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TAXATION

CHARLES H. RANDALL, JR.*

Legislation

The major developments in South Carolina tax law during the past year[1] were the result of legislation rather than judicial decision. In 1958, the General Assembly established the South Carolina Tax Study Commission,[2] composed of three persons to be chosen from the Senate, three from the House of Representatives and three to be appointed by the Governor.[3] Several legislative recommendations of this Study Commission were adopted during the 1961 Regular Session of the General Assembly.

Of most general interest, effective with respect to the estate of any decedent dying after December 31, 1961, is the adoption of a South Carolina Estate Tax,[4] and the repeal effective on that date of the existing Inheritance and Estate Tax laws.[5] The new statutory scheme is aimed at simplifying the work of counsel for executors or administrators and estate planners, and in addition is expected to relieve the Inheritance Tax Division of the South Carolina Tax Commission as well as probate judges of much technical work. Under the new law, tax returns are required only for estates which would have to file a federal return anyway, thus eliminating any returns or State transfer taxes on "gross estates," as defined below $60,000. This eliminates entirely the manifold problems, computational and otherwise, involved in current inheritance taxation of small estates. Furthermore, since the new statute largely incorporates by reference much of the current Federal Estate Tax[6] statutory language, counsel will have but one set of tax laws to consult.[7] The Tax Commission

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1. The survey of cases herein includes cases decided between April 1, 1960 and March 31, 1961, while the legislation discussed covers the entire 1961 Session of the General Assembly, ending May 18, 1961.
2. Act No. 770 of 1958, amended by Act No. 218 of 1959.
3. The composition of the Commission for 1961 was: for the Senate, Senators Edgar A. Brown, Marshall J. Parker and John C. West; for the House of Representatives, Representatives R. J. Aycock, C. Heyward Belser and E. LeRoy Nettles; and Governor's appointees, Dr. George H. Aull, A. Crawford Clarkson and R. M. Jeffries.
4. Act No. 382 of 1961.
5. CODE OF LAWS OF SOUTH CAROLINA §§ 65-451 to-529, 65-551 to-553 (1952).
6. INT. REV. CODE OF 1954, §§ 2001-2209.
7. The new law incorporates by reference the federal provisions as of

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and probate judges will be relieved of the onerous burden of processing the "continual stream of paper shuffling and correspondence"[8] currently required to pass between them regarding issuance of letters of administration or probate of wills.

The new estate tax adopts the federal definition of the "gross estate,"[9] but excluding in the case of residents real or tangible personal property with a situs outside the State. Non-residents, of course, are only taxed on property within the State. The federal definition of the "taxable estate" is also adopted, permitting deductions as allowed by federal code sections 2051 through 2056 inclusive.[10] The "taxable estate" thus computed is taxed at 4 per cent for the first $40,000, 5 per cent the next $60,000 and 6 per cent for the excess over $100,000.[11] The Additional Estate Tax in the current law[12] is continued in the new statute[13] in order to take full advantage of the federal credit of State death taxes.[14] Provisions for transfer liability in some cases, paralleling federal provisions,[15] are also introduced into the new statute.[16]

the date of enactment of the new law, so that no problem of legislative delegation should arise. Santee Mills v. Query, 122 S. C. 158, 115 S. E. 150 (1922); 1935-36 Op. Atty. Gen. 238. Decisions of the federal courts construing the incorporated sections are entitled to at least persuasive weight, McDowell v. Stilley Plywood Co., 210 S. C. 173, 41 S. E. 2d 872 (1947), and perhaps presumptive weight, Fuller v. S. C. Tax Commission, 128 S. C. 14, 121 S. E. 478 (1924).

