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# Ad Valorem Taxation -- Procedural Developments in the Discovery of Unlisted Property

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## NOTES

### Ad Valorem Taxation—Procedural Developments in the Discovery of Unlisted Property

Although all North Carolina property owners are required to list their property for *ad valorem* taxation each year<sup>1</sup> and substantial criminal<sup>2</sup> and civil penalties<sup>3</sup> are imposed for failure to do so, taxpayers fail to list assets worth millions of dollars each year.<sup>4</sup> To hold property to its fair share of the tax burden, the Machinery Act of North Carolina<sup>5</sup> provides for the listing, assessment, and imposition of penalties on property that the owner fails to list. The discovery statute<sup>6</sup> places an affirmative duty on tax officials to discover property, to list it, to appraise and assess it, and to take the action necessary to prevent failures to list.<sup>7</sup>

In separate decisions filed the same day,<sup>8</sup> the North Carolina Su-

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<sup>1</sup>N.C. GEN. STAT. § 105-285(a) (1972).

<sup>2</sup>*Id.* § 105-308 (1972) provides:

In addition to all other penalties prescribed by law, any person whose duty it is to list any property who willfully fails or refuses to list the same within the time prescribed by law shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars (\$500.00) or imprisonment not to exceed six months. The failure to list shall be prima facie evidence that the failure was willful.

Any person who removes or conceals property for the purpose of evading taxation or who aids or abets the removal or concealment of property for the purpose of evading taxation shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars (\$500.00) or imprisonment not to exceed six months.

<sup>3</sup>See note 15 and accompanying text *infra*.

<sup>4</sup>The response of 55 North Carolina counties to an informal survey made in 1971 revealed that the appraised evaluation of unlisted property discovered by them during 1970 was \$201,927,855. The surveyor cautioned that he figure should not be relied on because it was unreasonable to believe that all the counties which responded understood the request and responded in the same way. However, he noted, "the pattern disclosed is plain." H. LEWIS, *DISCOVERED PROPERTY: AN IMPORTANT SOURCE OF TAX REVENUE*, (Institute of Government, Property Tax Bulletin No. 36, 1972).

<sup>5</sup>N.C. GEN. STAT. §§ 105-271 to -395 (1972) (*enacted as* Ch. 806, [1971] N.C. Sess. L. —, *as amended* Ch. 931, [1971] N.C. Sess. L. —; Ch. 932, [1971] N.C. Sess. L. —; Ch. 1121, [1971] N.C. Sess. L. —; Ch. 1162, [1971] N.C. Sess. L. —). This note is limited to a narrow topic within the total statutory scheme. A full understanding of the *ad valorem* tax structure requires a recognition that the Machinery Act is an integrated body of statutes creating a tax cycle completed each year without overlap, providing for the annual revenue requirements of local government. For an excellent outline of the *ad valorem* tax structure, see H. LEWIS, *THE PROPERTY TAX, AN INTRODUCTION* (The Institute of Government, University of North Carolina, 1972).

<sup>6</sup>N.C. GEN. STAT. § 105-312 (1972).

<sup>7</sup>*Id.* § 105-312(b) (1972).

<sup>8</sup>May 10, 1972.

preme Court reviewed two discovery proceedings by county tax officials made under the statute.<sup>9</sup> *In re Strong Tire Service, Inc.*<sup>10</sup> held that the difference between the reported and actual values of a taxpayer's inventories constituted discovered property. *In re McLean Trucking Co.*<sup>11</sup> focused on the procedural elements of a discovery, holding that a discovery is made when tax officials become fully aware of facts sufficient to require the property to be listed. It further held that tax officials lost their authority to list and tax discovered property in a particular year when they were fully aware of facts to justify listing the property before the county board of equalization and review had adjourned but waited until that body had adjourned before initiating discovery proceedings.

The broadening of tax officials' duty to discover property under *Strong* and the limitations on the tax officials' discovery power imposed by *McLean* will require *ad valorem* tax administrators to review their practices. The purpose of this note is to examine the reasoning of the court in *McLean* and to determine the impact of the decision on the administration of *ad valorem* tax in North Carolina in light of *Strong*.

