Public Law: State and Local Taxation

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The most significant sales and use tax case decided by the appellate courts during the current term is probably the most significant tax case of recent years. In Chicago Bridge & Iron Co. v. Cocreham¹ the Louisiana Supreme Court had under consideration the application of the Louisiana sales and use tax to plaintiff contractor during the period between December 1, 1955, and December 31, 1960. The court found that during the taxable period the taxpayer, an Illinois corporation authorized to do business and doing business in Louisiana, was engaged in the business of constructing specialized steel plate structures, such as storage tanks, generally for municipalities and corporations. The structures built by the taxpayer consisted primarily of fabricated steel plates assembled by the taxpayer's employees on prepared foundations at the job site. The taxpayer purchased unfinished steel plates from out-of-state suppliers and carried them to out-of-state shops where the steel plates were fabricated with labor and overhead expenses paid by the taxpayer. After fabrication the steel plates were usually transported at the taxpayer's expense from its out-of-state shops by common carrier to Louisiana job sites. The taxpayer had paid use taxes on the purchase price paid to its out-of-state vendors for the unfinished steel plates. The collector claimed that the transportation expense paid to transport the fabricated steel plates to the Louisiana job site was includable in the tax base. The taxpayer disagreed, but paid the tax under protest in 1964 and timely filed suit for refund. The collector reconvened in August 1967, claiming additional taxes on the grounds that the expenses of labor and shop overhead in fabricating the steel plates were also includable in the tax base. He claimed in addition a ten percent attorney's fee on the total amount involved in litigation.

The supreme court concluded that both labor and shop overhead and freight (transportation charges) were includ-
able in the tax base, but that to that extent the statute was unconstitutional. The true significance of the case lies not in the court's conclusion that Chicago Bridge and Iron was not liable for the additional use tax, but in its statement that had the labor and shop overhead and freight been incurred by an in-state manufacturer-user no tax would have been due. Under Halliburton Oil Well Cementing Co. v. Reily, the out-of-state manufacturer-user could not be so discriminated against.

Although the department had made a concerted effort to develop the theory of a value added tax on intrastate labor and shop overhead in the decade following Halliburton, the court found from the sales tax law, the regulations, the Halliburton stipulation and the evidence that the legislature had not placed a use tax, or value added tax, upon the cost of intrastate labor and shop overhead. In reaching its conclusion concerning the freight, the court alluded to the decision of the first circuit in Mouton v. Klatex, and while not specifically overruling the decision found it neither controlling nor persuasive.

Given the history of the statute, the position expressly and impliedly taken by the department in the years preceding Halliburton, and the reasoning of the United States Supreme Court in Halliburton, the decision appears eminently correct and leaves to the legislature rather than the department the question of whether a value added tax is to be a part of the state's taxing scheme. It is unfortunate that the court chose not to settle the conflict between the two panels of the first circuit concerning attorney's fees and pretermitted a decision on the merits of Chicago Bridge & Iron's exception of prescription to the collector's reconventional demand, but these shortcomings, if shortcomings they be, are more than offset by the thorough and scholarly treatment afforded the main issues in the suit.

In Traigle v. Parish of Calcasieu and Parish of Calcasieu v. Traigle the courts considered liability for sales taxes,
penalties, interest and attorney's fees arising out of the construction of an aluminum plant under the provisions of the Louisiana Industrial Inducement Act.\(^8\) Relying on an opinion of the district attorney for Calcasieu Parish that sales taxes were not due, neither the contractor (lessee) nor the parish of Calcasieu (lessor) had paid sales taxes on materials purchased for use in the construction of the plant in question.

In the first case, the Third Circuit Court of Appeal found that under the sales tax law the parish was clearly liable for the taxes, that the contractor had assumed the liability for such taxes under the specific terms of its lease agreement, and that interest, penalties and attorney's fees were due.

The court indicated that despite Collector of Revenue v. J. L. Richardson\(^9\) it did not believe good faith was a defense against penalties, citing Claiborne Sales Co. v. Collector of Revenue\(^10\) and St. John the Baptist Parish School Board v. Marbury-Pattillo Construction Co.,\(^11\) but concluded that even if Richardson was good law, the contractor was not in good faith. The court refused to find estoppel on the basis of the legal advice given to the parish, citing Claiborne Sales, in which the supreme court had held that estoppel did not even apply to contrary advice given by an agent of the collector.

