

APPLICABILITY OF THE SALES TAX TO PARTICULAR TRANSACTIONS

The rapid spread of sales tax legislation within the past three or four years¹ is evidenced by its adoption to date by well over half the states of our nation.² In comparison with other forms of state taxation the revenue-raising powers of the sales tax are almost phenomenal. For example, in 1937 the State of Missouri derived almost 50 per cent of its revenue from that one channel alone. Whenever a tax assumes such extensive proportions it is not unusual to find an avalanche of litigation contesting the applicability of the tax to specific situations.³ The resulting opinions in this instance have been typical of those usually rendered during the embryonic period of development of a new phase of law: conflicting, shallow, pragmatic, and irrecconcilable. It is the purpose of this Note to assemble and correlate these decisions by a discussion of three principal methods by which the inapplicability of the sales tax to a particular transaction may be asserted.

1. IS THERE A "SALE" OF "TANGIBLE PERSONAL PROPERTY"?

A "sale at retail" is typically defined in the Missouri Sales Tax Law as any transfer of "the ownership of or title to, tangible personal property to the purchaser, for use or consumption, and not for resale in any form as tangible personal property for a valuable consideration."⁴ Reasoning from such a definition,

1. Although there were a few scattered instances of sales taxes enacted prior to 1934, that year may well be said to mark the modern and substantial development of sales taxation. See Status of State General Sales Taxes as of July 1, 1937 (1937) 15 Tax Mag. 541.

2. Sales taxes exist in slightly varying forms in the following states: Alabama, Arizona, Arkansas, California (Retail Sales and Use), Colorado (Retail Sale, Use, and Service), Connecticut (Gross Receipts), Delaware (Receipts and Purchases), Illinois (Retailers' Occupational and Public Utility), Indiana (Gross Income), Iowa (Retail Sales and Use), Kansas (Retail Sales and Compensating), Louisiana, Maryland (Stock in Trade), Michigan (General Sales and Use), Mississippi, Missouri, New Mexico, North Carolina, North Dakota (Receipts), Ohio (Retail Sales and Use), Oklahoma (Retail Sales and Use), Pennsylvania (Mercantile License Tax on Sales), South Dakota, Utah (Retail Sales and Use), Virginia, Washington (Retail Sales, Business and Occupation, and Compensating), West Virginia (Retail Sales and Business and Occupation), and Wyoming (Retail Sale and Use). The District of Columbia also has a sales tax, and New York City has Retail Sales, Gross Receipts, Public Utility Excise, and Special Personal Property Taxes. For specific reference to these statutes see Prentice-Hall State & Local Tax Service; and for a brief résumé see Status of State General Sales Taxes (1937) 15 Tax Mag. 541 ff.

3. It is not within the scope of this Note to consider the many cases which involved the constitutionality of the sales taxes.

4. Mo. Laws, 1937, p. 556; 12 Mo. Stat. Ann. secs. 10164b-1(g).

the applicability of the tax has often been questioned by an allegation that the transaction sought to be taxed did not constitute a sale or transfer of ownership in tangible personal property.

According to the unadulterated law of Sales a sale is an agreement whereby the seller transfers the property in goods to the buyer for a consideration.⁵ A distinction is drawn between a sale of goods and a furnishing of service.⁶ This distinction lies at the basis of many of the sales tax cases. The problem is best approached by a factual analysis of the specific types of cases in which this issue has been raised.

Restaurants—There is a conflict among the courts as to whether serving food and drink to customers in a restaurant constitutes a sale.⁷ Many jurisdictions maintain that it is not a sale and therefore hold that a customer can not sue the proprietor on the theory of implied warranty.⁸ The Uniform Sales Act, in effect in approximately two-thirds of the states, is silent on the matter.⁹ Although the Supreme Court of Alabama has refused to recognize the transaction as a sale for warranty purposes,¹⁰ it has held it subject to the sales tax.¹¹ The court admitted that it was applying varying meanings according to the circumstances but held that the manifest purpose of the tax should not be defeated by narrow constructions based on nice distinctions in the meaning of words.¹² The Appellate Court of Illinois, however, had already decided that the serving of a meal by a restaurateur to a patron constitutes a sale.¹³ It was not, therefore, unusual for the Illinois court to hold that such a transaction was taxable.¹⁴ Both the Alabama and the Illinois decisions would seem to be reasonable in the light of the purpose of the sales tax, but the Alabama decision serves to illus-

5. Vold, *Law of Sales* (1931) 5.

6. 23 R. C. L., *Sales* (1919) 1221, sec. 38, and cases cited.

