality of the State Revenue Commissioner's authority to adjust and equalize property tax assessments among counties and upheld the requirement that property be assessed at forty percent of fair market value. *Id.* at 882-83, 302 S.E.2d at 100-01. The propriety of legislative limitations on the use of local option sales and use taxes also was discussed. *Id.* at 882, 302 S.E.2d at 100.

III. Appellate Procedure

With the court's decision in *Plantation Pipe Line Co. v. Strickland*,[63] it is now well established that appeals from the superior courts to the Georgia appellate courts in state tax cases other than ad valorem tax cases may be taken only by following the discretionary appeal procedure.[64] This denial of appeal as of right applies regardless of the type of tax review remedy filed in the superior court.[65]

IV. Summary

The priority of state tax liens over other liens and claims continues to be the prevailing rule in Georgia, except for a few statutory exceptions and in cases in which a federal tax assessment has been issued prior to the state assessment. This rule continues to have application even in situations in which multiple creditors compete for insufficient assets and in which one or more claims are superior to a lien to which the state lien is inferior. In the property tax area, most of the major procedural issues raised during the survey period, along with the continued application of the discretionary appeal procedure for cases of state revenues, were mere applications of existing principles. The one significant addition was the clarification of the authority of the superior court to actually fix the millage rate for interim ad valorem tax collections prior to digest approval.

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63. 249 Ga. 829, 294 S.E.2d 471 (1982).

64. *Id.* O.C.G.A.§ 5-6-35 (Michie 1982), Ga. Code Ann. § 6-701.1 (Harrison Supp. 1983).

65. *See generally* Wheeler v. Strickland, 248 Ga. 85, 281 S.E.2d 556 (1981) (appeal); Thurman v. Strickland, No. 38393 (Ga. Feb. 10, 1982) (order and final judgment) (per curiam) (affidavit of illegality).

In the Georgia Supreme Court and Georgia Court of Appeals, an appeal as of right will go to the court of appeals in an ad valorem tax case, unless it concerns a constitutional, equitable, or other issue within the jurisdiction of the supreme court, or unless it challenges an action of the State Revenue Commissioner. DeKalb County Bd. of Tax Assessors v. W.C. Harris & Co., 248 Ga. 277, 278, 282 S.E.2d 880, 882-83 (1981); Ayers v. Douglas County Bd. of Tax Assessors, 162 Ga. App. 224, 225, 291 S.E.2d 84, 85 (1982). *But see* Camp v. Boggs, 240 Ga. 127, 128, 239 S.E.2d 530, 532 (1977), apparently overruled *sub silentio*. In other tax cases (such as non-ad valorem tax cases) which involve the revenues of the state, an application for discretionary review should be filed with the court of appeals; the application in these cases should show on its face, however, that the appeal is to be transferred to the supreme court pursuant to its order in Collins v. State, 239 Ga. 400, 403, 236 S.E.2d 759, 761 (1977).