The statute establishes the procedure a local government unit must follow to effect a discovery.<sup>12</sup> Typically, discovered property is listed under the direction of the tax supervisor who, if possible, may make a tentative appraisal.<sup>13</sup> A rebuttable statutory presumption arises that in addition to the current year, the property should have been listed by the taxpayer for the preceding five years.<sup>14</sup> The property is taxed and substantial penalties are imposed for each of the years in which the owner failed to list.<sup>15</sup> Both listing and appraisal are subject to approval by the county board of equalization and review and if that body has adjourned for the year, by the board of county commissioners.<sup>16</sup>

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<sup>9</sup>Ch. 806, § 1109, [1939] N.C. Sess. L. 367, as amended N.C. GEN. STAT. § 105-312 (1972).

<sup>10</sup>281 N.C. 293, 188 S.E.2d 306 (1972).

<sup>11</sup>281 N.C. 242, 188 S.E.2d 452 (1972).

<sup>12</sup>N.C. GEN. STAT. § 105-312(d) (1972). For purposes of this note, the discussion of discovery will be limited to personal property. The discovery of real property so far as it differs from personal property is provided for in subsection (c).

<sup>13</sup>*Id.* § 105-312(d) (1972).

<sup>14</sup>*Id.* § 105-312(f) (1972).

<sup>15</sup>*Id.* § 105-312(g)-(h) (1972). For the present year, the penalty is 10% of the amount of the tax. For the prior year, the penalty is 20%. For the year five years prior to the present year it becomes 60%. The entire bill is considered due for the present year. *Id.* § 105-312(i) (1972). If payment is late, interest is charged. *Id.* § 105-360 (1972).

<sup>16</sup>*Id.* § 105-312(d) (1972). The county commissioners constitute the membership of the county board of equalization and review; however, the board is a separate government agency. *Id.* § 105-322(a) (1972).

The board of equalization and review meets during each tax year for a period which must begin between the first Monday in April and the first Monday in May. It is supposed to complete its duties within three weeks; however, it may extend its term as required to perform its duties but never later than July 1.<sup>17</sup>

The board of equalization and review must review the listings and valuations assigned by the list takers and the tax supervisor, exercise its authority to change the listings and valuations, and make corrections to comply with the provisions of the Machinery Act. In addition, the board has authority to make discoveries and to hear taxpayers who appeal the listings and valuations determined by the list takers and the tax supervisor.<sup>18</sup> Prior to its adjournment, the board certifies and fixes the tax rolls, thereby establishing the identity and value of property taxable for that year,<sup>19</sup> subject only to limited changes by the board of county commissioners, one of which is the addition of discovered property to the rolls.<sup>20</sup>

Cities and towns as taxing units also have power to discover and list,<sup>21</sup> but they must accept county appraisals.<sup>22</sup> Nevertheless, a city or town can appraise discovered property if the county fails to do so.<sup>23</sup>

The discovery statute enacted by the 1971 General Assembly<sup>24</sup> represents a substantial revision of the comparable provision in the Machinery Act of 1939.<sup>25</sup> A commission created by the 1969 General Assembly to recommend changes to the Machinery Act<sup>26</sup> reported that it intended not to change the statute substantively but to redraft it in the interest of clarity. The commission noted a feeling among local tax officials and the State Board of Assessment that the discovery statute should expressly apply to property returned with an understatement in value, number, and amount.<sup>27</sup> Although tax officials felt that the pre-

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<sup>17</sup>*Id.* § 105-322(e) (1972).

<sup>18</sup>*Id.* § 105-322(g) (1972).

<sup>19</sup>*Id.* § 105-323 (1972).

<sup>20</sup>*Id.* § 105-325(a)(5) (1972).

<sup>21</sup>*Id.* § 105-312(l) (1972).

<sup>22</sup>*Id.* § 105-327 (1972). A city, however, may establish its own valuations if located in more than one county. *Id.* § 105-328 (1972).

<sup>23</sup>*Id.* § 105-312(l) (1972).

<sup>24</sup>*See* note 5 *supra*.

<sup>25</sup>Ch. 310, [1939] N.C. Sess. L. 600.