7. 1 *Uniform Laws Annotated* (1931) 117; 55 C. J., *Sales* (1931) 45, sec. 8, and cases cited. The cases are also listed in *Brevoort Hotel Co. v. Ames* (1935) 360 Ill. 485, 196 N. E. 461.

8. 1 Williston, *Sales* (2d. ed. 1924) 485, sec. 242b. See also 55 C. J., *Sales* (1931) 767, sec. 733, and cases cited.

9. 1 *Uniform Laws Annotated* (1931) 103, 117.

10. *McCarley v. Wood Drugs* (1934) 228 Ala. 226, 153 So. 446; *Hooper Cafe Co. v. Henderson* (1931) 223 Ala. 579, 137 So. 419.

11. *Pappanastos v. State Tax Commission* (Ala. 1937) 177 So. 158.

12. *Id.* at 159.

13. *Greenwood v. John R. Thompson Co.* (1919) 213 Ill. App. 371. This holding was, however, contrary to the Illinois Supreme Court holding in *Sheffer v. Willoughby* (1896) 163 Ill. 518, 45 N. E. 253.

14. *Brevoort Hotel Co. v. Ames* (1935) 360 Ill. 485, 196 N. E. 461; *O'Neil v. Dept. of Finance* (1935) 360 Ill. 484, 196 N. E. 463.

trate the negligible value of analogies in deciding the sales tax cases. It is interesting to speculate as to the effect of these sales tax decisions on the use of the doctrine of implied warranty in restaurant cases.

Printing, Engraving, Photography, etc.—The courts are sharply divided as to the applicability of the sales tax to this type of business.¹⁵ The New York courts, on the one hand, have upheld the tax on a transfer of a photo-engraving although the value of the metal in the finished product was only two per cent of the price paid by the purchaser.¹⁶ The reasoning of such courts seems to be entirely negative in character, namely, that if such a transfer were not taxed, many other articles, the chief value of which arises from the service expended in their manufacture, would escape the tax.¹⁷

On the other hand, it is asserted that the manufacturers of these products are not engaged in the sale of goods but in the business of furnishing skill and labor and the use of machinery.¹⁸ The materials used in making the finished product are said to be merely incidental to the business.¹⁹ The Illinois Supreme Court, for example, drew analogies between the paper on which a photostatic copy is made or a blue print produced and the paper on which a lawyer writes a will or deed or the abstractor shows a chain of title.^{19a} The Illinois view would appear to be more rational than that of New York. It is interesting, however, to speculate as to where and how the Illinois courts will draw the line of demarcation—will they permit the taxation of so-called sales of paintings, pottery, tailored clothing, Swiss watches and the like? Undoubtedly many such items are sold subject to the tax. The courts have thus far formulated

15. Transaction held taxable: *People ex rel. Walker Engraving Corp. v. Graves* (1935) 243 App. Div. 652, 276 N. Y. S. 674, aff'd 263 N. Y. 648, 198 N. E. 539 (photo engraving); *People ex rel. Foremost Studio, Inc. v. Graves* (1936) 246 App. Div. 130, 284 N. Y. S. 906 (designs); *Long v. Roberts & Son* (Ala. 1937) 176 So. 213 (printing, lithographing, engraving, steel dye embossing, bookbinding); *Cusick v. Commonwealth* (1935) 260 Ky. 204, 84 S. W. (2d) 14 (photographs).

Transaction held not taxable: *Washington Printing & Binding Co. v. State* (Wash. 1937) 73 P. (2d) 1326 (printing); *A. B. C. Electrotype Co. v. Ames* (1936) 364 Ill. 360, 4 N. E. (2d) 476 (electrotypes); *H. G. Adair Printing Co. v. Ames* (1936) 364 Ill. 342, 4 N. E. (2d) 481 (printing); *J. A. Burgess Co. v. Ames* (1935) 359 Ill. 427, 194 N. E. 565 (blue-printing, photostating, photography).

16. *People ex rel. Walker Engraving Corp. v. Graves*, supra, note 15.

17. *Cusick v. Commonwealth*, supra, note 15.

18. See cases cited in second portion of note 15, supra.

19. *Ibid.*

19a. *J. A. Burgess Co. v. Ames* (1935) 359 Ill. 427, 194 N. E. 565, 566.

no significant tests or standards by which to determine the applicability of the tax. It has been suggested that a workable test might be to ascertain whether the purchaser intended to purchase the goods for their own intrinsic value, or to contract for the rendition of a certain service without any particular desire to acquire personal property. This realistic approach would seem to provide a useful formula for the sales tax cases.

Optometry—In 1937 the Supreme Court of Alabama decided that the sales tax could be validly applied to the “sale” of glasses by an optometrist.²⁰ The court rejected the test of the relative value of material and service (used by the Illinois court in the blue-printing case), and adopted the test of “the nature and character of the process, activities, or manufacture required or employed.”^{20a} The court’s failure to explain or clarify its vague language is unfortunate.

Later in 1937 the Illinois Supreme Court held that such a “sale” was not taxable.²¹ The court stressed the fact that the Illinois Legislature had previously recognized “optometry” as a profession rather than a calling or a trade.²² The furnishing of lenses and frames was said to be merely incidental to the personal service rendered by the professional optometrist. The court appropriately compared the case with the furnishing of medicine or surgical dressing by a physician and of inlays, crowns, and false teeth by a dentist.^{22a}

License to Use—The peculiar wording of the New York City Sales Tax requires brief mention in passing. The statute expressly defines “sale” to include “license to use.”²³ This of course constitutes a new twist to the orthodox conception of a true sale. Thus the licensing of motion picture films for exhibition has been held to be a taxable sale pursuant to such a definition.²⁴ But the New York Court of Appeals has refused to extend the meaning to include the assignment by an artist of the right to reproduce certain of his paintings.²⁵ The court held that the possessory interest given was merely incidental, inasmuch as the right to use and sell the exhibit was retained by the artist.

20. *State Tax Commission v. Hopkins* (Ala. 1937) 176 So. 210.

20a. *Id.* at 213.

21. *Babcock v. Nudelman* (Ill. 1937) 12 N. E. (2d) 635.

22. *Id.* at 636.

22a. *Id.* at 637.

23. New York City, Local Laws, 1934, no. 24, published as no. 25, p. 165, sec. 1 (e).

24. *United Artists Corp. v. Taylor* (1936) 248 App. Div. 207, 288 N. Y. S. 946, *aff'd* (1937) 273 N. Y. 334, 7 N. E. (2d) 254.

25. *Howitt v. Street & Smith Publications, Inc.* (1938) 276 N. Y. 345, 12 N. E. (2d) 435, *rev'g* (1937) 251 App. Div. 461, 297 N. Y. S. 3.

It attempted to reconcile this case with the motion picture case on the ground that in the latter case the possessory interest was granted for a certain length of time. Such reasoning appears to be specious. It would seem that the New York court is trying to restrict the scope of the term "license to use."

Miscellaneous—There are other scattered instances in which the legal character of the transaction has been questioned. The furnishing of *financial reports* by Dun & Bradstreet, for example, has recently been held not taxable.²⁶ The court here held that the paper was a mere incident to the purchase of skilled service. The planting of nursery stock on a customer's land in performing a *landscaping* contract was held taxable as an instance in which "the service is a mere incident to the sale of the goods."²⁷ *Automobile repair* shop proprietors were likewise held to account for the payment of the tax on the "sale" of auto parts used in the repair of another person's automobile.²⁸ The court pointed out that it was the custom of the business to charge for parts and accessories at a stated price separate from the charge for service. On the other hand it refused to extend the tax to include the value of paints, lubricants and minor supplies furnished as an incident to and as a part of the service.²⁹ The court's approach appears to be purely factual and pragmatic.

Although from a strictly technical viewpoint it would seem to be an erroneous application of the tax to extend it to conditional sales, it would appear to be the only practical solution. From a logical standpoint, however, one would expect to find a credit allowed on the recapture of conditionally sold property.

