

GEORGIA'S LOCAL OPTION SALES TAX

History and Constitutional Challenges

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Every 10 years Georgia counties and municipalities engage in a process of renegotiation to reach an agreement on how to divide the local option sales tax (LOST). LOST is a one percent tax imposed on the purchase, sale, rental, storage, use and consumption of tangible personal property, including the sale of motor fuels and in a majority of counties the sale of food and alcoholic beverage.¹ The trigger for renegotiation of the tax is usually the decennial census. Following the release of the Census data, Georgia counties and municipalities that impose the tax have a two year period during which they must agree on how to apportion the tax among their competing interests, and failing to do so, the tax will lapse. The deadline for the last round of renegotiations for a division of LOST was December 30, 2012.²

LOST is a significant source of annual revenue for local governments in Georgia. For example, in 2013, counties and municipalities received over \$1.2 billion statewide from LOST, which accounted for 11.13% of general fund revenues.³ In 2013, local government property tax revenues statewide exceeded \$4.4 billion. The property tax levy without LOST would have exceeded \$5.7 billion, a property tax revenue reduction of 22.03%.⁴ As an additional source of revenue to finance the cost of local government services, LOST provides significant tax relief for Georgian citizens.

Historically, LOST dates back to the 1970s when state and local government officials began to look for ways to broaden the revenue base of county and municipal governments. Prior to LOST, other than limited fees and service charges, property taxes accounted for approximately 60 to 75 percent of local government revenue. Leaders of the Georgia Municipal Association met with the Speaker of the House, George L. Smith, II, and Lieutenant Governor Lester Maddox to request the appointment of a joint committee to examine the problems of local government finance.⁵ A Tax Revision Study Commission was subsequently created on June 18, 1969, chaired by Senator A. W. Holloway from Albany, Georgia.

The responsibility of the newly created Commission was revision of Georgia's tax structure, with emphasis on giving counties and cities equal taxing authority and expanding the revenue tax base of local government. In December, 1969, following extensive study and the conduct of public hearings throughout the State, the Commission submitted its final report of findings and recommendations to the Governor, Lieutenant Governor, Speaker of the House, members of the General Assembly, and other interested parties.⁶

The Commission's report underscored a need for additional revenue sources in many counties and school districts; however, the degree of need varied from county to county. Recognizing that ad valorem taxes had been the primary source of local government revenue, the Commission recommended "that counties (and municipalities in those counties which do not choose to do so) be authorized to impose a one half percent local option sales tax, and that the proceeds of such levies be allocated to all local political subdivisions (other than boards of education) located within the taxing jurisdiction, to be distributed on a per capita basis."⁷

In 1974, the Georgia General Assembly passed legislation to authorize a local option sales tax (LOST) for municipal and county governments. However, Governor Jimmy Carter vetoed the measure.⁸ The 1975 General Assembly re-enacted the legislation, and it was signed into law by Governor George Busbee. This legislation marked a giant step by Georgia legislators in recognizing the need of local governments for a broader revenue base, serving the dual purposes of property tax relief and flexible funding to finance local government.

The 1975 Local Option Sales Tax Act amended the Georgia Retailers' and Consumer's Sales and Use Tax Act,⁹ to authorize the levy of a one percent local option sales tax by counties, subject to approval by local referendum.¹⁰ The tax is administered and collected by the State Revenue Commissioner. One percent of the total amount collected was withheld for state administrative expense and the balance was divided between counties and municipalities based on the respective populations of unincorporated and incorporated areas of counties.¹¹

In order for cities to qualify for participation in LOST, they are required to impose any tax other than a sales tax and to provide at least three of the following services: water, sewage, garbage collection, police protection, fire protection and library.¹²

There are three key provisions in the 1975 LOST statute. First, it created a “special district of taxation for services” to exist only in those portions of counties that are outside the boundaries of any municipality. Second, it provided for a mandatory rollback of county ad valorem property taxation in this newly created special district. Third, it provided a rollback of municipal ad valorem property taxation within the boundaries of municipalities.¹³