<sup>26</sup>The Commission for the Study of the Local and Ad Valorem Tax Structure of the State of North Carolina. Res. 92, [1969] N.C. Sess. L. 1600.

<sup>27</sup>REPORT OF THE COMMISSION FOR THE STUDY OF LOCAL AND AD VALOREM TAX STRUCTURE OF THE STATE OF NORTH CAROLINA 300-02 (1970).

1971 statute tacitly applied to such property, the 1971 version expressly included substantially understated property within the definition of discovered property.

Although the former discovery statute was enacted more than thirty years ago, *Strong* was the first case raising the issue of whether it applied to understated property. In *Strong* the taxpayer listed its business inventories for *ad valorem* taxation on business abstract forms provided by the county. A portion of the form called for the listing of "inventories" by total value rather than by itemization. The abstract was completed and signed by the taxpayer's agent who swore that the listing was a "full, true and complete list"<sup>28</sup> of the property the taxpayer owned. After investigating the taxpayer's business records and state tax returns, the county tax supervisor determined that the taxpayer had significantly under-reported the value of its inventories from 1963 through 1968.<sup>29</sup> The tax supervisor treated the difference between the value of the inventories on the taxpayer's books and the reported value for each year as discovered property. After giving Strong opportunity to appear, the board of county commissioners approved the action and imposed taxes and penalties.<sup>30</sup>

On appeal, the North Carolina Supreme Court sustained the position of the county commissioners, holding that "[w]hen inventories are identified and listed only by value, gross understatement of value is evidence that *all* of the taxpayer's inventories were not listed."<sup>31</sup> The court found that the evidence was sufficient to demonstrate that the taxpayer had not listed a portion of its inventories and that the board of county commissioners properly applied the statute. The court rejected the argument of the taxpayer (accepted by the superior court) that the taxpayer had listed its inventories even though understated in value and that once property is listed, it cannot be deemed discovered property.<sup>32</sup> The taxpayer had argued that the change in its listing was an attempt to revalue the property after its valuation had been fixed for that year by the board of equalization and review.<sup>33</sup> The court distin-

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<sup>28</sup>281 N.C. at 295, 188 S.E.2d at 308.

<sup>29</sup>"The percentages of the taxpayer's actual inventories reported to the county was [*sic*] 45.87% for 1963; 41.26% for 1964; 35.32% for 1965; 31.71% for 1966; 27.13% for 1967; and 21.12% for 1968." *Id.* at 295, 188 S.E.2d at 308.

<sup>30</sup>The board of equalization and review had adjourned, and the board of county commissioners acted under Ch. 310, § 1108, [1939] N.C. SESS. L. 637, *as amended* N.C. GEN. STAT. § 105-325 (1972).

<sup>31</sup>281 N.C. at 299, 188 S.E.2d at 310 (emphasis by the Court).

<sup>32</sup>*Id.*

<sup>33</sup>*Id.* at 299, 188 S.E.2d at 309.

guished *Spiers v. Davenport*<sup>34</sup> and *Wolfenden v. Board of County Commissioners*,<sup>35</sup> both urged by the taxpayer. In those cases, the court had reversed actions by the board of county commissioners increasing the valuation of property after the board of equalization and review had adjourned and the taxpayer had paid his taxes. The *Strong* court distinguished the cases on the ground that *Spiers* and *Wolfenden* involved "specific listed property,"<sup>36</sup> that is, property identified by item, while the taxpayer in *Strong* listed his property "in bulk,"<sup>37</sup> indicating that the court found that the question of listing had not been raised in either case. In both these cases, the taxpayer specifically listed the property by item; thus, both were obvious attempts to reassess listed and previously appraised property. In *Strong*, the issue was whether the taxpayer's property had been listed at all.

This interpretation of the former discovery statute was eagerly awaited by tax authorities. Although there had been no judicial determination of the question, two opinions of the Attorney General<sup>38</sup> had expressed the view that the pre-1971 statute did not encompass undervalued property. Under *Strong* the discovery statutes reach inventories reported at a substantial understatement of value. This development emphasized the responsibility of tax officials to seek understated property and will necessitate extensive inquiry into business listings and determination of valuation problems.