26. *Dun & Bradstreet v. City of New York* (1937) 276 N. Y. 198, 11 N. E. (2d) 728, rev'g (1937) 251 App. Div. 25, 295 N. Y. S. 351. In this case the corporation delivered reference books to its subscribers without charge apart from the charge for services. The company retained title to the books, forbade their use by others than subscribers, and warned its subscribers not to rely on the books, but to consult reports in the possession of the company. The court held that the subscribers did not pay for the paper on which the information was conveyed or for the reference books, but rather for the service rendered in giving such information. The court likened the case to that of a telephone book and its relation to the service rendered by the telephone company.

27. *Swain Nelson & Sons Co. v. Dept. of Finance* (1937) 365 Ill. 401, 6 N. E. (2d) 632. The Illinois Court declared that trees and shrubs, being grown for purpose of sale, become personalty by severance from the land and by virtue of statute. (Ill. Smith-Hurd Stats. (1935) ch. 120, sec. 12). This is in accord with the law of Property. See Walsh, *The Law of Property* (2d ed. 1934) secs. 15 and 16.

28. *Doby v. State Tax Commission* (Ala. 1937) 174 So. 233.

29. *Id.* at 236.

But the Michigan courts, probably out of consideration for administrative expediency, have ruled otherwise.³⁰

2. IS THE SALE "AT RETAIL"?

Sales taxes are ordinarily restricted to retail sales or transfers to purchasers "for use and consumption and not for resale in any form."³¹ Whether or not a given sale is "at retail" has given rise to some "nice" questions.

Although the standard non-legal use of the word "retail" connotes a sale in small quantities,³² the cases are practically unanimous in holding that the quantity of goods sold is immaterial in determining whether or not a sale is at retail.³³ The Maryland court is alone in its position that the tax is inapplicable when the sale involves large quantities.³⁴

It is not unusual to find a wholesaler, manufacturer, or producer also engaged in retailing. The latter phase of that person's activity is taxable provided that the retail sales are not merely occasional but are sufficiently important to constitute a business and occupation.³⁵ Moreover, the sales tax is not limited to persons whose only business is keeping a store and disposing of property at a given location.³⁶ Nor does it make any difference how the vendor acquired title to the property, or who has produced it.³⁷

The most vexing problem in this connection is that of determining whether the vendee is in fact the user and consumer of the property sold. On this question generalizations are scarce

30. *Rudolph Wurlitzer Co. v. State Board of Tax Administration* (1937) 281 Mich. 553, 275 N. W. 243; *Montgomery Ward & Co. v. Fry* (1936) 277 Mich. 260, 269 N. W. 166, 170.

31. The Missouri and Illinois statutes are typical: Mo. Laws, 1937, p. 556; 12 Mo. Stat. Ann. secs. 10164b-1(g); Ill. Smith-Hurd Stats. (1935) ch. 120, sec. 440.

32. Webster, *International Dictionary* (1925) 1819.

33. See *Wiseman v. Arkansas Wholesale Grocers' Ass'n* (1936) 192 Ark. 313, 90 S. W. (2d) 987; *Herlihy Mid-Continent Co. v. Nudelman* (Ill. 1937) 12 N. E. (2d) 638; *Franklin County Coal Co. v. Ames* (1935) 359 Ill. 178, 194 N. E. 268.

34. *Buck Glass Co. v. Gordy* (Md. 1936) 185 Atl. 887. The court held that a sale to a consumer "is ordinarily retail selling, but not always; and sellers to consumers in the larger gross quantities are not within the regular meaning of the word retailers" (l. c. 888). The court held that the common acceptance of the word should control. Although the position of the Maryland court is logically correct, it would seem to be a limitation on the application of the sales tax which the legislature never intended.

35. *Franklin County Coal Co. v. Ames* (1935) 359 Ill. 178, 194 N. E. 268 (sale by coal mine operator); *State v. Louisiana Baking Corp.* (La. 1934) 153 So. 41; *Buck Glass Co. v. Gordy*, supra, note 34.

36. *Franklin County Coal Co. v. Ames*, supra, note 35.

37. See 194 N. E. at 270.

as well as misleading. The safest and more valuable approach is via a factual consideration of the individual cases.