The court did find that the increase in interest rate from six to twelve percent occasioned by the adoption of Act 663 of 1970\(^12\) was prospective only and applied only to taxes becoming due after the effective date of the act. Although it cited no authority, this conclusion is clearly supported by earlier jurisprudence, particularly Long Leaf Lumber, Inc. v. Svolos.\(^13\)

On rehearing the court allowed the claim against the parish and adhered to its opinion relative to interest and penalties, reserving to the parish the right to apply for a rehearing.\(^14\) While the parish met the general definition of dealer contained in the sales tax law, Louisiana law seems to be well settled that a contractor is the consumer of materials purchased for use in a contract to improve immovable property.\(^15\)

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\(^9\) 247 So. 2d 151 (La. App. 1st Cir. 1971).
\(^10\) 233 La. 1061, 90 So. 2d 345 (1957).
\(^11\) 259 La. 1133, 254 So. 2d 607 (1971).
\(^13\) 258 So. 2d 121 (La. App. 2d Cir. 1972).
\(^14\) Traigle v. Parish of Calcasieu, 302 So. 2d 921 (La. App. 3d Cir. 1974).
\(^15\) St. John the Baptist Parish School Bd. v. Marbury-Pattillo Construction Co., 259 La. 1133, 254 So. 2d 607 (1971); Claiborne Sales Co. v. Collector of
Hence, the position taken in the dissent that under these circumstances the parish was not liable appears to be the better legal position.

The case before the first circuit involved a portion of the taxes paid under protest by the parish and others. The plaintiffs filed suit to recover within the prescribed time and the collector reconvened for the ten percent statutory attorney's fee provided by Louisiana R.S. 47:1512. In addition to questioning the applicability of Act 663 of 1970, increasing the penalty interest rate, the plaintiffs raised questions concerning compromise, imputation of payment, imposition of penalties when failure to pay was in good faith, and imposition of attorney's fees when taxes are paid under protest. The court found no compromise or remission or improper imputation under the evidence. In view of the very limited compromise authority granted the collector by Louisiana R.S. 47:1578, it is at least questionable that any evidence could have justified a conclusion that the state's claim had been compromised or remitted.

The court found the attorney's fees provided by Louisiana R.S. 47:1512 were penalties not favored in the law or to be imposed except in cases that are free and clear from any doubt. Having reached this conclusion, it was fairly easy for the court to construe Louisiana R.S. 47:1512 in pari materia with the payment under protest provision,\(^\text{16}\) concluding that attorney's fees are not compensable when the taxpayer pays taxes under protest and files suit for recovery. This conclusion appears to be not only equitable but also sound. It is unfortunate that the Louisiana Supreme Court did not settle the conflict between this reasoning and the reasoning of another panel in the first circuit\(^\text{17}\) reaching the opposite conclusion in *Chicago Bridge & Iron Co. v. Cocreham*.\(^\text{18}\) Without discussing the availability vel non of good faith as a defense in sales tax penalty cases, the first circuit concluded, as had the third, that there was no showing of good faith in the case before it.

The question of attorney's fees was also one of several

\(^{16}\) LA. R.S. 47:1576 (1950).

\(^{17}\) Chicago Bridge & Iron Co. v. Cocreham, 303 So. 2d 750 (La. App. 1st Cir. 1974).

\(^{18}\) 317 So. 2d 605 (La. 1975). See text at notes 1-5, *supra*. 
issues in the case of *Schwegmann Bros. Giant Supermarkets v. Mouton.* In that matter the district court had before it two cases, one involving an appeal from a judgment of the Board of Tax Appeals affirming certain assessments for taxes made by the collector and the other involving a rule for taxes, interest and attorney's fees filed by the collector. The cases were consolidated in the trial court and it rendered judgment in favor of the collector for the taxes, interest and attorney's fees claimed while allowing Schwegmann vendor's compensation for the additional taxes owed.

The evidence showed that the taxpayer's attorney had represented the department in the Board of Tax Appeals proceeding, appellate number 6398, as a full time attorney for the department, but subsequently left the department and was employed as private counsel. The court declined to award attorney's fees on the basis of the dictum by the supreme court in *Daspit v. Sinclair Refining Co.*, finding that the term "private counsel" does not encompass salaried attorneys. It did, however, allow the attorney's fees in appellate number 6399, saying that "there is no indication that the present private counsel performed any work in case number 6399 of our docket while he was employed by the collector." It would have been preferable to have adopted the public policy argument adverted to in the *Daspit* dictum and to have refused any attorney's fees whatsoever under the circumstances. On the main issue involved, the court sustained the collector's assessment of additional taxes on the basis of asserted excess collection of the two percent tax, primarily on the ground that Schwegmann had failed to produce evidence to justify overturning the assessments made by the collector. The facts recited in the opinion would appear to have supported the assessment on any of the three bases argued by the collector: an analysis of the bracket schedule used the experience of similar businesses and the test audit made by the department. The court further held, quite correctly, that vendor's compensation under Louisiana R.S. 47:306A is allowed only when the amount due is not delinquent at the time of payment, and reversed that portion of the judgment below allow-

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20. 198 La. 9, 3 So. 2d 259 (1941).
21. 309 So. 2d at 694.
22. It should be pointed out that this opinion was not shared by Judge Lemmon who would have awarded the attorney's fees in both cases.
ing such compensation. In addition, the court joined the first circuit in deciding that Act 663 of 1970 increasing the interest rate was not retroactive and therefore not applicable to taxes assessed prior to its passage.

