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L.O. Buckland

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STATE TAXPAYER REMEDIES*

By L. O. BUCKLAND**

Taxpayers in Georgia have four principal means of obtaining judicial review of their state tax liabilities, but the statutes permitting review are not located in a single, convenient location and the practitioner faces considerable research in order to determine his client's remedies. The four means, or remedies, are: (1) the appeal under the tax administration provisions;¹ (2) the affidavit of illegality;² (3) the suit for refund;³ and (4) the appeal under the Administrative Procedure Act.⁴ This article provides a brief summary of these remedies. No attempt was made to exhaustively examine the many factual situations that can arise or to relate all of the tax procedures involved. The article simply pulls together the principal features of the remedies available and uses the income tax and the sales tax as the vehicles for discussing the remedies. The same remedies may have applicability to other taxes, but the statutes should be examined to determine if there are separate procedures for the particular tax, *e.g.*, real property taxes.

Before discussing the remedies, however, a brief discussion of the administrative procedures of the Department of Revenue as they primarily relate to the assessment and collection of income taxes will place the remedies in a context which should permit a better understanding of each. Each remedy is available at a different time during the administrative process. The appeal under the APA, the appeal under section 92-8446, and the affidavit of illegality are available before there is any payment of a tax, while the fourth remedy, the suit for refund, is available after payment of the tax.

I. ADMINISTRATIVE PROCEDURES

Generally, when a taxpayer submits a return to the Department of Reve-

* The opinions expressed herein are the personal views of the author only and do not necessarily reflect the views of the Georgia Law Department or the Department of Revenue.

**Assistant Attorney General, Georgia Department of Law. Montana State University (B.S., 1961); Emory University (J.D., 1970). Member of the State Bar of Georgia.

1. GA. CODE ANN. §92-8446 (Rev. 1974) [hereinafter referred to in the article as "section 92-8446"]. This provision was originally enacted as section 45 of Ga. Laws, 1937-38, Ex. Sess., pp. 77, 100, popularly known as "The Tax Administration Act." The Tax Administration Act provided for general administrative procedures for the Department of Revenue.

2. GA. CODE ANN. §92-3306 (Rev. 1974) [hereinafter referred to as "section 92-3306"] and GA. CODE ANN. §92-7301 (Rev. 1974) [hereinafter referred to as "section 92-7301"]. When the Income Tax Act of 1931, Ga. Laws, 1931, Ex. Sess., pp. 24-60, was enacted, separate procedures were provided for the administration of the income tax laws of Georgia. Thus, the two statutes exist.

3. GA. CODE ANN. §92-8436 (Rev. 1974) [hereinafter referred to as "section 92-8436"].

4. GA. CODE ANN. §3A-113 (Rev. 1975). The Administrative Procedure Act will hereinafter be referred to as "APA."

nue, the return is subject to audit and adjustment for three years.⁵ The audit may either be an office audit or a field audit. In the office audit, the return is examined in the offices of the Department of Revenue and the taxpayer may be contacted concerning certain features of the return. In cases of simple arithmetical error, the taxpayer will be notified of any increased taxes due without the need for making a formal assessment.⁶ In the field audit, an agent visits the taxpayer and examines books and records.

When the agent completes the office or field audit and finds that a deficiency⁷ exists, the State Revenue Commissioner (hereinafter referred to as the Commissioner) issues a notice of proposed deficiency and sends it to the taxpayer.⁸ When a proposed assessment is received, a taxpayer may protest within 30 days after the notice is mailed.⁹ The income tax procedures specifically provide that during this 30-day period, the Commissioner cannot take any action to collect the tax deficiency.¹⁰ The general administrative procedures¹¹ do not contain a similar prohibition against action during the 30-day period, but the prohibition appears to be implicit in the requirement that the taxpayer has 30 days in which to file the protest and request a conference.¹² The Commissioner must consider the information given by the taxpayer at the hearing before issuing a final assessment. After considering the protest,¹³ or after the expiration of 30 days, if a petition or protest is not filed, the Commissioner will issue a final assessment for any taxes determined to be due. It is at this point that the taxpayer and counsel must decide which remedy will be pursued.