In *McLean* the taxpayer was an interstate common carrier of freight, incorporated in North Carolina, with one of its sixty-six terminals located in Winston-Salem, the site of McLean's principal office in the state. In 1969 McLean listed in Winston Township, Forsyth County, all the tractors and trailers that were assigned to the company's Winston-Salem terminal (Winston Township is coterminous with the corporate limits of Winston-Salem). It also listed in Broadbay Township, Forsyth County, certain tractors and trailers not assigned to the Winston-Salem terminal which operated on an unassigned basis throughout the McLean system.<sup>39</sup> Prior to April 22, 1969, the Forsyth

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<sup>34</sup>263 N.C. 56, 138 S.E.2d 762 (1964).

<sup>35</sup>152 N.C. 83, 67 S.E. 319 (1910).

<sup>36</sup>281 N.C. at 297, 188 S.E.2d at 309.

<sup>37</sup>*Id.* at 298, 188 S.E.2d at 309.

<sup>38</sup>Letter from Harry McMullen, Attorney General of North Carolina, to Thomas C. Hoyle, December 22, 1950; 40 OP. N.C. ATT'Y GEN. 775 (1969).

<sup>39</sup>McLean's unassigned fleet of tractors and trailers listed in Broadbay Township included tractors and trailers which were operated in North Carolina as well as other states. The listing did not include "Group II" tractors which did not operate in North Carolina except in rare cases. The

county tax supervisor<sup>40</sup> questioned whether the tax situs of these unassigned vehicles lay in Broadbay Township, where McLean maintained a storage lot for the vehicles and where the property had been listed in previous years,<sup>41</sup> or in Winston Township, where the company's principal office was located.<sup>42</sup> Decision of this issue would determine whether the vehicles would be subject to city taxes as well as county taxes. The attorneys for Forsyth County and the City of Winston-Salem obtained information from the taxpayer's counsel concerning the use and prior history of the lot and made visits to the lot. After the county board of equalization and review had adjourned and the taxpayer had paid his county taxes on the unassigned vehicles, the county and city attorneys advised the tax supervisor that in their opinion the tax situs of the unassigned vehicles was Winston Township and Winston-Salem. After notifying the taxpayer, the county tax supervisor listed the unassigned vehicles in Winston Township and Winston-Salem as discovered property, and the board of county commissioners approved his action.<sup>43</sup>

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valuation of the vehicles was \$4,318,560. 281 N.C. at 244-45, 188 S.E.2d at 453-54.

<sup>40</sup>The city of Winston-Salem had elected to use the listings of property determined by the county rather than establish its own listing system. Ch. 310, § 1201, [1939] N.C. Sess. L. 641, *as amended* N.C. GEN. STAT. § 105-326(a) (1972). Therefore, the county tax supervisor was responsible for the proper listing of property both for the county and the city.

<sup>41</sup>In 1950, in response to an inquiry from McLean's attorney, the former county attorney expressed the opinion that the tax situs of the vehicles was in Broadbay Township, an opinion that, under the statute's requirement that personal property be relisted each year, was necessarily subject to an annual reevaluation. Nevertheless, that opinion was relied upon by all parties for nineteen years, that is until September 8, 1969, when the county attorney wrote McLean's attorney that "since the date of the former opinion, the facts regarding this situation are slightly different, and the interpretations of the law have been clarified somewhat." 281 N.C. at 248, 188 S.E.2d at 455-56.

<sup>42</sup>Ch. 310, § 800, [1939] N.C. Sess. L. 621, *as amended*, Ch. 836 [1947] N.C. Sess. L. 1142; Ch. 1102, [1951] N.C. Sess. L. 1134; Ch. 1012, §§ 2,3, [1955] N.C. Sess. L. 987-88; Ch. 940, [1969] N.C. Sess. L. 1086 (N.C. GEN. STAT. § 105-302 (1965)) provided:

(a) [A]ll tangible personal property . . . shall be listed in the township in which the owner thereof has his residence . . . . The residence of a corporation, partnership or unincorporated association, domestic or foreign, shall be the place of its principal office in this State . . . .