Plumbing and heating contractors—The decisions are in conflict as to the whether the contractor who buys and installs plumbing and heating equipment is the user and consumer of such materials. One line of cases holds that the contractor is the consumer and that there is no resale of the equipment by him within the meaning of the sales tax.³⁸ In the view of these courts the sale from the manufacturer to the contractor is therefore the taxable transaction.

The Illinois Supreme Court, however, has defined “use and consumption” as “a long-continued use and employment of a thing to the purposes for which it was adapted as distinguished from a possession and employment that are merely temporary or occasional.”³⁹ It follows that the person who uses the plumbing and heating materials on his property is the ultimate user under the Illinois definition, and that the sale of the supplies to the contractor is not a taxable retail sale.

The Kansas Supreme Court has said that the test should be whether the goods are bought for resale “in substantially the same condition” in which they were purchased.⁴⁰ It make no difference whether the purchaser uses or consumes the goods in his place of business or in his home.⁴¹

Repair Men—It has been held in a leading case that a *shoe repairer* does not “consume” the material in the form of soles and heels which he places on worn shoes;⁴² he resells such material to the owner of the shoes. The court discounted the fact that a custom existed among shoe-repairers not to make separate charges for service and materials. As a consequence, the sale of such material to the repairer was held not subject to the tax.

The sale of parts and accessories to an *automobile repair* shop operator who in turn sells them to automobile owners is not a retail sale subject to the sales tax.⁴³ But the contrary is true if the operator consumes the materials in repairing or reconditioning autos.⁴⁴ If the vendee uses the materials in both

38. *Atlas Supply Co. v. Maxwell* (N. C. 1937) 194 S. E. 117; *Albuquerque Lumber Co. v. Bureau of Revenue* (N. M. 1937) 75 P. (2d) 334.

39. *Bradley Supply Co. v. Ames* (1935) 359 Ill. 162, 194 N. E. 272.

40. *Warren v. Fink* (1937) 146 Kan. 716, 72 P. (2d) 968, where sales of ice, wrapping paper, twine and paper bags were involved.

41. See 72 P. (2d) at 971.

42. *Western Leather & Finding Co. v. State Tax Commission* (1935) 87 Utah 227, 48 P. (2d) 526.

43. *Cody v. State Tax Commission* (Ala. 1937) 177 So. 146.

44. *Ibid.*

ways, how can the vendor determine the amount of tax payable? The Alabama Supreme Court has ruled that if the vendee is engaged both in rendering repair service and in selling parts, so that the goods are used indiscriminately for either purpose, the entire sale is taxable.⁴⁵ It makes no difference that the vendee habitually resold a portion of the goods to others. No tax is due, however, if the vendee operates only a retail store and only occasionally uses parts for repair purposes. The vendor must act in good faith and exercise due diligence to ascertain "the usual course of business" of the vendee. If he so acts, he cannot be held responsible if the vendee finally uses the merchandise and does not resell it.^{45a}

The New York Court of Appeals has held taxable a sale of chemicals to a dyer who processed furs owned by other persons.⁴⁶ The court had to reverse a lower court's decision⁴⁷ to the effect that the dyer resold the chemicals in the form of microscopic particles which adhered to the fur.

Contractors—The most vexing, the most important and perhaps the most litigated problem which has arisen under the sales tax involves the taxability of sales either by or to contractors. As is to be expected, the courts have sharply divided on this issue.

Some courts have held that the contractor actually sells tangible personal property to a customer.⁴⁸ They hold that there is a retail sale of brick, stone, lumber, concrete, and nails to the person for whom the bridge, building, or highway is constructed.⁴⁹ However, these courts will admit that the materials and supplies become realty the moment the title becomes vested in the owner.⁵⁰ They contend that although the contractor changes the form of the materials he does not "consume" them.⁵¹ He merely purchases for resale to the customer who is regarded as the ultimate consumer. Such a viewpoint taxes not only the

45. *Id.* at 148.

45a. *Ibid.*

46. *Menoza Fur Dyeing Works, Inc. v. Taylor* (1936) 272 N. Y. 275, 5 N. E. (2d) 818.

47. *Menoza Fur Dyeing Works, Inc. v. Taylor* (1936) 247 App. Div. 368, 287 N. Y. S. 396.