8. SECOND ANNUAL REPORT, SOUTH CAROLINA TAX STUDY COMMISSION, p. 14 (1961).

9. Act No. 382 of 1961, § 3 incorporates INT. REV. CODE OF 1954, §§ 2031-2034.

10. Act No. 382 of 1961, § 5 permits deductions as set out in INT. REV. CODE of 1954, §§ 2051-2056.

11. Act No. 382 of 1961, § 1. Section 2 permits credits for previously taxed property, following generally the scheme of INT. REV. CODE of 1954, § 2013 (1954). This reduces double taxation where property passes through two successive estates within a short period of time.

12. CODE OF LAWS OF SOUTH CAROLINA §§ 654-551 to-553 (1952).

13. Act No. 382 of 1961, art. 3.

14. INT. REV. CODE of 1954, § 2011.

15. *Id.*, §§ 2205-07. These sections solve relatively few of the problems of apportionment of taxes and other burdens between beneficiaries of an estate, or between beneficiaries of the estate and beneficiaries of inter vivos arrangements created by the decedent during his lifetime. The decisions of the Supreme Court of South Carolina in Myers v. Singler, 235 S. C. 162, 110 S. E. 2d 241 (1959) and Gaither v. United States Trust Co., 230 S. C. 568, 97 S. E. 2d 24 (1957) will continue to control in other cases in which the decedent does not specify where he wishes these burdens to fall. These cases are discussed in Randall, *Taxation, 1960 Survey of S. C. Law*, 13 S. C. L. Q. 381-83 (1960), and Randall, *Taxation, 1957 Survey of S. C. Law*, 10 S. C. L. Q. 131-35 (1957); generally, see LOWNDES AND KRAMER, FEDERAL ESTATE AND GIFT TAXES, 614-617.

16. Act No. 382 of 1961, art. 10, §§ 2-4.

In addition to the estate tax, several other amendments to current tax law were proposed by the Tax Study Commission and passed by the General Assembly.[17] A proposal was made to the Tax Study Commission that the State incorporate by reference in its own tax law the entire federal law of income taxation. The Tax Study Commission indicated that it "unanimously endorsed the basic concept of the proposal," but due to the need for further study, no recommendation was made thereon at this time.[18] In one important instance, the so-called merchant's "floor tax," the proposal of the Tax Study Commission was rejected in favor of a Joint Resolution by the General Assembly directing the Tax Commission to reduce the assessment rates under this tax, over a period of three years.[19]

Fixed Fee License Tax, Interstate Commerce

In *Olan Mills v. Town of Kingstree*[20] plaintiff corporation was a commercial photographer with its principal place of business in Chattanooga, Tennessee, and sued to recover the sum of $45 assessed by the Town[21] for a business license and paid under protest by plaintiff. Plaintiff asserted that imposition of the tax was in violation of the Commerce Clause of the Constitution of the United States.[22] The plaintiff's method of doing business is set forth succinctly by Mr. Justice (now Chief Justice) Taylor in his opinion:[23]

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17. Adopting or closely following the recommendations of the Tax Study Commission were the following: Installment Method of Reporting Income, Act No. 165 of 1961; Further Defining the Term "Adjusted Gross Income," Act No. 166 of 1961; Increasing the Limitations with Respect to Deductions for Charitable Contributions, Act No. 208 of 1961; Tax Commission's Power of Waiving Penalties and Interest, Act No. 277 of 1961; Admissions Taxes for Athletic Contests of Institutions of Higher Learning, Act No. 278 of 1961; Exemptions from Soft Drinks Tax, Act No. 279 of 1961; Reports and License Fees of Corporations, Act No. 167 of 1961; Use Tax on Construction Equipment Act No. 209, of 1961; and Preparation and Publishing of Annual Statistics by Tax Commission, Act No. 148 of 1961.

18. REPORT, *supra* note 8, at 17. The State has employed a similar technique in levying a tax on corporate income. See Santee Mills v. Query, *supra* note 7.

19. Act No. 439 of 1961.

20. 236 S. C. 535, 115 S. E. 2d 52 (1960).