(d) [T]angible personal property shall be listed in the township in which such property is situated, rather than in the township in which the owner resides, if the owner or person having control thereof hires or occupies a . . . place for storage . . . .

<sup>43</sup>Ch. 310, § 1108, [1939] N.C. Sess. L. 637, *as amended* N.C. GEN. STAT. § 105-325 (1972) provided in part:

After the Board of Equalization has finished its work and the changes effected by it have been given effect on the tax records, the Board of County Commissioners may not authorize any changes to be made on said records except as follows:

(5) To add any discovered property under the provisions of this Act.

McLean appealed to the State Board of Assessment, which affirmed the action of the county commissioners. McLean then petitioned for judicial review, and the superior court of Forsyth County affirmed the findings of the State Board of Assessment.

The North Carolina Supreme Court reversed. Accepting the administrative decision that the proper tax situs of the vehicles was Winston Township,<sup>44</sup> the court nevertheless held that the county commissioners' jurisdiction to add discovered property to the tax records applied only to property discovered after the board of equalization and review had adjourned for that year. Terming the natural and ordinary meaning of "discovered" to be "newly found and not previously known"<sup>45</sup> and reading the record to indicate that the tax officials of the city and the county were fully aware of the facts governing the tax situs before adjournment of the county board of equalization and review,<sup>46</sup> the court held that the discovery could not be deemed to have taken place after that board had adjourned, and thus the listing was void.<sup>47</sup>

For purposes of analysis, a property tax discovery under the statute may be divided into two distinct elements: factual inquiry and legal determinations. When tax officials, while performing their duty to look out for unlisted property, suspect that certain property has not been listed, they inquire into facts necessary to determine whether the property is in fact listed,<sup>48</sup> whether it is taxable,<sup>49</sup> and whether it has a situs

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<sup>44</sup>Relying on *In re Pilot Freight Carriers, Inc.*, 263 N.C. 345, 139 S.E.2d 633 (1965), that "situated" means more or less permanently located, the court concluded the vehicles were not "situated" on the lot because, "[a]s of 1 January 1969, and for many months prior thereto, none of these vehicles was stored upon this lot or elsewhere in Broadbay Township . . ." 281 N.C. at 250, 188 S.E.2d at 457.

For a discussion of intrastate situs problems of personal property, see H. LEWIS, *INTRASTATE TAX SITUS OF TANGIBLE PERSONAL PROPERTY* (The Institute of Government, University of North Carolina, 1963).

<sup>45</sup>281 N.C. at 252, 188 S.E.2d at 458.

<sup>46</sup>The court also concluded that the former discovery statute also limited the power of the city as well as the board of county commissioners to list the discovered property after the board of equalization and review had adjourned. *Id.*

<sup>47</sup>The taxpayer had also contested the assessment of the vehicles at 100% of their value. The taxpayer argued that since they were engaged in interstate commerce, their tax value should be apportioned among the states in which the vehicles operated, contending that an assessment at 100% of the value was a violation of the commerce clause. However, since the taxpayer had not contested the county assessment based on 100% of the vehicles' value and since the city listing was void, the question was not reached in this case. The issue was raised when the taxpayer listed its unassigned vehicles in the city for 1970 taxes, and the North Carolina Supreme Court upheld the assessment at 100% valuation but remanded the case because the valuation of the vehicles was defectively formulated. *In re McLean Trucking Co.* 281 N.C. 375, 189 S.E.2d 194 (1972).

<sup>48</sup>See N.C. GEN. STAT. § 105-312(a)(2) (1972).

<sup>49</sup>*Id.* §§ 105-274 to -281 (1972).

within the jurisdiction of the taxing unit.<sup>50</sup> In addition, they must also determine the legal consequences of these facts under the appropriate statutes and constitutional provisions. Since tax officials often determine the legal consequences of facts as they are collected, the two elements are not always seen as separate. However, if a complex legal question is presented, it is possible for tax officials to know all the relevant facts before they or the taxing unit's attorney can determine their legal consequences, thus producing a distinct two-step process.

