LEGISLATION AND ADMINISTRATION

CONFLICTING INTERPRETATIONS OF RETAIL SALES TAX LAWS*

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STATE sales taxation is unquestionably the outstanding current development in American state taxation, and has expanded so remarkably during the past calendar year that no less than 63.5 per cent of the population of the United States now resides in sales taxing states. The number of states now imposing general sales taxes is 26, of which 15 have enacted such laws during 1933.¹ During the present year 1934 Kentucky, New Mexico and West Virginia have enacted additional sales tax legislation, and two further states, Missouri, and Iowa, have enacted sales tax laws. At time of writing the passage of similar laws by the legislatures of Ohio, Florida and Wisconsin appears imminent.

The comparative novelty of this type of taxation has given rise to numerous problems of defining the legal status and interpreting these statutes. The majority of recent sales tax statutes have been emergency legislation. Perforce, the press of time within which to obtain badly needed revenues frequently has prevented tax officials from giving mature thought to questions of interpreting their respective laws.

It is desired to draw attention to certain divergencies or inconsistencies in interpretations by the several state administrative authorities, and by judicial authorities insofar as adjudications have been made in reference

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¹ The term "general sales tax" is used herein to include all general excise taxes, the measures of which are, or are approximately, value of property or services sold or purchased. This definition includes taxes whose measures are not only gross amount of sales of tangible property but also gross income, gross receipts from sales, gross proceeds from sales, or gross amount of purchases.

States enacting a general sales tax during 1933 were the following: Arizona, California, Illinois, Indiana, Michigan, Minnesota, New Mexico, New York, Oklahoma, Oregon, South Dakota, Utah, Vermont, Washington, and Wisconsin. Those states having general sales taxes in effect prior to 1933 were: Connecticut, Delaware, Kentucky, Mississippi, North Carolina, Pennsylvania, Rhode Island, Virginia, and West Virginia. Georgia enacted such a law in 1929, but it expired by its own terms in December, 1931, and was not reenacted.

to such recent legislation, of similar statutory provisions in retail sales tax laws. Fruitful though such analysis might prove to be, the provisions of the statutes will not be comparatively analyzed *per se*, as this discussion is primarily confined to administrative and judicial rulings interpreting only similar statutory provisions contained in different state laws.² Retail sales taxes, or provisions of sales tax laws relating to taxation of final sales at retail, are considered herein in particular, as distinguished from "turn-over" or gross income taxes applying to extractive industries, manufacturers, jobbers or wholesalers in addition to retailers, such as are in effect in Mississippi, Indiana, South Dakota, Washington and West Virginia.

The sales tax statutes, that we herein consider, impose privilege or occupation taxes on persons engaging in the business of selling tangible personal property at retail, with the exception of Oklahoma and Utah whose taxes are imposed directly on "sales" of tangible personal property at retail. Logically, a full treatment of the problem of conflicting interpretations would commence with differing concepts of similar statutory provisions relating to "engaging in business," and proceed to definitions of "sale," of "tangible personal property," and of "retail." Finally, it would deal with the measures of the taxes (i.e. "gross receipts," "gross proceeds," etc.) and with exemptions. Limitations of space preclude a full development of the subject along these lines, and only those particular phases are treated where disagreement has been most marked.

Eleven states possessing laws imposing, in whole or in part, taxes measured by retail sales of tangible personal property, have had these statutes in effect a sufficient length of time within which to have developed and published fairly complete administrative interpretation.³ These states are Arizona, California, Illinois, Iowa, Kentucky, Michigan, Missouri, North Carolina, New York, Oklahoma and Utah. A discussion of all rulings of administrative and judicial authorities in these states relative to their retail sales tax statutes far from exhausts the field.⁴ Yet a discussion

² Cf. Table by the author in *Tax Systems of the World* (5th ed. 1934), 106, published by Commerce Clearing House, Inc., for outline of sales tax laws.

³ The phrase "taxes measured by retail sales of tangible personal property" is used advisedly. The taxes are, with the exception of those in Oklahoma and Utah, imposed on *persons* on account of occupations or privileges exercised, the measures of such taxes being (at least approximately) amount of retail sales. The distinction is legalistic only. See *infra* p. 82.

⁴ Pennsylvania was the first state to impose a tax of this type. Its Emergency Relief Sales Tax Act imposing a one per cent tax was in effect for six months ending February 28, 1933, and was not reenacted. The Statement of the Pennsylvania Department of Revenue, issued August 31, 1932, relative to this tax, must be recognized as the pioneer foundation of regulations for tax laws of this type. These regulations are not considered herein as the statute is not now effective.

of even a part of them is indicative of the character of problems of interpretation which exist in great profusion, and it may serve to direct attention to avenues of standardization and unification. The number of these inconsistencies in construction of similar provisions of statutes is susceptible of future reduction.

SALE AT RETAIL

The phrase "sale at retail" is of fundamental importance and it appears to be susceptible of at least three different definitions: (A) a sale in small quantities and at prices higher than are associated with wholesalers' or jobbers' sales; (B) a sale to a consumer, using "consumer" in the sense of a person who personally derives utility from, uses or enjoys the property purchased by him; (C) a sale to a user or consumer, using "consumer" in the sense of a person who does not physically resell the property purchased *in any form as tangible personal property*.

Definition (A) represents the customary trade definition of "retail," while definitions (B) and (C) represent application of the criterion of the *use* to which the property is put by the purchaser. It will be observed that many sales which are not considered retail sales under definition (A), such as carload sales of coal to the owner of a large residence, are taxable transactions under definitions (B) and (C). Furthermore, many transactions not retail sales under definition (B) as, for example, the sale of machinery to a manufacturer of shoes, are taxable transactions under definition (C). Definition (C) greatly enlarges the scope of application of the statute. None of the legislatures of states under consideration have used definition (A) in the statutes, probably because of the obvious administrative difficulties involved in setting up with respect to each of thousands of commodities criteria for distinguishing retail from wholesale sales, and further because the courts have not been inclined to define the term "retail" on that basis. The administrative authorities of Washington and North Carolina, however, have sought to apply definition (A) in the administration of their tax laws, although the language of their statutes does not appear to bind them thereto.⁵ In the latter state acute administrative difficulties appeared in applying this definition and in later regulations the tax authorities have discarded definition (A) and substituted definition (C),⁶ although opposition to the change has for obvious reasons been ex-

⁵ N.C. Revised Rules & Regs., adopted June 27, 1934, sp. rule 25; Wash. Revised Rules & Regs., issued Jan., 1934, § 6.

⁶ N.C. Revised Rules & Regs., adopted June 27, 1934, Nos. 5 and 6.

treme on the part of wholesalers and manufacturers, and the new definition has been subsequently receded from.⁷

From the economic point of view definition (B) is the most logical, since manufacturers are not the economic consumers of machinery, equipment and supplies necessarily used by them in the process of producing goods for resale, all of which form part of the cost of production thereof. It is plausibly argued on a basis of definition (B) that the full amount of the tax is collected on the final sale of property to consumers, as the selling price of such property will include all elements of cost, such as fuel, supplies and other items sold to manufacturers. Therefore, the sale of *all* of these items used in production to manufacturers are not taxed as retail sales under definition (B). This is in contrast with definition (C) under which only sales of raw materials which reappear in the manufacturer's product and are resold as a physical constituent thereof are not taxable. The Michigan courts have tended to adopt definition (B) and have thereby reversed the rulings of the Michigan tax administrative authorities who have attempted to apply definition (C).⁸ While legislative intent probably supports the position of the Michigan courts, nevertheless the language of the statute measuring the tax by "sales to users or consumers and *not for resale in any form as tangible personal property*" (italics supplied) lends support to the interpretation placed on the statute by the Michigan State Board of Tax Administration.

The adoption of definition (C) by the tax authorities of Michigan has represented the common practice of other state tax authorities, including those of Illinois, New York, Kentucky, California, Utah, Oklahoma, Iowa, Arizona and Missouri.^{8a} Administrative authorities of the last named state, in apparent inconsistency with the terms of the statute and with administrative authorities in other states having the same statutory provisions, originally ruled that whenever tangible personal property is resold not in

⁷ Letter, Director of Assessments and Collections, N.C. Dept. of Revenue, Aug. 17, 1934.

⁸ In *American Box Board Co. v. Stack*, Auditor General, (C. C. Kent County, Michigan, April 28, 1934), the Court held that sales of all types of containers to persons or firms who sell their products therein constitute sales for resale, for the reason that the value of these containers becomes part of the selling price of products contained therein. This doctrine was more specifically affirmed in *The Boyer-Campbell Co. v. Fry* (C. C. Wayne County, Michigan, April 11, 1934), wherein the Court held that "sales of tools, materials, supplies and power used and consumed in the manufacture of tangible personal property destined for resale are not sales taxable under Act 167 P. A. 1933."

^{8a} This definition has been challenged in Illinois by a number of coal mining companies in *Franklin County Coal Co. et al. v. Ames*, Ill. S.C. no. 22744, now pending before the Illinois Supreme Court.

substantially the same form but in a different form (e.g. wheat purchased from a grain company by a miller for resale as flour) the original sale of the property constitutes a "retail" sale.⁹ This construction of the law not only involves administrative difficulties in determining when the form in which property is to be resold is "substantially changed," but also appears to be in direct contravention of the statute, the language of which provides that a sale is not at retail when the property is resold *in any form* as tangible personal property.¹⁰ As this ruling appeared not likely to be sustained by the Missouri courts, it was subsequently rescinded.

Either by statute or by regulation nearly all of the states have placed the burden of proof on sellers of tangible personal property to show that sales are made for purposes of resale and do not fall within the taxable class. New York, California and Missouri have accomplished this by statutory provision, while Illinois, Michigan and Iowa by regulation have thrown this burden of proof on the seller.¹¹ Such a provision should, for self-evident reasons, be a part of every retail sales tax statute. To be required to prove that any particular transaction was within the law places any tax administering authority in an extremely unsatisfactory position.

RELATION OF TAX TO PRICE

The relation of taxes measured by retail sales of tangible personal property to prices charged to consumers for merchandise claims attention. How shall retailers pass on to consumers the burden of taxes which they are obligated to pay to the state? The majority of the states which we consider herein have *by statute* prohibited retailers from advertising that taxes are not an element in their prices, although this is not true of Illinois.

A related point has been almost exclusively the subject of *regulation*; that is, whether or not retailers may add taxes which they must pay to the State to prices as separate items. All state retail sales tax laws, except Utah and Oklahoma, impose, in form, occupation or privilege taxes upon retailers for the privilege of selling or engaging in the business of selling tangible personal property at retail. Constitutional provisions have in many cases precluded imposing these taxes on the sales transaction or on

⁹ Mo. Rules & Regs., effective Jan. 15, 1934, art. 2. This regulation was changed to correspond with the construction adopted by other state tax authorities by an amendment, effective July 6, 1934.

¹⁰ Laws of Mo. Ex. Sess., 1933, H. B. no. 5, § 1(g).

¹¹ Cal. Deering General Laws (1933 Supp.), art. 8493, § 17; Ill. Rules & Regs., effective Feb. 1, 1934, sp. rule 23, art. 14; Iowa Rules & Regs., effective April 1, 1934, p. 9; Mich. Supp. Regs. & Decs., State Board of Tax Administration; Mo. Ex. Sess., 1933, H. B. no. 5; N.Y. Laws (1933), c. 181, § 391.

the consumer. Legal theory, however, has conflicted with economic fact. It is a familiar phenomenon, to which the United States Supreme Court has given judicial recognition, that the burden of a sales tax is almost inevitably passed on to consumers in whole or in part, irrespective of whether the tax in question is imposed upon the occupation of retailing or directly upon consumers.¹²

Proceeding on the basis of a statute imposing an occupation tax, Arizona rulings prohibit retailers from adding the tax as a separate item, and hold that they must shift the burden, if at all, through increased prices.¹³ It is argued that the popular acceptance of a sales tax can be enhanced under this procedure since it eliminates the tax as a visible item to the consuming public. Even conceding that this superficial view does represent the popular reaction, it is doubtful whether such a regulation can, as a legal matter, be enforced. Provided that retailers do not misrepresent the amount of the tax in adding separate items to prices and properly identify such increments as part of their selling prices, it is doubtful whether additions of separate amounts to cover taxes or any other cost of doing business are violative of the statutes. At the other extreme, North Carolina administrative authorities have interpreted the occupational tax law to make it *mandatory* upon retailers to add the tax as a separate item, and have gone so far as to issue official schedules of additions to be made to sales of various amounts.¹⁴ Oklahoma has permitted this procedure by statutory provisions, which appears proper in view of the fact that the law imposes a sales and not an occupational privilege tax.¹⁵ Michigan, New York and Illinois by administrative regulation permit either the addition of separate items to prices, under restrictions, or the incorporation of the tax in prices.¹⁶

Although the Michigan and North Carolina statutes impose occupational or privilege taxes upon retailers, the tax authorities in these states have ruled that additional amounts that retailers may add to prices to reimburse themselves for tax which they must pay to the state are not to be

¹² *Panhandle Oil Co. v. Knox*, 277 U.S. 218 (1923); *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1931). See also Brown, *Economics of Taxation* (1932), for a discussion of the economic theory relating to this point.

¹³ *Op. Atty. Gen. Ariz.*, Aug. 2, 1933.

¹⁴ *Rules & Regs., N.C. Dept. of Revenue*, no. 2, adopted June 27, 1933.

¹⁵ *Okla. Sess. Laws* (1933), c. 196, § 4, par. 9; *Okla. Rules & Regs.*, Dec. 22, 1933, p. 7.

¹⁶ *N.Y. Letters from Dept. of Taxation and Finance*, May 6 and Aug. 2, 1933; *Ill. Rules & Regs.* no. 3, art. 20; *Mich. Regs.*, Jan. 1, 1934, art. 3; *N.C., Rules & Regs.*, June 27, 1933, Rule 1.

included in the measure of the tax.¹⁷ This is contrary to the regulations of Illinois and other states imposing occupational taxes. In the event that no additions to prices are made on account of the tax, the same result is arrived at by permitting a prior deduction of 3 per cent (the rate of tax for each state) from gross proceeds or gross receipts from sales, to determine the basis on which the tax is imposed. This procedure does not appear consistent with the letter of the statutes in question, as it implies that they impose taxes on the consumer and not on the retailer, which is contrary to the expressed intent of these laws.

It would appear proper that administrative regulations give retailers their option as to the method whereby they shift the burden of the tax to consumers, as this is a matter of business policy not properly within the scope of state regulation.

MEASURE OF TAX

In general, the types of retail sales taxes under discussion fall into two classes with respect to the measures by which any taxpayer's liability is determined. The first class measures the amount of tax by the *gross amount of sales* made, irrespective of when the retailer realizes receipts therefrom; the latter class measures the tax by *receipts from sales* and does not include credit sales in the measure until collections are made thereon. New York, Michigan, Arizona, California and Oklahoma statutes all provide for a gross amount of sales measure, although the administrative authorities in New York and California are given statutory powers to permit use of a receipts measure.¹⁸ The Illinois statute imposes a tax falling into the latter class but administrative experience has shown that the gross amount of sales measure is preferable. Computation of tax liability is simpler for the taxpayer thereunder, and auditing on the part of the state tax authorities is capable of being more rapidly and inexpensively performed, as necessity for an analysis of receipts into taxable and non-taxable categories is eliminated. The Illinois administrative authorities have by regulation granted taxpayers permission to use the gross amount of sales measure, and many taxpayers have hastened to avail themselves of this privilege despite the fact that their liability is not infrequently increased.¹⁹ The conclusion follows that state legislatures are well advised to specify a gross amount of sales measure in framing retail sales tax laws.

¹⁷ Mich. Regs., Jan. 1, 1934, art. 3; N.C. Rules & Regs., June 27, 1933, Rule 1.

¹⁸ Cal. Deering General Laws (1933 Supp.), art. 8493, § 9; New York Laws (1933), c. 281, § 391.

¹⁹ Ill. Rules & Regs., no. 3, art. 10.

ENGAGING IN BUSINESS

In determining whether or not a specific taxpayer is "engaging in business" several tests may be applied, the most common of which are: (A) frequency of sales transactions, (B) whether or not profit is the motive of entering into transactions, (C) whether or not the vendor advertises or holds himself out to the public as selling tangible personal property, and (D) whether or not the sale of tangible personal property is an activity incidental and ancillary to a principal occupation (e.g. sale of furniture by a storage warehouseman for purpose of satisfying a warehouseman's lien for storage charges). Test (B) appears to have met with most approbation by the courts,²⁰ although test (A) has been heavily relied upon as determinative of "engaging in business" by the state tax authorities, probably for administrative reasons.²¹

Under certain statutes a tax liability is placed upon *every person who sells* tangible personal property at retail, while under others only persons who are *engaged in the business of selling* tangible personal property are liable. "Isolated or occasional sales," as they are termed, are taxable in New York, but are expressly exempted by statute in Illinois and Missouri, and by regulation in Michigan, California and Iowa.²² This difference in construction is explained on the ground that the New York law imposes a tax for the privilege of selling tangible personal property whereas other statutes are imposed for the privilege of engaging in the business of selling tangible personal property, the legislative intent inferentially being to exempt sales of agricultural produce by farmers, which was an application of these taxes that rurally dominated legislatures would not tolerate.²³ The making of "isolated or occasional sales" of tangible personal property clearly does not constitute engaging in business, but the distinction is fre-

²⁰ *Cuzner v. California Club*, 155 Cal. 303, 100 Pac. 868 (1909); *Easterbrook v. Hebrew Ladies' Orphan Society*, 85 Conn. 289, 82 Atl. 561 (1912); *Atlantic Postal Cable Co. v. City of Savannah*, 133 Ga. 66, 65 S.E. 185 (1909); *State v. Roberson*, 136 N.C. 587, 48 S.E. 595 (1904).

²¹ See, for instance, Iowa, Rules & Regs., April 1, 1934, pp. 7, 8.

²² Ill. Callaghan's Ann. Stat. (1933 Supp.), c. 120, § 426; Mo. Ex. Sess. (1933), H.B. 5, § 1-A; Mich. Supp. Regs. & Decs., Jan. 1, 1933, art. 2; Cal., Analysis of Sales Tax Act., § 2; Iowa Rules & Regs., April 1, 1934, p. 7; N.Y., Laws (1933), c. 281.

²³ Under an original Retailers' Occupation Tax Act, passed by the Legislature of Illinois and effective April 15, 1933, "sales of agricultural produce by the producers thereof" were expressly exempted. This exemption was one of the principal grounds upon which the Illinois Supreme Court held the Act unconstitutional in *Winter v. Barrett*, 352 Ill. 441, 186 N.E. 113 (1933). Accordingly, when the statute now in effect was drafted and reenacted, this exemption was omitted but the provision that "the making of isolated or occasional sales did not constitute engaging in business" was inserted in lieu thereof.

quently difficult to draw, and has not, in fact, been drawn uniformly by tax authorities in those states wherein such sales are not within the statutes.

WATER, GASES, ELECTRICAL ENERGY AND STEAM

An important and highly controversial subject in the interpretation of laws imposing taxes measured by sales of "tangible personal property" at retail is whether or not such taxes extend to sales of waters, gases or electrical energy. In the majority of states this question has fortunately been solved by statutory provisions. The New York and California laws have expressly exempted these commodities when delivered through mains, lines and pipes.²⁴ The laws of Oklahoma, Arizona and Michigan have defined "tangible personal property" to include gas and electrical energy only, the inference being that the legislatures had no reasonable doubt as to the tangibility of water and the taxability of sales thereof.²⁵ The statutes of Utah, Iowa and Missouri specifically provide that taxes shall be paid with respect to sales or furnishing of water, gas and electrical energy, although these commodities are not included within the phrase "tangible personal property."²⁶ With no statutory provision whatever on this subject, Illinois tax authorities have ruled that these commodities are "tangible personal property" and sales thereof come within the terms of the statute.²⁷ The North Carolina and Pennsylvania administrative authorities have ruled to the contrary that neither water, gases nor electrical energy are commodities coming within their sales tax laws.²⁸ The 21 leading water, gas and electric public utility corporations of Illinois have secured a temporary injunction restraining collection from them of the Illinois sales tax, pending a judicial determination of the validity of the Illinois ruling that they are liable therefor. The Circuit Court of Cook County, Illinois, held for the state in this cause, and, at time of writing, the case awaits a decision by the Illinois Supreme Court.²⁹ Substantially the same issues have been presented, plus the additional one involving the propriety

²⁴ N.Y., Laws (1933), c. 281, § 390(b); Cal., Deering, General Laws (1933 Supp.), art. 8493, § 5.

²⁵ Okla., Sess. Laws (1933), c. 196, § 4; Mich., Baldwin's Compiled Laws (Supp. 1934), c. 61 A, § 1(b2).

²⁶ Utah, Laws (1933), c. 63, as amended by Sp. Sess. S.B. 6, § 1; Iowa Sales Tax Act of 1934, § 38; Mo., Laws Ex. Sess. (1933), H.B. no. 5, § 2 A(B).

²⁷ Ill. Rules & Regs., no. 3, sp. rule 27.

²⁸ Op. Atty. Gen. Pa., Nov. 19, 1932; Letter, N.C. Commissioner of Revenue, Oct. 10, 1933.

²⁹ See oral opinion of Judge Harry Fisher, C. C. Cook County, Illinois, in *Commonwealth Edison Co. v. K. L. Ames, Jr.*, July 18, 1934.

of applying the tax to transactions whereby water is sold or furnished by municipal corporations, in a suit recently filed by a number of municipalities.³⁰ Assuming that "sales" of "tangible personal property" are involved, the fact that such sales are made by municipal corporations does not, however, appear to except such corporations of Illinois from the application of the tax.³¹

The question has wide legal ramifications, involving not only whether the phrase "tangible personal property" embraces the substances water, gas or electricity, but in addition whether the compulsory furnishing of such commodities at government-controlled rates to customers who have no option of bargaining with competitors can be construed as "sales" of tangible personal property in the sense in which the word "sale" is ordinarily used. It is not the province of the present article exhaustively to explore the merits of opposing arguments relative to these propositions. It may be briefly pointed out, however, that the contention of the public utilities that the word "tangible" in its ordinary and popular sense does not include water, gas and electrical energy, and that, therefore, a legislature imposing a tax measured by sales of tangible personal property at retail, being assumed to use words in their ordinary and popular sense, could not mean to impose the tax with respect to sales of these commodities, may be countered by a plausible and forceful argument. This argument commences by pointing out that the terms "tangible" and "intangible" have in the development of the law of personal property become respectively synonymous with the terms "corporeal" and "incorporeal," and that a legislature must be presumed to use a word in the sense in which it is used at common law, unless a different meaning is unmistakably indicated. At common law the terms "tangible" or "corporeal," when used in classifying property, are used to denote choses or things in possession, as opposed to the terms "intangible" or "incorporeal," which are used to denote choses or things in action. As there is no third classification of personal property, water, gas or electrical energy must fall within one or the other class, and it is undeniable that as between the two, they constitute choses in posses-

³⁰ *Village of Winnetka v. K. L. Ames, Jr.*, Super. Ct. Cook County, Chancery No. 34511610. The original motion for a temporary injunction was denied by Judge Lewé and this case will undoubtedly go before the Illinois Supreme Court for adjudication on appeal by the State. See also *Village of Algonquin v. Ames*, C. C. Sangamore County, Chancery No. 61287 in which the Circuit Court held for the State, and *Village of Antioch et al. v. Ames*, Super. Ct. Cook County, No. 34514085, both of which involve points substantially similar to those in the Village of Winnetka case.

³¹ *Wagner v. City of Rock Island*, 146 Ill. 139, 34 N.E. 545 (1893); *People v. Deep Rock Oil Corporation*, 343 Ill. 388, 175 N.E. 572 (1931); *Canavan v. City of Mechanicville*, 229 N.Y. 473, 128 N.E. 882 (1920).

sion as opposed to choses in action, and are, therefore, corporeal or tangible personal property.³²

The circumstance that vendors or furnishers of water, gas and electrical energy are not in a position, as are other retailers, to shift the burden of sales taxes to consumers without receiving permission from state public utility authorities to increase their rates is a further factor placing them in a peculiar position, although the Mississippi Supreme Court has not differentiated them from other taxpayers on this ground.³³

The classification of steam involves similar legal problems to those pertaining to waters, gases and electrical energy. In this connection, the Circuit Court of Wayne County, Michigan, has recently upheld the imposition of Michigan sales tax with respect to sales of steam, where the steam is actually delivered for consumption by the consumer and is not used in the preparation of an article which is itself subject to the sales tax.³⁴

NEWSPAPERS

A related question of interpretation that has been productive of much disagreement is the application of retail sales taxes to newspapers, magazines and periodicals. Illinois and New York tax authorities have defined the term "tangible personal property" by regulation to include these articles, and have thus brought sales thereof within the purview of their statutes.³⁵ They have likewise been included by the state of Arizona, but by statutory provision.³⁶ The contrary view has been taken by the tax administrative authorities of Michigan, Kentucky, Oklahoma, Iowa and Missouri, who have ruled that sales of newspapers are not sales of tangible personal property and, hence, do not come within the purview of their laws.³⁷ California has with apparent inconsistency distinguished newspa-

³² Cf. brief filed on behalf of State in Commonwealth Edison Company case, *supra* note 29.

³³ In *Mississippi Power & Light Co. v. C. D. Ross*, 168 Miss. 400, 150 So. 830 (1933), the court held that the complainant, Ross, was liable to pay the defendant Power & Light Co. only at the contractual rate for gas furnished to him, and the company could not validly assert an additional amount equal to 2% of its gas bill, which had been added thereto to cover Mississippi Sales Tax owing by the company to the state.

³⁴ *Detroit Edison Co. v. Fry, et al.* (C. C. Wayne County, January, 1934). The court further held in this case that a sale of steam which took the form of the sale and delivery of heat units through the medium of passing steam through a radiating system did *not* constitute a taxable sale. The inference is that heat units were not regarded as tangible personal property although steam was so regarded.

³⁵ Ill. Rules & Regs., Feb. 1, 1934, no. 3, art. 15; N.Y. Regs., May 14, 1933, c. 1.

³⁶ Ariz. Gross Income (Privilege Sales) Tax, effective June 28, 1933, § 2, par. 7.

³⁷ Mich. Regs., Jan. 1, 1934, art. 28; Ky. Rulings and Explanations, Op. Atty. Gen. re Newspapers, Sept., 1931; Okla. Rules & Regs., Dec. 22, 1933, § 5(18); Iowa Rules & Regs., April 1, 1934, Rule 60; Mo. Rules & Regs., Jan. 15, 1934, sp. rule 44.

pers from magazines, and holds newspapers to be not within its statute, but magazines to constitute "tangible personal property" and so to be included.³⁸ That the "power of the press" has wielded an influence in the formation of certain of these administrative rulings and the statutes that did not expressly include sales of newspapers is undeniable. A united front in the form of a uniform regulation on the part of all states having discretion to regulate thereon would nevertheless simplify the task of tax administrators.

It is the contention of the newspaper publisher that his occupation is primarily that of rendering the service of providing the public with up-to-date information; that white paper and printers' ink is used or consumed by him in the process of rendering this service; and that these media are only used for the means of conveying intangible information which possesses only temporary value. This superficially plausible argument appears entirely unconvincing. When a person purchases a newspaper no peculiarly personal service is rendered to him. Title to an article of tangible personal property merely passes to him from the seller. It is true that the newspaper so purchased can be made to render "services" (in a utility or economic sense) if the purchaser reads it, but the service element is *inherent* in the tangible personal property. In this respect a newspaper falls in no different class than such other items, universally conceded to be tangible personal property, as a book which must be read, a radio which must be listened to, or an automobile which must be driven, before the "service" inherent in them may be personally derived by the purchaser.³⁹

A further factor frequently alluded to that does not so much complicate as obfuscate the issue is the circumstance that advertising revenues permit many publishers to sell printed newspapers for less than the costs of the raw materials entering into them. What occurs in substance is that publishers are enabled to unload part of their production costs upon advertisers, leaving only a fraction of these costs to be covered by purchase prices of newspapers paid by consumers. This reduction in the consideration of sales of newspapers in no wise appears to alter the reality that publishers sell items of tangible personal property.

REPAIR OCCUPATIONS

In connection with treatment of the various repair trades⁴⁰ wide divergencies in rulings have developed, only a few of which can be treated here-

³⁸ Cal. Letter of Acting Director, Sales Tax Div., State Board of Equalization, Oct. 6, 1933.

³⁹ See Op. