Mercer Law Review

Volume 3 | Number 1 Article 24

12-1951

Taxation

T. Baldwin Martin Jr.

TAXATION

By T. BALDWIN MARTIN, JR.*

LEGISLATION

The pivot point of tax legislation by the 1951 General Assembly consists of the Georgia Retailers' and Consumers' Sales and Use Tax Act.[1]

Radiating from this hub were repeal of nuisance taxes,[2] rededication to the principle of ever-increasing corporate taxation,[3] reduction of excise levies on bulk sales of malt beverages,[4] reduction of motor fuel taxes,[5] permanent driver's licenses,[6] and cut rates for combined hunting and fishing licenses.[7] In addition and in keeping with governmental self perpetuation, it brought into existence the Agricultural Commodities Authority,[8] presented the State Revenue Commissioner with a deputy,[9] while at the same time giving the commissioner authority to levy upon the property of the hapless taxpayer and conduct judicial sales in the manner heretofore reserved for sheriffs.[10] Additional legislation of local or incidental nature not justifying elaboration within the confines of this resume was also enacted.[11]

Turning first to the mechanical aspects of the Sales & Use Tax Act we

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*Associate in the firm of Martin, Snow & Grant, Macon; A.B., LL.B., 1948, Mercer University; LL.M., 1950, Northwestern University School of Law; Member Georgia Bar Association.

1. Ga. Laws 1951, p. 360, hereinafter referred to as the Sales & Use Tax Act.
2. Ga. Laws 1951, p. 157 §§ 1, 2, 3, 4 (Taxation—Occupation Taxes. Fishing and Hunting Licenses, Etc., Act). See P-H GA. TAX SERV. ¶ 400 (1951) wherein appears an enumeration of all items affected with reference therein to a discussion of each individual item; also including a summary of changes by the 1951 legislature.
3. Discussed *infra* note 44.
4. Ga. Laws 1951, p. 356 (Taxation of Malt Beverages and Wines Act), effecting a reduction of the excise tax on bulk sales of malt beverages fifty percent; theoretically, the reduction of tax is to produce greater consumption and result in overall increase in the tax produced; also equality of price with surrounding states assisted in the passage of this legislation.
5. Ga. Laws 1951, p. 446, amending GA. CODE ANN. § 92-1403 (Supp. 1947), effecting a tax reduction in motor fuel taxes of 1c per gallon (7c to 6c), this tax saving being offset almost completely by the sales and use tax levy.
6. Ga. Laws 1951, p. 157, § 7, amending § 5 of Art. 4, Ga. Laws 1937, p. 322, 344, GA. CODE ANN. §§ 92A-408 to 92A-410 (Supp. 1947), and providing for permanent drivers' licenses.
7. Ga. Laws 1951, p. 157, §§ 8, 9, 9a, providing for combined hunting and fishing licenses for the total of $1.25.
8. Ga. Laws 1951, p. 717; see *infra* note 46 for discussion.
9. Ga. Laws 1951, p. 614 (State Revenue Commissioner and Deputy Act).
10. Ga. Laws 1951, p. 717 *et seq.*, amending Ga. Laws Extra Sess. 1937-1938, § 41 *et seq.*, GA. CODE ANN. § 92-8443 *et seq.* (Supp. 1947).
11. Ga. Laws 1951, p. 457 (Social Security for Employees of Political Subdivisions); Ga. Laws 1951, p. 512 (Employment Security Law—Amendments—Code c. 54-6 amended); Ga. Laws 1951, p. 528 (Tax Levies—Specification of Amounts and Purposes in Certain Counties); Ga. Laws 1951, p. 539 (Fire Protection in Certain Counties); Ga. Laws 1951, p. 610 (Municipal *Ad Valorem* Tax Rate—Code § 92-4101 amended); Ga. Laws 1951, p. 691 (Old Age Assistance); Ga. Laws 1951, p. 715 (County Boards of Tax Assessors); Ga. Laws 1951, p. 738 (Fertilizer Inspection Fees—Alternative Method).

find a privilege or excise levy[12] of three percent directed toward the selling,[13] storing,[14] leasing,[15] renting,[16] or using,[17] of tangible personal property.[18] In addition certain defined services[19] are included. The levy is upon the purchaser in those cases where *retail sales* constitute the mode of measuring the tax and collection is made by the "dealer selling"[20] as an agent of the state who in turn computes the tax to be remitted upon his *gross sales*.[21] Those levies computed by the cost price of tangible personal property involved, as well as rentals, are also collected by "dealers" who, by legislative determination, are those engaged in the use, the consumption, the distribution, and the storage for use or consumption in the state of such property.[22] The ultimate objective of this legislation, aside from revenue, is to tax "property" as defined by the act "after it has come to rest in this state and has become a part of the mass of property of this state."[23] The manner in which this act proceeds to go about obtaining this result is neither spectacular nor novel,[24] but in view of anticipated revenue[25] the method is deadly effective.

The newness of this legislation, together with the absence of uniformity of the "sales" levies of the several states, leaves an infinite number of vital issues unresolved, there having been reported only ninety-six administrative rulings[26] at the time of this writing; however the broad constitutional aspects of a sales and use tax have been considered. The *sales* aspects of various state levies have been attacked on the basis of taxing persons, property or interest not within its territorial jurisdiction,[27] an absence of equality

12. See Notes, 89 A.L.R. 1433 (1934); 128 A.L.R. 894 (1940); 117 A.L.R. 847 (1938) with reference to the general nature of sales taxes.
13. Ga. Laws 1951, p. 360, § 2(a).
14. *Id.* § 2(b).
15. *Id.* § 2(d), (e).
16. *Ibid.*
17. *Id.* § 2(b). See also *infra* note 33 for full discussion of use tax feature.
18. Ga. Laws 1951, p. 360, §§ 2(c), 3(i), defined as meaning and including, "property, which may be seen, weighed, measured, felt, or touched, or is in any other manner perceptible to the senses. The term 'tangible personal property' shall not include stocks, bonds, notes, insurance or other obligations or securities."
19. *Id.* § 2(e).
20. Seven definitions of "dealer" are available—*id.* § 4.
21. *Id.* § 2(a); the "dealer" collecting on "retail sales," thus theoretically having the opportunity to collect 6c per $1.00 of retail sales, but he must remit to the state the amount of tax due or the actual amount collected, whichever is greater (less three percent as compensation). Interesting to note that O.P.S. regulations inapplicable to sales tax, same not constituting a portion of the purchase price; O.A.G. to Comm'r of Rev., Aug. 17, 1951, P-H GA. TAX SERV. ¶ 23,607 (1951).
22. See note 20 *supra*.
23. Ga. Laws 1951, p. 360 § 4.
24. The Georgia statute reflecting in numerous instances identical verbiage gleaned from the Florida and Tennessee statutes. Examination by the practitioner of the relative regulations of these states will assist in anticipating ruling of the Attorney General.
25. Originally $60,000,000; now more than $100,000,000.
26. P-H GA. TAX SERV. ¶ 23,800 (1951).
27. James v. Dravo Contracting Co., 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155 (1937).

and uniformity,[28] violation of due process,[29] impairment of contract,[30] and as constituting a burden on interstate commerce.[31] These attacks have been singularly unsuccessful, and in this writer's opinion, the constitutionality of the Georgia act will, if challenged, be upheld.[32].

The use tax aspects of the instant act make an ideal running mate for the sales tax features in preventing a loss of revenue stemming from the purchase of goods without the state by Georgians for use and consumption within the state. The immunity of interstate sales is likewise thwarted by the use levy.[33] The theory of the use tax is that it imposes an excise upon a taxable event, to wit, storage, use, etc., within a state and the fact that it operates as an indirect tax upon interstate sales is not fatal.[34] By the same token there exists no discrimination against such commerce.[35]

Miscellaneous provisions of the act providing for trade-ins, sales of business, collection and remittance of tax, penalties, exemptions,[36] treatment of commingled fungible goods, and numerous other related matters round out this legislation[37] which, strictly from an objective point of view, when considered with other 1951 tax legislation, still reveals a chronic need for tax revision.[38] The revenue measures which are correlated with the Sales & Use Tax Act reflect tax reduction in occupation, license and other excise taxes,[39] but the ultimate result is a reallocation or redistribution of the tax burden with an anticipated overall increase in tax revenue for state consumption.[40]

Tax reduction in any form is a novelty, and as such deserves attention. The repeal of license taxes on occupation[41] enumerated some 175 varied occupations ranging from the manufacture of soft drinks[42] to the business of legerdemain and sleight of hand.[43] These "nuisance taxes," so-called,

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28. This objection being generally reserved for property taxes—Note, 89 A.L.R. 1433 (1934); uniformity generally being interpreted to mean uniformity with a class, not necessarily a uniformity of classes. See Note, 110 A.L.R. 1487 (1937). See Georgia exclusions, Ga. Laws 1951, p. 360, § 3(c)2, (a)-(g).
29. A. Magnano Co. v. Hamilton, 292 U.S. 40, 54 S.Ct. 599, 78 L. Ed. 1109 (1934); tax must virtually amount to confiscation to violate Fifth and Fourteenth Amendments of the Federal Constitution.
30. For general discussion, see 47 AM. JUR., *Sales and Use Taxes* § 8 (1943).
31. Ga. Laws 1951, p. 360, § 4; intent of act "to levy a tax on bona fide interstate commerce." This loss of revenue is met by the "use" tax levy; see *infra* note 33.
32. See P-H STATE & LOCAL TAX SERV. ¶ 92,514 *et seq.* The depression years gave birth to many state sales taxes, and the necessity for revenue lent itself to an air of liberality on the part of the courts in passing upon constitutional issues, 89 A.L.R. 1441 (1934).
33. See Note, 129 A.L.R. 223 (1940).
34. Per Justice Cardozo, Henneford v. Silas Mason Co., 300 U.S. 577, 57 S.Ct. 524, 81 L. Ed. 814 (1937).
35. Note, 129 A.L.R. 228, 229 (1940); the objections of inequality and absence of uniformity, denial of due process and lesser constitutional objections have been urged with a general absence of success. *Id.* at pp. 232-234.
36. Ga. Laws 1951, p. 360, § 3(c) 2, (a)-(g). See comment, *supra* note 28.
37. Unfortunately no legislative committee reports reflecting legislative intent are available.
38. Wilson, *Taxation*, 2 MERCER L. REV. 220, 221 (1950), reflecting the existence of a need for tax revision and recognition of this need by the 1950 General Assembly.
39. Itemized in introduction hereto—notes 2-11 *supra.*
40. The ultimate, and usual result, will be a general tax increase, note 25 *supra.*
41. Note 2 *supra.* See also P-H GA. TAX SERV. ¶ 400 (1951).
42. *Id.* ¶ 38,235.
43. *Id.* ¶ 43,094; GA. CODE § 92-620 (1933).

not only because of the taxpayer's feelings, but because of the expense of collecting same, constituted a goodly portion of the "underbrush" which cluttered Georgia's tax structure and their repeal was both justified and progressive.

The computing of a license tax on domestic and domesticated corporations based upon their net worth[44] instead of issued capital stock as was formerly the mode of measure,[45] represents a more realistic approach to accuracy. Net worth is to be computed as shown upon corporate books subject to right in the commissioner to estimate such worth based on any obtainable information in event such records do not present a true picture of net worth. This tax is due ninety days from January 1st of each year and must be paid within ninety days from due date.

A novel innovation, the Agricultural Commodities Authority[46] demonstrates the continuing encroachment of government into agriculture while at the same time pointing out the necessity for coordinated action by those engaged in agricultural production in the promotion and advertising of their products, as well as research relating to such products. This act provides that the authority here created may, if authorized by a two-thirds vote at referendum of producers, as defined,[47] levy an unusual "assessment charge" on the following commodities grown in Georgia: tobacco 10c per acre, cotton 10c per bale, and peanuts 25c per ton, collection to be made by "warehouseman, ginner, dealer, or handler" depending upon the commodity, records of collection to be retained two years by the collector, and returns made by them as requested by the authority.

The Attorney General's ruling[48] on the constitutionality of this tax caused a wide diversity of opinion among the representatives of the so-called "agricultural counties."

DECISIONS

Georgia tax litigation during the year just passed concerned itself to a large extent with the Industrial Relations chapter of the Code. Primarily this litigation was definitive in nature and involved interpretation of such vital verbiage as "employees,"[49] "employer,"[50] "wages,"[51] "factory, estab-

44. Note 3 *supra*.
45. The Director of the Property and License Tax Unit says this law requires no additional report or payment for 1951; a corporation chartered after July 1, 1951 pays directly to the Department of Revenue the tax based on net worth. P-H GA. TAX SERV. ¶ 400 (1951).
46. Note 8 *supra*. Attorney General Cook, acting at the instance of the Governor, ruled that this legislation is unconstitutional. O.A.G. to Gov. Talmadge, May 18, 1951, P-H GA. TAX SERV. ¶ 44,111 (1951).
47. "Any person producing or causing to be produced for sale any agricultural commodity as herein defined" (cotton, peanuts and tobacco). Ga. Laws 1951, p. 717 § 2(g). The obvious inequity of allowing a "one acre" "producer" a vote equal to a "1000 acre" "producer" would tend to reflect a need for a referendum predicated on acreage.
48. Note 46 *supra*.
49. The status of "employee" is primarily dependent upon whether he is employed by an "employing unit" (GA. CODE ANN. § 54-657 (f) (Supp. 1947)), or by an "employer" (*id.* § 54-657 (g)).
50. GA. CODE ANN. § 54-657 (g) (Supp. 1947).
51. *Id.* § 54-657 (n), specifying "all remuneration for personal services."

lishment or premises,"[52] and "voluntary unemployment."[53]

The impact of unemployment benefits upon our economic productivity is tremendous. However, its importance as a taxing statute is secondary in that it is designed to create a special fund[54] for special groups and not for the production of general tax revenue. The definitions hereafter dealt with deal not with the tax aspects of this act, but with the administration of funds produced by virtue of the revenue producing sections of the statute and are worthy of note.

The issue of whether an "employer-employee" relationship existed for unemployment compensation tax purposes was presented to the Court of Appeals in the cases of *Hedrick Construction Co. v. State*[55] and *Redwine v. Wilkes*.[56] The *Hedrick* decision involved the use of alleged "independent contractors" by the taxpayer company in the construction of houses upon real estate held by the company for sale, the company contending that because of the incidental nature of the construction work and its subservience to the real estate functions of the company that these contractors were not "employees." The court, speaking through Judge Felton, looked to the corporate purpose as expressed by its charter, as well as the corporate activities as expressed by its operation, and found the statutory presumption[57] imputing the existence of an "employer-employee" relationship was not overcome.[58]

The *Wilkes* case found the taxpayer alleging that individuals to whom he rented cabs at a flat rate were not his employees. Again the court looked to the mode[59] of operation and the ostensible relationship of "employer-employee" and held for the taxing authority, the fares netted above the rental fee by the drivers being construed as "wages."[60]

A more novel proposition was submitted to the Supreme Court in *Ford Motor Co. v. Abercrombie*[61] wherein the employee claimants sought unemployment benefits during unemployment caused by a labor dispute in a Ford plant in Michigan, the Georgia plant being dependent upon the Michigan plant for its continued operation. Chief Justice Duckworth, looking to the unity of the employees, as expressed through their union membership, the Michigan and Georgia locals both belonging to the same International, and as demonstrated by the Georgia locals' consent and approval of the Michigan strike, found that the employees were not "involuntarily unemployed" and as such did not qualify for the benefits claimed. A further disqualifica-

52. *Id.* § 54-610 (d).
53. *Id.* § 54-610 (a), (d).
54. *Id.* §§ 54-620, 54-621, 54-622.
55. 82 Ga. App. 647, 62 S.E.2d 218 (1950).
56. 83 Ga. App. 645, 64 S.E.2d 101 (1951).
57. GA. CODE ANN. § 54-657 (f) (Supp. 1947), setting forth that where use is made of contractors and subcontractors in work that is part of the "usual trade, occupation, profession or business" of the employing unit, the employees thereof shall be deemed individual employees of the "employing unit."
58. The test of "ultimate responsibility," *i.e.*, that of the taxpayer to the person receiving the house, was also a determinative factor.
59. All cabs bore taxpayer's name and liability insurance was issued to him. He possessed a right to "hire and fire."
60. Note 51 *supra*.
61. 207 Ga. 464, 62 S.E.2d 209 (1950).

tion was set forth in that as the Michigan and Georgia plants' ultimate function was the production of Ford automobiles, they constituted one 'factory, establishment or other premises" within the purview of the statute preventing benefits from accruing where a work stoppage exists because of a labor dispute "at the factory, establishment or other premises."[62]

The definitive trend of litigation extended itself also to the corporate income tax field, the Supreme Court again concerning itself as to what constitutes "doing business" within the purview of the corporate income taxing statue.[63]

The issue was presented in *Redwine v. Dan River Mills, Inc.*[64] wherein the commissioner sought to levy a tax on income which was allegedly derived by defendant company from "doing business" within the state where such company owned no property in this state and maintained a small office force solely for the purpose of solicitation of business within this state. The Supreme Court, neatly avoiding the constitutional issues[65] predicated its holding upon its 1950 decision in *Suttles v. Owens-Illinois Glass Co.*[66] In the *Suttles* case, which was for all practical purposes identical in ts factual background, the right of the state to tax accounts receivable was questioned and found wanting as the taxpayer was not "doing business"[67] within this state, the concept of "doing business" being applied to property and income taxing statutes alike.[68]

The 1950 legislature apparently sensing the ultimate outcome of the protracted litigation[69] regarding the definition of "doing business" extended the definition thereof to include all corporation "activities or transactions for the purpose of financial profit or gain" within the state, it mattering not if no office and place of business is maintained, whether it qualifies to do business within the state and regardless of the fact that such activity is connected with interstate commerce.[70]

The constitutionality of this broad definition remains undetermined, but all indications point toward an attack thereon,[71] predicated upon the undecided constitutional issues set forth in the *Dan River* decision.[72]

Segments of the enforcement aspects of our taxing systems presented

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62. GA. CODE ANN. § 54-610 (d) (Supp. 1947).
63. GA. CODE ANN. § 92-3001 *et. seq.* (Supp. 1947), and c. 92-31, as amended, Ga. Laws 1951, p. 299.
64. 207 Ga. 381, 61 S.E.2d 771 (1950).
65. The issue raised being whether the Georgia income tax constitutes a burden on interstate commerce or a denial of due process.
66. 206 Ga. 849, 59 S.E.2d 392 (1950); see Wilson, *Taxation*, 2 MERCER LAW REV. 220, 222 ff. (1950), where such action was anticipated.
67. The taxpayer maintaining, as in the Dan River case, a Georgia office for the purposes of solicitation of business and promotion.
68. Wilson, *supra* note 66 at 224.
69. Redwine v. Dan River Mills merely culminating a series of decisions including the Suttles case, *supra* note 66; Lipton Tea Co. v. Phillips, No. 161440 Super. Court Fulton County, Ga., Dec. 1, 1947; and Montag Bros., Inc. v. State Rev. Comm., 50 Ga. App. 660, 179 S.E.2d 563 (1935).
70. Ga. Laws 1950, p. 299, § 1.
71. Wilson, *supra* note 66 at 225.
72. Note 65 *supra.*

themselves in the cases of *West v. McBride*,[73] *Salter v. Salter*,[74] *Clarkson v. Hair*,[75] and *Bagwell v. Cash*.[76]

The *West* decision served to reiterate the general legal principles that a conveyance by taxing authorities predicated upon an excessive levy is void and that a purchaser at such void tax sale is entitled to reimbursement of that portion of his money and to pay off a valid and subsisting lien. Land sold in satisfaction of taxes was also the subject-matter of the *Salter* case, the court holding therein that one who fails to redeem land sold for taxes within the forty-five day interval provided for by Georgia Code, Section 92-8306, following notice that his right to redeem would be foreclosed, as provided therein, does not qualify for the extension of redemption time allowed by the Act of 1949 (Ga. Laws 1949, p. 1132), authorizing a twelve-months extension to taxpayers of any redemption rights the taxpayer may have had under a 1937 redemption statute,[77] the failure to redeem, following notice under Section 92-8306 having barred a right to redemption under the 1937 act.

The remaining decisions are restricted in their importance factually, the *Clarkson* case concerning itself solely with the arbitration procedure outlined by the Code[78] for the reconsideration of real property assessments, and the *Bagwell* ruling being relative to a futile attempt by the County Board of Tax Assessors of Hall County to employ a nonresident company to "survey"[79] the tax potential of realty and personalty in that county.[80]

The promulgation of taxing statutes and the judicial interpretations thereof present a constant and ever-increasing challenge to the taxpayer and his attorney. The magnitude of taxation at the state level is of vast significance, for in recent years state taxes have accounted for at least fifty percent of all tax revenue collected.[81]

73. 207 Ga. 261, 61 S.E.2d 133 (1950).
74. 81 Ga. App. 864, 60 S.E.2d 424 (1950).
75. 207 Ga. 699, 64 S.E.2d 64 (1951).
76. 207 Ga. 222, 60 S.E.2d 628 (1950).
77. Ga. Laws 1937, p. 491, GA. CODE ANN. § 92-8301 *et seq.* (Supp. 1947).
78. GA. CODE §§ 92-6303, 92-6912, 92-6917 (1933).
79. Presumedly tax assessments predicated solely upon these "surveys" were in the offing. The "surveyors" agreeing to furnish expert testimony as to value in the event of protest being filed, the agreed fee for the survey being $35,000.
80. The court found that the tax assessors were without authority (see GA. CODE § 92-6910 (1933)) to employ the "surveyors" and that in effect they were paying others to perform duties allocated to them.
81. See preface, GRISWELL, CASES ON FEDERAL TAXATION, ix (2d ed. 1946).