Once satisfied that they have made a discovery, the statute requires that tax officials list the discovered property in the taxpayer's name and send him notice of this right to a hearing,<sup>51</sup> an act which does not take place until both the necessary factual and legal conclusions have been reached. By requiring tax officials to take this action, the statute itself provides precise evidence of when a discovery is made. In contrast, the court's holding that a discovery is made when tax officials are fully aware of the facts not only assumes that factual inquiry and legal determinations are a single process but also requires a subjective inquiry into the state of mind of tax officials.

The court's error is evident if its test is applied to differing discovery situations. If a tax official finds an unlisted automobile,<sup>52</sup> the facts necessary to make a discovery as well as the legal conclusions are usually readily apparent, and the tax official can make the factual inquiry and legal determination at the same time. In such a situation, even tax officials may see the discovery as a single-step process, and the court's test will pose little difficulty in application. However, the court's test is inadequate in circumstances in which the discovery does not depend on an uncovering of facts but on a determination of their legal consequences. For example, property owned by a redevelopment commission is exempt from *ad valorem* taxation if the property is held and used for a public purpose.<sup>53</sup> If it were leased to private individuals, its exemption might be questioned, but despite their awareness of all the facts regarding the property, responsible tax officials would probably not list the property as discovered until a legal determination of its exemption had been made, usually by the taxing unit's attorney. By

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<sup>50</sup>*Id.* §§ 105-301, -304, -305 (1972).

<sup>51</sup>*Id.* § 105-312(d) (1972).

<sup>52</sup>Tax supervisors are provided with a list of motor vehicles registered in the supervisor's county. *Id.* § 105-314 (1972).

<sup>53</sup>Redevelopment Comm'n of High Point v. Guilford County, 274 N.C. 585, 164 S.E.2d 476 (1968).

treating a discovery as a one-step process, the court seems to have imputed to administrators the capacity to make instant determination of potentially complex questions of exemption and tax situs.

Factual inquiry alone can be highly complex, and cases may arise in which raw data are known but in which, as in *Strong*, business accounting records require audit, an analysis that may be beyond the capacity of the examining tax official. Information from state income and franchise tax returns provide such an audit, but these returns are unavailable for inspection until two or three months after the board of equalization and review has adjourned. Under these circumstances, *McLean* raises the serious problem of determining when tax officials are sufficiently aware of the facts to be held to have made a discovery. They may have fully investigated the taxpayer's business records; nevertheless, if they must wait until months after the board has adjourned to determine if there is an understatement, *McLean* may preclude a discovery.

Only one other court has faced the issue of when an *ad valorem* tax discovery occurs. In a statutory framework similar to North Carolina's,<sup>54</sup> the Massachusetts Supreme Judicial Court in *Noyles v. Hale*<sup>55</sup> was required to determine the time of discovery in circumstances analogous to the facts in *Strong*. In that case, the taxpayer was an executor who had listed the property of an estate by value rather than by item. He under-reported, and the board of assessors listed the difference between the actual and reported values as discovered property. The taxpayer appealed, alleging that the discovery had occurred when members of the board of assessors became aware of the understatement before the tax rolls were fixed. He argued that since the property was not entered on the tax rolls until after they had been fixed, the later listing by the board was void. Rejecting the taxpayer's contention, the court refused to apply the test later formulated in *McLean* and held that the discovery occurred when the board of assessors, as a body, listed the property, thereby focusing its attention on the corporate act of the board. Functionally, the corporate decision of the board in *Noyles* is equivalent to the listing and sending of notice under the North Carolina statute, for both constitute acts manifesting the time when the tax officials have determined both elements of a discovery. By limiting its definition of "discovered" to the dictionary meaning of the word, the

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<sup>54</sup>Ch. 320, § 78, [1868] Mass. Sess. L. 238.

<sup>55</sup>137 Mass. 266 (1884).

North Carolina court foreclosed an inquiry into the time at which a discovery takes place as reflected in the statute.