The LOST statute was amended in 1976 to clarify the property tax rollback provisions. Under the 1975 version of the LOST statute the tax levy was county-wide and not imposed jointly by counties and cities. The tax was divided strictly on a population basis between counties and cities. The 1976 amendment allowed the tax to be applied in two ways. First, it provided for a rollback of the tax for county operation and maintenance in the unincorporated area, and, second, it provided for a rollback of the tax for municipal operation and maintenance in the incorporated area. It thus continued the *differential rollback* in the countywide tax rate between unincorporated and incorporated areas. The statute was further amended to allow any surplus revenue from the tax could be used “for any lawful governmental purpose, including the retirement of bonded indebtedness.”¹⁴

Three years following its adoption, the constitutionality of the 1975 LOST statute came under attack when taxpayers and residents of the City of Dalton brought suit alleging that, as a result of implementation of the *differential rollback* provision of LOST, their property inside the city was taxed at 12 mills while the property of residents outside the city were not taxed for county operations.¹⁵ Plaintiffs asserted the differential rollback violated the uniformity provision of the Constitution of 1976, which mandates uniformity of taxation.¹⁶ On appeal, the central issue in this case was whether a county could charge county residents dwelling outside a municipality one rate for services, while charging those dwelling inside a wholly different rate for identical services.¹⁷

Defendants and the State Revenue Commissioner argued that the uniformity requirement was inapplicable, in that Article IX, Section IV, Paragraph II of the Constitution of 1976 authorized the creation of special taxing districts and the levy of special taxes within such districts. The question then was “whether this constitutional provision authorized the differential tax rollback mandated by the Local Option Sale Tax Act; if so, then the differential rollback is valid; if not, the differential rollback is void.”¹⁸

Finding for the Plaintiffs, the trial court said, as to the uniformity argument, "The conflict between this constitutional command, if it is applicable, and the differential rollback established by subsections (i) and (j) of the local option sales tax act could not be clearer. The Constitution requires uniformity, and the LOST statute provides for non-uniformity."¹⁹ The differential rollback mandated by the local option sales tax was not authorized by the special taxing district provision of the Constitution in that the LOST statute established a non-uniform scheme of taxation in violation of the uniformity provision of the Constitution.

The Georgia Supreme Court affirmed the judgment of the trial court holding that the constitutional provision which authorizes the division of a taxing jurisdiction into special taxing districts and the levy of special taxes within such districts did not authorize a differential rollback of county taxes mandated by the Act. The Court further ruled on the severability provision of the Act, citing *Elliot*,²⁰ stating that when the objectionable part of the Act is stricken, the remainder properly effectuated the intent of the legislature and, thus, the entire Act should not fall because of the invalid rollback provision.²¹

In the second major lawsuit challenging the constitutionality of LOST, plaintiffs in each of two principal suits were taxpayer residents outside the city who sought to restrain their respective counties from distributing local option tax proceeds to the municipalities located therein.²² The trial court enjoined collection and distribution of the tax in the first suit. In the second suit, the trial court ruled the population distribution provisions unconstitutional, but upheld the remainder of the LOST statute.

In a consolidated appeal of fifteen different lawsuits challenging the constitutionality of LOST, the Supreme Court stated that the local option sales tax was a county tax and not a state tax. The issue on appeal was “...whether the Georgia Constitution is violated by the Act’s scheme of allowing counties to

tax and to distribute a portion of the tax proceeds to cities’’.²³ Appellant cities argued that the 1975 LOST statute expressly authorized taxation by participating counties for the joint benefit of counties and their cities, which is a public purpose. The Court disagreed stating that taxation by counties for the purpose of sharing the resulting revenue with cities is not legitimate because it is not among the list of authorized purposes enumerated in the 1976 Constitution. The Court thus ruled the distribution provisions of the 1975 LOST statute unconstitutional as an invalid purpose.

The Court next considered the question of whether it would be necessary to invalidate the entire LOST statute. Looking to the severability clause of the Act, the Court held that the invalid portions of the county tax were not severable and thus the entire LOST statute was held unconstitutional, including the distribution formula.²⁴

Two options were immediately considered by state and local elected officials to overcome the Court’s invalidation of the 1975 LOST statute. The first was simply to revise the law to overcome the Supreme Court’s objections. The second alternative was to adopt a statewide increase of one percent in the sales tax. The first alternative was selected by the State’s leadership, and on April 1, 1979, a revised re-enacted LOST statute became law.²⁵

LOST was re-enacted as a special district tax that is neither a city or county tax pursuant to the special districts clause of the 1976 Georgia Constitution.²⁶ The tax is imposed jointly by counties and cities in each of these special districts subject to a referendum by the special district, as opposed to a separate county or city referendum in the district. The new LOST statute allowed cities and counties that had previously approved the tax to continue collection without an additional referendum. It also required city and county officials to agree upon a formula for distribution of the tax and upon failure to do so the tax would lapse. Property tax rollback provisions were continued under the Act, with incorporated taxpayers receiving a rollback on both their city and county property taxes.