II. THE REMEDIES

A. Appeal Under Section 92-8446

Under the provisions of section 92-8446, an appeal may be taken from "any order, ruling, or finding of the . . . Commissioner to the superior court. . . ."¹⁴ The issuance of a final assessment constitutes a finding by

5. See, e.g., GA. CODE ANN. §§92-3303, -3447(a) (Rev. 1974). But see GA. CODE ANN. §92-8435 (Rev. 1974).

6. GA. CODE ANN. §92-3302(e) (Rev. 1974).

7. A "deficiency" is defined in GA. CODE ANN. §92-3302(f) (Rev. 1974) as the amount by which the tax imposed by this or any prior law exceeds the amount shown as the tax by the taxpayer upon his return, or if no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, the amount determined by the commissioner to be the correct amount of the tax.

8. GA. CODE ANN. §92-3302(a), -8431 (Rev. 1974).

9. *Id.*

10. GA. CODE ANN. §92-3302(a) (Rev. 1974).

11. See note 1, *supra*.

12. GA. CODE ANN. §92-8432 (Rev. 1974).

13. The protest is styled as a "petition for redetermination" under the income tax procedures. See GA. CODE ANN. §92-3302(a) (Rev. 1974).

14. GA. CODE ANN. §92-8446 (Rev. 1974).

the Commissioner that can be appealed to the superior court. A decision to deny a claim for refund,¹⁵ however, is not an appealable "order, ruling, or finding."¹⁶

Because of the structure of section 92-8446, the time for filing the appeal may not be clear.¹⁷ The initial sentence on the time for appeal states that "[t]he appeal and necessary records shall be certified and transmitted . . . and shall be filed with the Clerk of the Superior Court within thirty (30) days from the date of judgment. . . ."¹⁸ The appeal must, however, be filed with the Commissioner within 30 days after the date of decision and the Commissioner will then file the appeal with the clerk of the superior court within 30 days after the appeal is filed.¹⁹ But the Commissioner's failure to have the appeal filed within 30 days does not result in dismissal of the appeal.²⁰ The taxpayer's failure to file the appeal with the Commissioner within 30 days, however, will result in dismissal since the statutory requirements must be met in order for the superior court to have jurisdiction in a suit against the State.²¹

Another jurisdictional requirement is the filing of "a writing whereby such taxpayer shall agree to pay on the date or dates the same shall become due all taxes for which such taxpayer has admitted liability. . . ."²² There is no requirement that contested taxes be paid before the action is maintained. A bond, however, must be filed with the clerk of the superior court within 30 days after the date of the decision by the Commissioner.²³ Sometimes, the bond is incorrectly filed directly with the Commissioner, but the statute provides that it must be filed with the clerk. The clerk must deter-

15. See discussion under *Suit For Refund, infra*.

16. *Williams v. Suwannee Longleaf Mfg. Co.*, 96 Ga. App. 260, 99 S.E.2d 734 (1957). The Harrison Company has reflected this decision in the annotated code by including the language "except with respect to claims for refund." GA. CODE ANN. §92-8446 (Rev. 1974).

17. In *Blackmon v. Alexander*, 233 Ga. 832, 213 S.E.2d 842 (1975), a good history of section 92-8446 and its genesis as section 45 of the Tax Administration Act is given. When the Tax Administration Act was enacted, it provided for a Board of Tax Appeals. The Board of Tax Appeals was subsequently abolished, but section 45 was not amended. It was originally written to function in a different administrative structure than now exists. This is illustrated by the words "either party may appeal" still contained in section 92-8446 even though the right of the Commissioner to appeal was abolished when the Board of Tax Appeals was abolished. See GA. CODE ANN. §92-8446 (Rev. 1974).