21. The Town seems to have assessed the license tax based on classifying the photographer as a "resident." Fees for residents were set at $20 for annual gross income of $1,000 or less, and $5 for each additional $1,000 or fraction thereof. For non-residents, the license tax was doubled. Transcript of Record, pp. 2,3; 236 S. C. 535, 115 S. E. 2d 52 (1960).

22. U. S. CONST. art. I § 8.

23. 236 S. C. 535, 538; 115 S. E. 2d 52, 53 (1960).

.... As a first step, an advance salesman traveling from place to place solicits orders for photographs to be processed at the Chattanooga plant. He collects a deposit and arranges for a sitting or exposure. Second, a traveling cameraman takes the pictures as previously arranged and collects an additional payment. Third, the exposed film is sent to Chattanooga where the film is developed and proofs for showing are printed. Fourth, the proofs are mailed to a traveling salesman who presents same to the customer for his selection and order. Fifth, approved proofs are then mailed back to Chattanooga, where the photographs are manufactured and processed; and, finally, the finished photographs are mailed to the customer.

The Court held that the case was governed by the "drummer" line of decisions of the Supreme Court of the United States, of which *Robbins v. Shelby County Taxing District*[24] and *Nippert v. Richmond*[25] are leading. These decisions established the unconstitutionality of State or municipal fixed-fee privilege taxes on the soliciting of orders for later interstate shipment. The principle has been recently reasserted in a dictum in *Northwestern States Portland Cement Co. v. Minnesota*.[26] Several bases for these decisions have been suggested. It is said that the privilege of engaging in interstate commerce is not one granted by the States, and therefore is not a subject of their taxing power; that the taxes involved are of a fixed-fee class, and hence bear particularly heavily upon an itinerant solicitor of a product of a highly limited character, who makes only sporadic visits to any particular town; and that such taxes are often laid by municipalities and other subdivisions of states, hence giving rise to the danger of a cumulative effect if many municipalities resort to the same revenue-raising device.[27]

The principal issue in the case was whether the activities of Olan Mills were exclusively interstate commerce activities, or whether the local activities were of sufficient importance to permit a finding that the company was doing a local business. The case was decided on demurrer to the complaint, and

24. 120 U. S. 489, 30 L. Ed. 694 (1887).
25. 327 U. S. 416, 90 L. Ed. 761 (1946).
26. 358 U. S. 450, 3 L. Ed. 2d 421 (1959).
27. Nippert v. Richmond, *supra*.

the circuit judge, relying on *Lucas v. City of Charlotte*,[28] found the local incidents sufficient to sustain the tax. In reversing, the Supreme Court of South Carolina found that the local incidents in connection with the sale of photographs were each an "inseparable link in the chain of events which culminate in the final photograph"[29] and hence were an integral part of the process of interstate commerce.

Exemption From State Stamp Taxes on Notes Issued by Building and Loan Association to Secure Federal Home Loan Bank "Advances"

The decision in *Laurens Federal Savings and Loan Association v. South Carolina Tax Commission*,[30] decided by the Supreme Court of South Carolina in 1960 and discussed in this survey last year,[31] was reversed on certiorari to the Supreme Court of the United States.[32] Discussion herein will be limited to adding a few remarks to the comments in last year's survey. Mr. Justice Black, for a unanimous Court, found that the "advances" were exempt from taxation under the Federal Home Loan Bank Act of 1932,[33] and that the *Pittman* case[34] was controlling authority for the proposition that it made no difference that the tax was laid not directly on the Home Loan Bank but indirectly, on a member Association. Further support for this view was found in the legislative history of the 1932 Act, in that the intent of the statute was to make mortgage funds available at low cost to home owners.

The Court found that no repeal of the exemption was effected by the Home Owners' Loan Act of 1933.[35] No express language provided for such repeal, nor could intimation toward reduction of the scope of the exempt status be found in the legislative history. Nor could the Court find any basis

28. 86 F. 2d 394, 109 A.L.R. 297 (4th Cir., 1936). The facts in the *Lucas* case, involving a different photographic company, were virtually identical to those in the instant case, but problems of federal jurisdiction and procedure involved in the former case were urged by appellant as grounds for distinguishing the two cases.
29. 236 S. C. 535, 538, 115 S. E. 2d 52, 54 (1960).
30. 236 S. C. 2, 112 S. E. 2d 716 (1960).
31. 13 S. C. L. Q. 386 (1960).
32. — U. S. —, 5 L. Ed. 2d 749 (1961).
33. 12 U.S.C.A. § 1421 (1952).
34. Pittman v. Home Owners' Loan Corp., 308 U. S. 21, 84 L. Ed. 11 (1939).
35. 12 U.S.C.A. § 1461 (1952).

for the view that the exemption was repealed by implication:[36]

> It also would be difficult to think of less apt circumstances for the finding of an implied repeal. These two Acts, both designed to provide home owners with easy credit at low cost, were passed within a year of each other on the basis of the same hearings and when read together form a consistent scheme in which the 1932 exemption provision contributes to the major purpose of low-cost credit precisely as it did before passage of the 1933 Act.

Property Tax — Intangible Personal Property

In *Francis Marion Life Insurance Co. v. City of Columbia*,[37] plaintiff sued to recover property taxes assessed against certain intangibles for the calendar years 1957 and 1958. Plaintiff predicated his claim on two grounds: first, that the exaction was unconstitutional[38] in that no legislation had been "especially provided by the General Assembly by the authority and within the limitation of this [constitutional] provision" authorizing the tax; and second, that the tax imposed was in excess of the limitation set forth in the same constitutional provision.

Prior to 1932, when this amendment to Article X, Section 1 of the Constitution became effective, there existed no con-

36. —U. S.—, 5 L. Ed. 2d 749 (1961).
37. 237 S. C. 162, 115 S. E. 2d 796 (1960).
38. S. C. CONST. art. 10 § 1 (1895) was amended by submission to the electorate of an amendment proposed by the General Assembly. The amendment became effective in 1932. The pertinent parts of the section as amended now provide:

> § 1. Taxation and assessment.
> The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe regulations to secure a just valuation for taxation of all property, real, personal and possessory . . . . Provided, Further, That the General Assembly may provide by law for the assessment of all intangible personal property, including moneys, credits, bank deposits, corporate stocks, and bonds, at its true value for taxation for State, County and municipal purposes or either thereof: Provided, That the total rate of taxation imposed thereon shall never exceed one-half of one per centum of the actual value of such intangible property: Provided, Further, That such intangible personal property shall not be subject to the three mill levy provided by Section 10, Article 11, of this instrument or to any other general or special tax levy, except such as is especially provided by the General Assembly by the authority and within the limitation of this provision. . . .

stitutional barrier against taxation of intangible personal property as such. Statutes had been enacted, dating from 1881 and 1915,[39] generally permitting taxation of intangibles. In both 1942 and 1952, the legislature adopted codes re-enacting these laws. Thus, a very narrow question was presented in the case on the first issue, that is, whether the codifications in 1942 and 1952 constituted legislation "especially provided" within the meaning of the constitutional provision. In upholding the taxpayer, the Court, per Mr. Justice (now Chief Justice) Taylor, held that while the recodification might constitute "legislative action," authorizing the tax, it did not constitute legislation "especially provided . . . by the authority and within the limitation of this provision." The city had argued that since statutory authority already existed to assess the tax, enactment of additional legislation "would have been a useless legislative performance."[40] Since the plaintiff prevailed on this ground, the Court did not reach the plaintiff's second contention.

39. Now found in CODE OF LAWS OF SOUTH CAROLINA §§ 65-1521, 65-1501 (2) and 65-1721 (1952).
40. Brief of Appellants, p. 5; 237 S. C. 162, 115 S. E. 2d 796 (1960).