One year after its passage, the constitutionality of the 1979 Act was challenged a third time.²⁷ Taylor County Board of Commissioners and city and state officials sought review of a decision of the Taylor

Superior Court holding that the LOST act violated the state constitution because it allowed the county to give funds to municipalities and thus was an unlawful delegation of legislative power. The Georgia Supreme Court reversed, holding that:

(a) the tax was constitutional whether viewed as a joint county-city tax which the General Assembly could and did authorize in the exercise of the state's inherent power to tax, or viewed as a special tax district authorized by Amendment 19 of the State Constitution; (b) the statutory scheme does not violate *Mangelly, supra*, since the tax is a joint city-county tax and not a tax being distributed to cities; (c) there was no equal protection or due process violation on the basis that some areas of the district or some taxpayers in the district might receive a greater benefit than others; (d) the local negotiation feature of the Act was not an unlawful delegation of legislative authority; (e) there was no violation of an equal protection feature of the Act for automatic levy of the tax based on a referendum under the 1975 Act before the 1975 Act was declared unconstitutional; and (f) there is no violation of equal protection in the fact that urban centers generate more revenue from sales tax than rural areas do.

Aside from various technical amendments, two substantive amendments were made to the 1979 LOST statute in 1994 and 2010.

The distribution provisions of LOST were substantially revised by an amendment adopted by the Legislature in 1994.²⁸ Distribution of proceeds from LOST revenues under the 1979 LOST statute was made in accordance with negotiated percentages listed on the LOST distribution certificate filed with the State Revenue Commissioner. With population growth and increased service delivery demands, many local governments found that the percentages negotiated in 1975 and 1979 were no longer equitable; however there was no legal means to trigger renegotiation. The LOST statute provided no standards or requirements for such renegotiation. Moreover, historically, population had served as the basis for negotiation in most local jurisdictions.

The 1994 amendment first required that LOST allocations be renegotiated every ten years, within two years after each census. Secondly, it established certain guidelines for a new negotiation process by requiring the county and qualified municipalities to consider a minimum of eight specified criteria in negotiating LOST distribution.²⁹

While there may be questions about the legislative intent underlying the eight criteria for determining the proper distribution of tax proceeds, guidance as to such intent is found in the LOST statute,³⁰ which states in part:

The General Assembly recognizes that the requirement of government services is not always in direct correlation with population. Although a new distribution certificate is required within a time certain of the decennial census, this requirement is not meant to convey an intent by the General Assembly that population as a criterion should be more heavily weighted than other criteria. It is the express intent of the General Assembly in requiring such renegotiation that eligible political subdivisions shall analyze local service delivery responsibilities and the existing allocation of proceeds made available to such governments under the provisions of this article and make rational the allocation of such resources to meet such service delivery responsibilities. Political subdivisions in their renegotiation of such distributions shall at a minimum consider the criteria specified in subsection (b) of this Code Section.

Service delivery responsibilities of each political subdivision are given considerable weight among the eight criteria and are referenced in four of the eight criteria.³¹ Moreover, the revised 1979 LOST statute provided that the tax would be for the purpose of “assisting such political subdivisions in funding all or any portion of those services which are to be provided by such governing authorities pursuant to and in accordance with Article IX, Section II, Paragraph III (Amendment 19, also known as the Supplementary Powers Clause) of the Constitution of this State.”³² The reenacted LOST statute thus limits the services contemplated under the eight criteria for application of the LOST proceeds to those services specifically enumerated under the Supplementary Powers Clause of the Georgia Constitution.