48. *Moore v. Pleasant Hasler Const. Co.* (Ariz. 1937) 72 P. (2d) 573 (two steel bridges) subsequently overruled, *infra*, note 52; *Wiseman v. Gillioz* (Ark. 1936) 96 S. W. (2d) 459 (dam, intake tower, filtration house); *R. S. Blome Co. v. Ames* (1937) 365 Ill. 456, 6 N. E. (2d) 841 (buildings) also subsequently overruled, *infra* note 52.

49. *Wiseman v. Gillioz*, *supra*, note 48.

50. *R. S. Blome Co. v. Ames*, *supra*, note 48.

51. *Moore v. Pleasant Hasler Const. Co.*, *supra*, note 48.

sale but also reasoning and logic to the limit of their elasticity.

The majority of courts appear to have adopted the opposite and more reasonable conclusion, namely, that of viewing the contractor as the consumer.⁵² The sale of the materials to him is thereby made taxable. These courts insist that the completed structure, when erected on the customer's land, is as much real property as the land itself.⁵³ The contractor does not sell lumber, lime, cement, etc. His undertaking is to deliver to his customer some edifice, the construction of which requires the application of skill and labor to the materials which in turn lose their original character.⁵⁴

The majority view is not only preferable from a common-sense viewpoint but it recognizes the orthodox rule of Sales law that in the performance of ordinary building contracts there is no sale of the materials by the contractor to the owner of the site, but "title to the material passes by accession as the materials in the process of construction become integral parts of the building belonging to the owner of the site as part of his real estate."⁵⁵

Inasmuch as two state courts have within the past six months reversed their original holdings in favor of the majority view,⁵⁶ it would seem that the tendency is to regard the contractor rather than his customer as the consumer.

The Alabama court has settled the problem in simple fashion. It has held that the sale to the contractor and the transfer of the structure to the customer are both taxable.⁵⁷

52. *Moore v. Pleasant Hasler Const. Co.* (Ariz. 1937) 76 P. (2d) 225 (steel bridges). The court reversed its previous decision (72 P. (2d) 573) on a technical point of statutory construction. It is submitted that the real reason for the reversal was a realization of the erroneous holding in its earlier decision. The court in the first decision relied a great deal on the Illinois case of *Blome Co. v. Ames* (1937) 365 Ill. 456, 6 N. E. (2d) 841, which had been reversed (infra this note) before this second decision was rendered; *Herlihy Mid-Continent Co. v. Nudelman* (Ill. 1937) 12 N. E. (2d) 638 (sewers and tunnels), expressly overruling the *Blome* case, supra, note 51; *State v. J. Watts Kearny & Sons* (1934) 181 La. 554, 160 So. 77; *State v. Christhilf* (Md. 1936) 185 Atl. 456 (building for state university and public roads); *City of St. Louis v. Smith* (Mo. 1937) P. H. State & Local par. 23,016 (street, sewer, and hospital).

53. *State v. Christhilf*, supra, note 52.

54. *State v. J. Watts Kearny & Sons*, supra, note 52.

55. Vold, *Law of Sales* (1931) 13.

56. The Arizona and Illinois Supreme Courts have both reversed their prior holdings, supra, note 52.

57. *Lone Star Cement Corp. v. State Tax Commission* (Ala. 1937) 175 So. 399, where the court held that the sale to the contractor was taxable, but said that the resale would also be subject to the tax.

3. IS THE VENDEE A TAXABLE PERSON?

Although the transaction may be truly a sale of tangible personal property at retail, the sale may still not be taxable if one of the parties to the sale is a federal or state agency or a charity.

In this connection, it is important to scrutinize carefully the particular state statute in question. It ordinarily contains express provisions on the subject. Problems have, however, arisen in the absence of statutory provisions.