A municipality is a taxing authority separate from the county where it is situated<sup>56</sup> although it is bound by statute to adopt county valuations.<sup>57</sup> Under statutory authority, it may establish its own listing system or, as a convenience, it may secure its listings from the county.<sup>58</sup> Lying wholly within Winston Township, Winston-Salem had elected to accept the county's Winston Township listings. Although Winston-Salem relied on the county for its listings, no express provision of the Machinery Act requires it to relinquish its independent tax powers. However, the city's long standing use of the county listings resulted in a virtual acquiescence to the listing actions of the county.<sup>59</sup>

In understanding the imposition of the time limitation, it is crucial to determine whether the court approached the action of the county in the attempted discovery as if it were the sole taxing authority or as if it were the "agent" of the city exercising the city's discovery power. The court's treatment of *Smith v. Town of Dunn*<sup>60</sup> indicates that it questioned the discovery power of a city where it adopts county listings. In *Smith* the town board of Dunn, independently of any action by the county, discovered and added to the town's listings property which in the town's view had been "improperly" listed in another township of the county. The court held that the property, although "improperly" listed within the county, was unlisted as far as the town was concerned, and therefore the town correctly exercised its discovery power. While this decision might have been controlling in *McLean*, the court cited *Smith* only as general authority that unlisted property could be construed to include property improperly listed.<sup>61</sup> The court's limitation of the holding in *Smith* is explained if the court tacitly distinguished *Smith* on the

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<sup>56</sup>N.C. GEN. STAT. § 105-326 (1972).

<sup>57</sup>*Id.* § 105-327 (1972).

<sup>58</sup>*Id.* § 105-326(a) (1972).

<sup>59</sup>Not only had Winston-Salem and Forsyth County integrated their listing systems, they had also combined their tax collection departments. Pursuant to Ch. 230, [1941] N.C. Priv. L. 229, Winston-Salem and Forsyth County entered into a contract February 28, 1942 in which "all County taxes shall be collected by the County-City Tax Collector and all property taxes, poll taxes, and late listing penalties due to the City of Winston-Salem shall be likewise collected by the County-City Tax Collector at his office to be maintained in the Forsyth County Court House." In addition the operation of the joint office was placed under the supervision of the Forsyth County Commissioners. Joint Tax Collection Contract Between the City of Winston-Salem and Forsyth County, February 28, 1942.

<sup>60</sup>160 N.C. 174, 76 S.E. 242 (1912).

<sup>61</sup>281 N.C. at 252, 188 S.E.2d at 458.

ground that there the city, possessing its own listing system, had initiated a discovery on its own. Implicit in this distinction is the assumption by the court that Winston-Salem had given up its own listing and discovery powers when it acquiesced in the county listings. Apparently the court was not alone in making this assumption, for a principal contention of both the city and county before the court was that if the county commissioners could not correct the listings, a city taxpayer could list his property wherever he pleased in Forsyth County, and if the county failed to correct the listing prior to the adjournment of the board of equalization and review, Winston-Salem would be powerless to tax the property.<sup>62</sup>

Despite its treatment of *Smith*, the court recognized, at least in principle, the independent discovery power of Winston-Salem. Since the city as well as the county were fully aware of the facts, the court stated in dicta that Winston-Salem was also precluded from discovery proceedings because “[t]he power conferred by G.S. 105-331(e) upon cities and towns is, by the terms of that statutory provision, no more extensive than the power conferred by that section and by G.S. 105-330 upon the Board of County Commissioners.”<sup>63</sup>

Through the court’s failure to identify the city’s part in the attempted discovery, *McLean* may be read as limiting the discovery powers of the county commissioners. The fixing of the tax rolls by the board of equalization and review for a given year is subject only to certain limited alterations by the board of county commissioners. In contrast, the statute does not provide for a time limitation on discoveries. The policy that lies behind the freezing of the tax rolls is to prevent listed property from being subject to a change in tax liability and to provide stability for taxing units that must complete a tax cycle each year. The same policy is not applicable where the property has not been subject to tax liability at all because it was unlisted. The opinion does not offer any explanation for the imposition of the time limitation other than that “G.S. 105-330 makes it clear that the authority of the Board of County Commissioners to change its listing extends no further than a change as to property ‘discovered’ after the County Board of Equalization and Review has finished its work and ceased to function.”<sup>64</sup> Such a result is clear only if the court, despite its general acknowledgement of the inde-

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<sup>62</sup>Brief for Appellee at 10, *In re McLean Trucking Co.*, 281 N.C. 242, 188 S.E.2d 452 (1972).