In the 2010 legislative session, the Georgia General Assembly further revised the LOST statute to provide an additional step for resolving disputes.³³ Prior to the enactment of the 2010 amendment, alternative dispute resolution was the final step for the parties to reach an agreement; otherwise, the tax would lapse. If nonbinding arbitration or mediation results in an impasse, the 2010 amendment provides an additional step in the process known as “baseball arbitration.” This procedure is initiated by petition to a judge who is not a judge in the circuit in which the county is located. The county and qualified cities are required to submit to the judge their best and final offer specifying the distribution of the LOST proceeds. After the conduct of such hearings as the judge deems necessary, the arbitrating judge is mandated to render a binding decision with a finding of facts on one of the best and final offers. The Judge’s final order as specified in the LOST statute is subject to appeal by application upon one or more of the following grounds: (i) The judge’s disregard of the law; (ii) Partiality of the judge; or (iii) Corruption, fraud, or misconduct by the judge or a party.³⁴

Because of an impasse under the alternative dispute procedure, the Cities of Ashburn, Rebecca, and Sycamore filed a petition in the Superior Court of Turner County asking that the dispute with Turner County over distribution of the LOST proceeds be resolved in accordance with the procedures provided by the 2010 amendment.³⁵ Turner County subsequently filed a motion to dismiss the cities’ petition in which it challenged the constitutionality of the 2010 amendment on various grounds.³⁶ The trial court denied Turner County’s motion to dismiss the petition, sustained the constitutionality of the 2010 amendment, and adopted the final and best offer of the municipalities. Turner County filed application for discretionary appeal to the Georgia Supreme Court alleging, among other grounds, that the procedures for judicial resolution set forth in the LOST statute violate the separation of powers doctrine of the 1983 Constitution.

The Court granted Turner County’s application for discretionary appeal stating that the dispositive issue of the case is “...whether the procedure for judicial resolution set forth in OCGA § 48-8-89 (d)(4) violates the separation of powers doctrine of the Georgia Constitution of 1983.”³⁷ The Court said that this

procedure did violate the separation of powers doctrine of the Constitution and declared that portion of the statute void.³⁸ Citing *Board of Commissioners of Taylor County v Cooper, supra*, that the power to tax is exclusively of a legislative character, the Court said:

It follows that the issue of whether an existing tax should be renewed or permitted to expire is a legislative issue that is properly left solely to the discretion of the elected legislative body. To the extent the 2010 amendment to the LOST Act permits judicial resolution of the issue of whether LOST should be renewed and the governing bodies of the special district should be required to levy and collect the tax, the amendment violates the separation of powers doctrine of the constitution.³⁹

In summary, the Court reversed the order of the trial court stating that it erred upon its denial of Turner County's motions dismiss and sustaining the constitutionality of the 2010 amendment to the LOST statute. The result of this holding put in question arbitration cases that were pending in 35 counties and in the 125 cities within those counties that had not successfully filed a distribution certificate with the Department of Revenue.⁴⁰ As a remedy, the 2014 State Legislature adopted legislation to ensure that Local Option Sale Tax (LOST) distribution certificates filed with the Department of Revenue between June 4, 2010, and October 18, 2013, would remain in effect until a subsequent distribution certificate is lawfully executed.⁴¹

Conclusion

This article defines LOST, records the history of LOST in Georgia and examines the constitutionality of LOST through four legal challenges since 1975, the last of which invalidated the procedure for judicial resolution of county and municipal disputes on how to divide the tax. It concludes with a discussion on the future of LOST and offers recommendations.

The next round of renegotiations for division of LOST will be the end of a two year period following the 2020 Census. Accounting for more than ten percent of general fund revenues, LOST provides flexible financing of local government services and property tax relief. In view of the Court's decision in the

Turner County case, the resolution of disputes arising out of future county and municipal LOST renegotiations will now depend upon the voluntary negotiation efforts of the parties or to nonbinding arbitration, mediation or other forms of conflict resolution as provided by law.⁴² The local negotiation feature of LOST requires the county and the qualified municipalities therein to reach an agreement on how to divide the tax. Failing to do so, the tax will lapse. Judicial resolution of the dispute resulted in a final binding decision the negotiation process – the judge selected either the county or the city’s proposal.