It should be borne in mind that the courts have quite generally held that the consumer or purchaser is the real taxpayer.⁵⁸ Although from a strict and technical standpoint the tax is levied on the seller, he is merely a type of collection agent for the state. This is especially true in those states where the statute makes it unlawful for the seller to refuse to pass the tax on to the purchaser.⁵⁹

The federal government and its agents are of course exempt even though not expressly exempted by the terms of the particular statute.⁶⁰ An interesting question, however, was raised as to the taxability of sales to federal receivers operating businesses within the taxing state. The problem has become largely academic since the enactment by Congress in 1934 of an act providing in substance that receivers and trustees in bankruptcy shall be subject to the same taxes as private business.⁶¹ Thus a receiver operating a restaurant in Chicago has been held subject to the Illinois Retail Occupations Tax.⁶² He was therefore obliged to add the sales tax to the price of food "sold" to patrons. This would seem to be a fair treatment, for otherwise the receiver would be given an unjust advantage over his solvent competitors. A contrary holding would endanger the life of going concerns in the hope of reviving a failing business. This form of commercial blood transfusion is economically untenable. It is not surprising that the courts permitted the taxing of receivers and trustees in

58. See by way of illustration but not by limitation: *Bird & Jex Co. v. Anderson Motor Co.* (Utah 1937) 69 P. (2d) 510; *School Dist. of K. C. v. Smith* (Mo. 1937) 111 S. W. (2d) 167; *Long v. Roberts & Son* (Ala. 1937) 176 So. 213.

59. See by way of illustration but not by limitation: Mo. Laws, 1937, p. 558; 12 Mo. Stat. Ann. sec. 10164b-5; Alabama Acts, 1937, sec. 24.

60. *Long v. Roberts* (Ala. 1937) 176 So. 213, 218. This involves the application of the old doctrine of *McCulloch v. Maryland* (1819) 4 Wheat. 316, 4 L. ed. 579, and *Collector v. Day* (1871) 11 Wall. 113, 20 L. ed. 122. See *M. G. West Co. v. Johnson* (Cal. 1937) 66 P. (2d) 1211, appeal dismissed for want of jurisdiction (1938) 58 S. Ct. 45, 82 L. ed. (adv. op.) 5 (sales to Federal Land Bank, Federal Intermediate Credit Bank of Cooperatives, and Production Credit Corp.).

61. (1934) 48 Stat. 993, 28 U. S. C. A. sec. 124a.

bankruptcy even prior to the enactment of the above-mentioned statute.⁶³ Perhaps a valid distinction could and should be drawn between a sale by a receiver who is in the process of liquidating a business and a sale made in the usual course of business by a receiver who is operating a concern in an effort to rehabilitate it.

As to the applicability of the tax to state agencies, the courts have reasoned from opposite directions, arriving at conflicting results. Some courts have held that the failure to include the state and its agencies among the specific statutory exemptions indicates a legislative intent to tax sales to such units.⁶⁴ It would seem that the better view is expressed by those courts which hold that state agencies are exempt even in the absence of statutory provisions to that effect. They regard the exemption as resting on principle rather than on statute.⁶⁵ The argument of the Missouri Supreme Court is that such taxation would be merely taking money out of one pocket and putting it in another.⁶⁶ It is possible that the unreported facts involved in the first group of cases would reveal peculiar circumstances under which the state would not have to pay the tax in any event—perhaps because the sale was made under a fixed contract price which would necessitate the absorption of the tax by the vendor.

The Michigan Supreme Court refused to authorize the levy of the tax on a sale *by* municipally-owned public utilities.⁶⁷ It is

62. *People ex rel. Ames v. Oppenheimer* (C. C. A. 7, 1936) 85 F. (2d) 1002.

63. See *People ex rel. Weber & Heilbronner, Inc. v. Graves* (1936) 249 App. Div. 49, 291 N. Y. S. 354, motion for leave to appeal denied (1937) 273 N. Y. 681. The court refused to follow the holdings in *In re Flatbush Gum Co.* (C. C. A. 2, 1934) 73 F. (2d) 283, and *In re Browning King & Co., Inc.* (C. C. A. 2, 1935) 79 F. (2d) 983, where the federal courts interpreted the New York Sales Tax as not applying to receivers; see also *In re Leavy* (C. C. A. 2, 1936) 85 F. (2d) 25 (trustee in bankruptcy). The Supreme Court of Utah held that a liquidating receiver appointed by the state court was required to pay the tax since the tax is imposed on the sale rather than on the seller as such. *Bird & Jex Co. v. Anderson Motor Co.* (Utah 1937) 69 P. (2d) 510.