18. GA. CODE ANN. §92-8446 (Rev. 1974).

19. Although it was originally thought that appeals had to be filed within 15 days, see, e.g., *Farr v. Williams*, 214 Ga. 525, 106 S.E.2d 14 (1958) (dictum), the Georgia Court of Appeals, in *State Bd. of Equalization v. Pineland Tel. Cooperative*, No. 50614 (Ga. App., September 2, 1975), *rehearing denied*, held that GA. CODE ANN. §6-102 (Rev. 1975) governs all appeals to the superior courts. This holding has the effect of changing the time for the appeal of a decision of the Commissioner from 15 days to 30 days.

20. *American Legion Post 69 v. Undercofler*, 108 Ga. App. 521, 133 S.E.2d 418 (1963).

21. Compare *Williams v. Lawler Hosiery Mills, Inc.*, 212 Ga. 617, 94 S.E.2d 699 (1956) with *Roberts v. Barwick*, 187 Ga. 691, 1 S.E.2d 713 (1939) and *Lee v. Chilivis*, 234 Ga. 255, 215 S.E.2d 256 (1975).

22. GA. CODE ANN. §92-8446 (Rev. 1974).

23. *Id.*

mine the sufficiency of the bond and not the Commissioner. The bond requirement is negated if the taxpayer has real property in Georgia with a value in excess of the amount of the tax in dispute.²⁴ Since the bond requirement is jurisdictional, the taxpayer should plead that real property with value in excess of the tax in dispute is owned in Georgia.²⁵

The appeal is normally filed in the superior court of the county of residence of the taxpayer.²⁶ The only special categories of taxpayers set forth are railroads, other public service corporations, or nonresidents. For these taxpayers, the appeal is made

to the superior court of the county in which is located its principal place of doing business, or in which the chief or highest corporate officer, resident in the State, maintains his office.²⁷

The trial of the appeal is a *de novo* proceeding and the case may be submitted to a jury for decision.²⁸ Since the trial is *de novo*, only the evidence presented to the superior court will be considered.²⁹ The burden of proof will normally be on the taxpayer as the moving party. A deficiency tax assessment is presumed to be *prima facie* correct and the burden is on the taxpayer to establish that the assessment is clearly erroneous or unreasonable.³⁰

The principal advantages of the appeal are that the tax being contested does not have to be paid and there is the option of having a jury trial. Nevertheless, interest on the deficiency assessment will continue to accrue. The appeal must, of course, be filed within 30 days after the date of the order, ruling, or finding of the Commissioner so there is an element of time pressure present. Because of this time element, the opportunity for filing an appeal may pass before the attorney receives the case. In that event the benefit of not paying the contested tax may be obtained by the filing of an affidavit of illegality.

B. Affidavit Of Illegality

If the taxpayer fails to file an appeal, the Commissioner will give the taxpayer notice and demand payment of the tax.³¹ If the tax deficiency is not paid after notice and demand, the Commissioner will issue an execution requiring the levy on and sale of the real or personal property of the taxpayer in a sufficient amount to satisfy the execution.³² For income

24. *Id.*

25. *Undercoffer v. Ernhardt*, 111 Ga. App. 598, 142 S.E.2d 317 (1965) (appeal dismissed for failure to plead bond or property).

26. GA. CODE ANN. §92-8446 (Rev. 1974).

27. *Id.*

28. *See Forrester v. Pullman Co.*, 66 Ga. App. 745, 19 S.E.2d 330 (1942).

29. *Id.*

30. *See Undercoffer v. White*, 113 Ga. App. 853, 149 S.E.2d 845 (1966).