<sup>63</sup>281 N.C. at 252, 188 S.E.2d at 458.

<sup>64</sup>*Id.*

pendent authority of the city, analytically lost sight of its significance and treated the attempted discovery as an attempt by the county alone to change the listing of McLean's property after the tax rolls had been frozen for that year. The court apparently saw the county attempting to effect through a discovery what the court had previously condemned in *Spiers* and *Wolfenden*: an alteration of the tax records of previously listed property, potentially changing its tax liability after it had already been determined and fixed for that year by the board of equalization and review.

If the action of the county tax authorities listing McLean's property in Winston Township is analyzed from the standpoint of the city, there was a true discovery, not an enlargement of county tax liability of the kind condemned in *Spiers* and *Wolfenden*. Recognizing under *Smith* that the property was unlisted as far as the city was concerned, Winston-Salem could have initiated a discovery on its own and separately listed the property which, for county tax purposes, would still be listed in Broadbay Township. Since the county listing would be unaffected, the policy in *Spiers* would be inapplicable. The only change in the liability of the property would be the additional city taxes imposed as a result of the city's discovery.

However, the city's long standing use of the county's listings influenced the city either to overlook its statutory authority to list separately or, more likely, to assume that the county would make discoveries for the city since the city would appear to have no right to waive such a necessary tax power. Having decided to treat the Winston Township listings as listings for Winston-Salem, both the county and the city seem to have assumed that the county was empowered, in Winston-Salem's behalf, to exercise the city's discovery authority. Thus, there being only one set of records (those of Winston Township), in making a discovery as the city's agent, county officials necessarily changed the county listings records, an act which the court interpreted as changing the tax liability of already listed property, thereby invoking the prohibition in *Spiers*.

But if the procedure is viewed in light of the city's interest to add previously unlisted property to its adopted listings, the same tax consequences result as if the city independently discovered the property. The only additional liability incurred was city taxes resulting from the discovery authorized by the city. At this point in its analysis, the court seems to have lost sight of what was in substance, though not in form, a city discovery. The county did not have any interest at stake in the proceeding, for whether the property was listed in one township or the

other could not effect county tax liability.

*McLean* imposes a difficult practical burden on tax officials, intensified by the inclusion of understated property within the discovery statute. Under *McLean*, tax officials are placed in a dilemma: if they hesitate to make a discovery, awaiting, for example, a ruling on an exemption question, the discovery might be foreclosed by the adjournment of the board of equalization and review; on the other hand, if they list the property without awaiting a ruling, they risk initiating an unwarranted discovery proceeding.

In dealing with a case in which an understatement of inventory is suspected, a tax official seeking to minimize the impact of *McLean* will probably have to list "value of unlisted inventory" as soon as he has reasonable grounds for assuming that substantial understatement is present. Valuation may be deferred until supporting data are available, at which time the board of equalization and review or the board of county commissioners can make an appraisal, perhaps after state income and franchise returns have been examined.<sup>65</sup> Such an approach places a premium on gamesmanship at the expense of orderly administration. Fortunately for tax officials, they are not liable for honest errors they make in listing. Until the result in *McLean* is altered by statute or subsequent decision, *ad valorem* tax discovery procedures in North Carolina will remain in some disorder.

THOMAS S. STUKES

### Constitutional Law—Changes in Party Affiliation and the Right to Vote in the Primary

Does the Constitution allow a state to bar a qualified voter from voting in a party primary for a period of months or even years after he has switched his party affiliation or last participated in another party's nominating procedures? The Supreme Court's increasing solicitude for the right to vote and for freedom to associate for political purposes has culminated within the last few years in the application of its new "com-

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<sup>65</sup>One useful result of *McLean* is that it prevents supervisors from diplomatically arbitrating a valuation on the discovered property before it is listed. This has been a common practice not sanctioned under the statute. Valuation occurs after the listing of the property. The tax supervisor places a valuation on the property if it is feasible and the final valuation is set by the appropriate board. N.C. GEN. STAT. § 105-312(d) (1972).