64. *Moore v. Pleasant Hasler Const. Co.* (Ariz. 1937) 72 P. (2d) 573; *Arkansas St. Hghwy. Comsn. v. Wiseman* (Ark. 1936) 95 S. W. (2d) 557; *Oklahoma Gas & Electric Co. v. Oklahoma Tax Commission* (1936) 177 Okl. 179, 58 P. (2d) 124. The Moore case was subsequently reversed on another point, *supra*, note 52. The Arkansas court in *Wiseman v. Gillioz* (Ark. 1936) 96 S. W. (2d) 459, held the transfer of a water system (dam, intake tower, etc.) to a municipality taxable without considering the question of the effect of the tax on the municipality.

65. *Long v. Roberts & Son* (Ala. 1937) 176 So. 213.

66. *State ex rel. Mo. Portland Cement Co. v. Smith* (Mo. 1936) 90 S. W. (2d) 405, 408.

67. *City of Wyandotte v. State Board of Tax Admin.* (1936) 278 Mich. 47, 270 N. W. 211.

submitted that a more sound result was reached by the Kentucky Supreme Court, which held that sales by a municipality were not exempt since the tax is imposed on the buyer and not on the seller.⁶⁸

As to the taxability of charities and educational institutions, a great deal depends on the local statutes.^{68a} Sales *by* charities and educational institutions were held subject to the tax by the Kentucky court although the statute granted specific exemption to sales made *to* such bodies.⁶⁹ The Supreme Court of Kansas adopted what would seem to be a better approach by taxing sales by educational institutions only when the proceeds were not subsequently expended for educational purposes.⁷⁰

One of the most perplexing features of sales taxes is their relation to interstate commerce. The space limitations of this Note preclude a discussion of this phase of the sales tax, which has been ably treated in other recent legal periodicals.⁷¹

CONCLUSION

It would be impossible as well as misleading to conclude this Note with a summary of general rules and principles applicable to the sales tax cases. The cases are too conflicting and devoid of general reasoning to permit of such an undertaking. A few suggestions might, however, be made as to the proper approach in ascertaining the applicability of the tax in any given situation. The first step should always consist of a careful examination of the express provisions in the sales tax statutes. If the particular state statute does not cover the situation, a pragmatic approach to the problem would seem advisable. Such an approach involves a thorough knowledge of the factual circumstances and the customs of the particular business or trade, a surmise of the practical results which would follow from a levy of the tax, an investigation into the manner in which the article

68. *City of Covington v. State Tax Commission* (1934) 257 Ky. 84, 77 S. W. (2d) 386. The Kentucky sales tax has since been repealed.

68a. Thus sales by or to the Y. M. C. A. have been held exempt within the provisions of the New York City Sales Tax law exempting receipts from sales by or to "semipublic institutions" from the tax. *Young Men's Christian Ass'n v. City of New York* (1935) 159 Misc. 539, 287 N. Y. S. 287.

69. *City of Covington v. State Tax Commission* (1934) 257 Ky. 84, 77 S. W. (2d) 386.

70. *State Tax Commission v. Board of Education* (Kan. 1937) 73 P. (2d) 49.

71. Johnson, *State Sales Taxes and the Commerce Clause* (1936) 24 Cal. L. Rev. 155; Warren & Schlesinger, *Sales and Use Taxes: Interstate Commerce Pays its Way* (1938) 38 Col. L. Rev. 49; Perkins, *The Sales Tax and Transactions in Interstate Commerce* (1934) 12 N. C. L. Rev. 99.

in question is used after it is transferred, and a consideration of whether the "purchaser" intends to buy tangible personal property or to receive certain services. It might not be amiss to suggest that the financial status of the state's treasury might conceivably influence the court in its adoption of a strict rather than a liberal application of the tax.

Although there is still a great deal of conflict among the existing sales tax decisions and a tendency on the part of the courts to develop their own unique law on the subject, a growing number of cases will soon produce a body of helpful precedent in the field of sales tax law. But it would not seem advisable to rely too strongly on precedent and analogy in other fields of law for the very nature and purpose of the enactment of the sales tax often compels the courts to disregard such precedent and analogy and to adopt a different course of reasoning in order to give effect to the basic principles of sales taxation.

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