31. GA. CODE ANN. §92-3302(c) (Rev. 1974).

32. GA. CODE ANN. §§92-3306, -7301 (Rev. 1974).

taxes, the taxpayer is given 10 days after notice and demand to pay the taxes before the execution is issued.³³

When the levying officer attempts to levy upon the property, the taxpayer can contest the execution by filing an affidavit of illegality with the levying officer which arrests the execution and prevents further action for the collection of the tax. Under section 92-3306, however, the taxpayer is required to either pay the tax or give an eventual condemnation money bond and, when personal property is levied upon, a forthcoming bond to the levying officer in order to contest an income tax execution. Under the provisions of section 92-7301, the tax must be paid only "if required as a condition precedent by the law levying the tax. . . ."³⁴ Otherwise, an eventual condemnation money bond must be filed with the levying officer. Both section 92-3306 and section 92-7301 provide that the levying officer will return the affidavit and bond to the superior court of the county of the residence of the taxpayer.

Section 92-3306 provides that an income tax execution will be tried "at the first or next term" after the affidavit and bond are filed with the court. Additionally, the issues may be tried before a jury. Under section 92-7301, however, the time for the trial is not established. Also, the statute does not provide for a jury trial. Instead, there is merely the provision that the affidavit "shall be summarily heard and determined by the court."³⁵

Therefore the affidavit of illegality and the appeal under section 92-8446 do not differ in any substantial degree. The affidavit of illegality permits a contest of the tax assessment without the necessity of paying the tax, even though a bond must be filed. With an income tax assessment, a trial by jury is available, while affidavits filed under section 92-7301 are summarily heard by the court. This summary proceeding, and the provision in section 92-3306 that the action will be heard at the first or next term, permits an opportunity for a rapid determination of the issues involved before the taxes are paid.

C. *Suit For Refund*

After a tax has been paid, a taxpayer may recover any tax that has been erroneously or illegally collected.³⁶ The payment may have been made inadvertently, erroneously, or as the result of a deficiency tax assessment issued by the Commissioner. Section 92-8436 provides that "[i]n any case in which it shall be determined that an erroneous or illegal collection of tax or license has been made by the commissioner," the taxpayer can begin the recovery process. The determination, however, does not have to be made by a judicial or quasijudicial body.³⁷

33. GA. CODE ANN. §92-3306 (Rev. 1974).

34. GA. CODE ANN. §92-7301 (Rev. 1974).

35. *Id.*

36. GA. CODE ANN. §92-8436 (Rev. 1974).

37. See *Parke, Davis & Co. v. Cook*, 198 Ga. 457, 31 S.E.2d 728 (1944).

The recovery process must begin within three years after the payment of the tax.³⁸ The first step is the filing of a claim for refund with the Commissioner. This claim is mandatory in order to maintain an action before the Commissioner or in the superior court.³⁹ The claim must include a summary statement of the grounds upon which the taxpayer relies. The taxpayer may also request a conference with the Commissioner for the purpose of presenting any information or evidence to support the claim for refund. The Commissioner will consider the available information and may approve or disapprove the claim. If the Commissioner approves the claim, the taxpayer receives a refund and the process is ended, but if the Commissioner disapproves the claim, the taxpayer may file a suit for refund with the superior court.⁴⁰

The Commissioner has one year from the date of the filing of the claim in which to make a decision on the claim.⁴¹ During this year, or until the Commissioner decides to disapprove the claim, whichever comes first, the taxpayer may not file a suit for refund. After the Commissioner has made a decision to disapprove the claim, or after the expiration of the one year period, the taxpayer has two years in which to file the suit for refund.

Venue for a suit for refund is the same as for an appeal under section 92-8446.⁴² As with the appeal, venue is normally in the county where the taxpayer resides. Venue for railroads, other public service corporations, and nonresidents is in the county in which the taxpayer's principal place of business is located or in the county in which the taxpayer's chief or highest corporate officer or employee resident in Georgia maintains his office. Section 92-8436 goes further than section 92-8446 and provides that if a nonresident or a foreign corporation does not have a principal place of business in Georgia and does not have a resident officer or employee who maintains an office in the State, then venue is in Fulton County or in the county in which the incumbent Commissioner resides.