In *Putch v. Collector of Revenue*, the taxpayers, owners of coin-operated amusement devices, paid under protest certain sales taxes claimed by the state and filed suit to recover in Caddo Parish, a forum apparently more to the taxpayers' liking than the tax collector's. The Second Circuit Court of Appeal reversed the judgment of the district court overruling the collector's exception of improper venue and transferred the case to the Parish of East Baton Rouge, the collector's official domicile.

That the collector may have won the battle but lost the war, at least in this particular area, seems clear from a decision of the First Circuit Court of Appeal rendered several months later in *Barbin v. Department of Revenue*, holding that the proceeds from the operation of coin-operated amusement devices do not come within the purview of the Louisiana sales and use taxes. Although the court cited no authority, the language of the statute and the department's position for the past quarter century clearly support the conclusion.

**INHERITANCE TAXES**

In *Succession of Bright*, the Fourth Circuit Court of Appeal construed a provision in a will that all debts and taxes were to be paid out of the residuary estate as requiring the division of the residue before the imposition of taxes. Since *Bright* involved an individual residuary legatee and a tax exempt charitable legatee, the effect was to increase the charitable deduction for federal estate tax purposes under Section 2055 of the Internal Revenue Code.

*Succession of Christina* concluded that the inheritance tax must be based on the revised inventory figure agreed to

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24. 299 So. 2d 809 (La. App. 2d Cir. 1974).
26. 307 So. 2d 140 (La. App. 1st Cir. 1974).
28. 300 So. 2d 614 (La. App. 4th Cir. 1974).
30. 299 So. 2d 422 (La. App. 4th Cir. 1974).
for federal estate tax purposes rather than on the original
inventory approved by the attorney for the state tax collector. There the tax had not been paid prior to the revision and
the court indicated that perhaps the state would have been
estopped had payment been made. That conclusion appears to
run counter to the general rule that estoppel does not apply
to the state in tax matters.31 To the extent that any estate
transfer taxes were due the present law makes it clear that
the additional payment would also be due.32 The court also
found the interest provided by Louisiana R.S. 47:2420 to be
true interest rather than penalty. Accordingly, the reduction
effected by Act 513 of 197233 was prospective only and not
available since the testator had died prior to the adoption of
the act.

INCOME TAXES

The constitutional term "net income" does not prohibit
Louisiana from collecting income tax on sums paid as federal
income tax. So held the Louisiana Supreme Court in Stream
v. Collector of Revenue.34 The able dissent of Justice Summers
to the contrary notwithstanding, the decision in Stream was
foreshadowed by earlier decisions of the appellate courts indi-
cating that deductions for federal income taxes are a matter
of legislative grace.35 The observation contained in Justice
Barham's dissent that the decision effectively permits the
legislature by simple majority to impose a tax which would
otherwise require a two-thirds vote was apparently antici-
pated by the constitutional convention and the 1974 constitu-
tion now requires a two-thirds vote to change exemptions.36
Furthermore, the deductibility of federal income taxes is ex-
pressly provided for in section 4 of Article 7 of the 1974 Con-
stitution.

SEVERANCE TAXES

In the improvement of the Lafayette Regional Airport,
some two and three-quarter million tons of sand and gravel

31. Claiborne Sales Co. v. Collector of Revenue, 233 La. 1061, 90 So. 2d 345
   (1957).
34. 296 So. 2d 274 (La. 1974); La. Const. art. X, § 1 (1921).
35. W. Horace Williams Co. v. Cocreham, 214 La. 520, 38 So. 2d 157 (1948);
   Truckline Gas Co. v. Collector of Revenue, 182 So. 2d 674 (La. App. 1st Cir.
   1965).
36. LA. CONST. art. VII, § 2.
were moved by hydraulic dredging from parish-owned property abutting the airport to the airport proper. Despite having earlier lost an effort to collect severance taxes from the City of Lake Charles in a somewhat similar situation,\(^37\) the collector sought to collect one hundred thirty-three thousand dollars in severance taxes plus penalty, interest and attorney's fees in *Traigle v. Lafayette Airport Commission*.\(^38\) The court properly found that the severance tax was not a property tax but rather an excise tax on the privilege of severing and that the imposition of the tax upon a public body violated no constitutional provisions.