Municipalities are now at a distinct disadvantage under the present legal procedures for renegotiation because of the Turner decision. The parties can simply ignore the eight criteria specified by the General Assembly for negotiation of LOST and rely on population as a basis for division of LOST proceeds as opposed to an evaluation of service delivery criteria prescribed by law. From a municipal perspective, the worst case scenario would be for the county to hold out, let the tax lapse, and proceed with the adoption of a Homestead Option Sales and Use Tax (HOST).⁴³ This is a tax that may be collected by counties that do not have a LOST. HOST requires that eighty percent of the tax proceeds provide for an increased homestead exemption from county ad valorem taxes.

The distribution and negotiation features of LOST need a thorough review by the General Assembly with a view toward addressing the issues fairness and equity in the division of this tax between counties and cities. In 1994, the General Assembly established guidelines for renegotiation of LOST stressing that population not be more heavily weighted than other criteria. Perhaps a statutory formula based on population, service delivery costs, point of sale, or other factors should be considered. The position of municipalities in any future renegotiation of LOST will need to be strengthened as municipalities are not presently on a level playing field with counties. The establishment of a fair and rational basis for division of this revenue source between counties and municipalities will continue to be a difficult task for the Georgia General Assembly.

Endnotes

¹ Georgia Municipal Association, *Renegotiating Local Option Sales TAX (LOST)*, August, 2011.

² *Id.* at 35.

³ Georgia Department of Community Affairs, *Local Government Finance*, 2013.

⁴ *Id.*

⁵ The Georgia Municipal Association, *Local Governments' New Source of Revenue*, Urban Georgia, October 1975, pp. 10-11.

⁶ Report of the Tax Revision Study Commission, December, 1969.

⁷ *Id.* at 9.

⁸ 1974 Ga. Laws 4120. HB 1012, veto date 3-21-74.

⁹ 1951 Ga. Laws 360.

¹⁰ 1975 Ga. Laws 984.

¹¹ *Id.* at Subsection (e).

¹² *Id.* at Subsection (g).

¹³ *Id.* at, Subsections (i) (j) and (k).

¹⁴ 1976 Ga. Laws 1026

¹⁵ *Martin v. Ellis*, 242 Ga. 340, 240 S.E. 2d 23 (1978)

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Elliot v. State*, 91 Ga. 694, 696, 17 S.E. 1004, 1005 (1982)

²¹ *Id.*

²² *Augusta v. Mangelly*, 243 Ga. 358, 254 S.E. 2d 315 (1979)

²³ *Id.*

²⁴ *Id.*

²⁵*The Local Option Sales Tax: A general Overview*, 31 Mercer L. Rev. 313 (1979)

²⁶ O.C.G.A. § 48-8-81 and § 48-8-83. (2013).

²⁷ Board of Commissioners of Taylor County et al. v. Cooper et al, 245 Ga. 251, 264 S.E. 2d 193 (1980)

²⁸ O.C.G.A. § 48-8-89 (2013).

²⁹ O.C.G.A. § 48-8-89(b) (2013).

³⁰ O.C.G.A., § 48-8-89(d)(1) (2013).

³¹ Criteria numbers (1) (2) (3) and (8), O.C.G.A. § 48-8-89(b) (2013)

³² O.C.G.A. § 48-8-89(a)(2) (2013), Ga. Const. Art 9 § 2 ¶ 3, Amendment 19 empowered counties and municipalities to provide the following services: police and fire protection, garbage and solid waste collection and disposal, public health facilities and services, including hospitals, ambulances, emergency rescue and animal control, street and road construction, including curbs, sidewalks, and street lights, parks, recreational areas, facilities and programs, storm-water and sewage collection and disposal systems, water utilities, public housing, public transportation, libraries, archives, and arts/sciences programs and facilities, terminal and dock facilities and parking facilities, codes, including building, housing, plumbing and electrical codes, air quality control, planning and zoning.

³³ 2010 Ga. Laws 958, O.C.G.A. § 48-8-89 (d)(4) (1983).

³⁴ Id

³⁵ The City of Ashburn et al v. Turner County, Civil Action File No. 2012 CV 0168

³⁶ Id

³⁷ S13A0992. Turner County v. City of Ashburn et al, October 7, 2013

³⁸ Id

³⁹ Id

⁴⁰ Data provided by the Georgia Municipal Association. Source: Georgia Department of Revenue.

⁴¹ HB 719, 2013-2014 Leg., Reg. Sess.

⁴² O.C.G.A. § 48-8-89 (2013).

⁴³ O.C.G.A. § 48-8-100 et seq. (2013).