The action in the superior court is similar to any other suit. A complaint is filed with the clerk of the superior court and an answer by the Commissioner is required. Unlike the procedure for filing an appeal under section 92-8446 or the filing of an affidavit of illegality, a bond or other writing is not required to be filed. As with any other suit, a trial by jury is available. The action is in the nature of a suit for money had and received.⁴³ Therefore, the burden is on the taxpayer to prove the true and correct tax liability.⁴⁴

38. GA. CODE ANN. §92-8436 (Rev. 1974).

39. *Blackmon v. Georgia Independent Oilmen's Ass'n*, 129 Ga. App. 171, 198 S.E. 2d 896 (1973).

40. GA. CODE ANN. §92-8436(b) (Rev. 1974).

41. *Id.*

42. *Id.*

43. *Hawes v. Shuman*, 228 Ga. 101, 184 S.E.2d 178 (1971), adopting the dissenting opinion in 123 Ga. App. 543, 181 S.E.2d 708 (1971).

44. *Id.*

The suit for refund permits the recovery of taxes erroneously or illegally collected and allows a trial by jury. The taxpayer can stop the accumulation of interest by paying a deficiency tax assessment and then seek recovery of the payment. The taxpayer still must prove the true and correct tax liability. The length of time required for a final determination of the suit will depend upon the local calendar.

D. Administrative Procedure Act

Section 13 of the APA⁴⁵ provides that the

Department of Revenue shall hold a hearing upon written demand therefor by any taxpayer aggrieved by any act of said department in a matter involving his liability for taxes. . . .⁴⁶

The demand for a hearing must be made within 30 days after the act causing the injury.⁴⁷ While there are no reported Georgia decisions on section 3A-113, the issuance of a final assessment by the Commissioner has been treated as an act by which a taxpayer is aggrieved. Section 3A-113 thus permits a taxpayer to appeal the final assessment of a tax deficiency without the necessity of first paying the tax or filing a bond. Unless the time is extended by consent of the parties, the hearing must be held within 30 days after the Department of Revenue receives the request for hearing. At the hearing, evidence is received and a record established which serves as the basis for appeal to the superior court if the taxpayer is dissatisfied with the findings of the Department of Revenue.⁴⁸

A dissatisfied taxpayer may appeal to the superior court by filing a petition within 30 days after the service of the final decision by the Department of Revenue.⁴⁹ The petition is filed with the superior court of Fulton County, or in the superior court of the county of an individual's residence or the county where a corporation's principal place of business is located.⁵⁰ The action is decided by the judge, sitting without a jury, based upon the record established at the hearing before the Department of Revenue.⁵¹

Section 3A-113 provides that the filing of a demand for a hearing with the Department of Revenue operates as an election of remedies and the appeal to the superior court will be the taxpayer's exclusive remedy. However, a taxpayer does not have to pay the tax or file a bond in order to obtain a hearing or appeal to the superior court. Additionally, the taxpayer has an additional fifteen days in which to make the appeal than would be available if an appeal was taken under section 92-8446. A decision can be

45. Ga. Laws, 1965, pp. 283, 289.

46. GA. CODE ANN. §3A-113(a) (Rev. 1975).

47. *Id.*

48. GA. CODE ANN. §3A-114 (Rev. 1975).

49. GA. CODE ANN. §3A-120 (Rev. 1975).

50. *Id.*

51. *Id.*

obtained in a relatively short time by taking an appeal under the APA and interest costs on the unpaid deficiency assessment will not accrue for an excessively long period.

III. CONCLUSION

The taxpayer in Georgia generally has each of the four remedies available for obtaining judicial review of a tax deficiency when a notice of a proposed deficiency tax assessment is received. The taxpayer's options, however, are reduced as time passes. A basic familiarity with the remedies, therefore, will aid in selecting the desirable option.