The court found that under the facts of the case there was no severance but merely a relocation not subject to tax. The dissent felt that in light of the distance moved and the different purpose served by the sand and gravel, there was in fact a severance.\(^39\) Although the Lake Charles case can be readily distinguished on its facts, the result in the *Lafayette* case was the same: the public body paid no severance tax.

**Corporación Franchise Tax**

Under the Louisiana corporation franchise tax law,\(^40\) certain stocks and bonds are allocated "to the state in which they have their business situs or, in the absence of a business situs, to the state in which is located the commercial domicile of the taxpayer."\(^41\) In *North Baton Rouge Development Co. v. Collector of Revenue*,\(^42\) a development company, a Louisiana corporation, was a wholly owned subsidiary of the Louisiana and Arkansas Railway Company, a Delaware corporation with its principal office in Missouri. The railway company in turn was a subsidiary of another corporation. The development company's only office was in East Baton Rouge Parish, three of its four officers were located in Louisiana and the charter provided that the annual stockholders meeting was to be held in Shreveport, Louisiana. During the years in question, certain stocks were purchased in the name of North Baton Rouge Development Company. The decisions to pur-

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38. 309 So. 2d 904 (La. App. 3d Cir. 1975).
39. Id. at 909.
42. 304 So. 2d 293, 298 (La. 1974).
chase the stocks were made by management of the parent company and financing was obtained by or through it. The certificates were kept in Missouri. North Baton Rouge Development had no office in Missouri or in any other state, did no business in any other state, and filed no income or franchise tax returns in any state other than Louisiana. Where should the stocks have been allocated?

The stocks did not acquire a business situs. "If North Baton Rouge Development Company can be said to have a commercial domicile in any place, it is in Louisiana and Louisiana alone," 43 said the court. Considering the statute involved, the decision appears to be the only one which logically could have been reached. The difficulty, of course, is that the theory of commercial domicile was developed to cover cases in which corporations have a legal domicile in one state but management functions and the business is conducted in another. 44 Realistically, the stocks here had no business situs and the corporation really had no commercial domicile—only a legal domicile where its very limited activities took place. The difficulty encountered in this case could have been avoided had the statute allocated stocks to the commercial domicile of the corporation or in the absence of a commercial domicile, to its legal domicile.

PROPERTY TAXES

Of the five cases involving tax titles, the tax sales were upheld in three 45 and declared null in two 46 on the basis of the well established principles that certain defects in tax sales may be cured by constitutional peremption, that the burden of invalidating a tax sale is on the party attacking the sale, and that an insufficient property description renders a tax sale null and void and not subject to cure by constitutional peremption.

In Louisiana & Arkansas R.R. v. Goslin, 47 the railroad

43. Id. at 298.
44. Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936).
47. 300 So. 2d 483 (La. 1974). The case had been before the court earlier at 258 La. 530, 246 So. 2d 852 (1971).
attacked the validity of a two-mill Red River Waterway District tax on the ground that it was unconstitutional, illegal and discriminatory. The evidence showed that the district included only seven of the ten parishes bordering the river and that the seven parishes within the district assessed and collected taxes on varying and unequal percentages of the actual cash value of the property in each of the parishes. All of these, incidentally, were less than the values upon which the railroad's assessment and tax levy were based. The court found little difficulty in deciding that the omission of the three parishes did not constitute discriminatory treatment of the other seven, concluding that the evidence proved practical and reasonable grounds for excluding the three parishes since none would receive any substantial navigational benefits from the project. On the surface at least, this conclusion seems to be in accord with well established constitutional principles.

The court went on to find that the railroad was in the public utility class, that taxes were uniform on that class throughout the territorial limits of the taxing authority within the requirements of section 1 of Article 10 of the Louisiana Constitution of 1921, and that there had been no showing that the railroads were caused to pay an unfairly disproportionate share of the tax burden. The court brushed aside the variations in the practices affecting non-utility properties throughout the district as irrelevant to the case at hand. In answer to the railroad's contention that it was being arbitrarily taxed to support local improvements from which it derived no benefit, the court found that there would be a substantial benefit to the railroad from the economic development of the area and that no special benefit to each property within the district is required. One wonders why neither the trial court nor the supreme court discussed the question of general benefit to the three untaxed parishes from the economic development of the area in their discussions on this point.

The court's conclusion that a general ad valorem tax on a railroad taxpayer along with other taxpayers does not generally constitute an unlawful burden on interstate commerce is well supported by the jurisprudence. Although the opinion


49. Ott v. Mississippi Valley Barge Line Co., and cases therein cited, 336
by Justice Tate, as usual, is well constructed and technically sound, the decision appears to the writer to represent a retreat, for better or worse, from the philosophy underlying the court's decision in *Bussie v. Long*.
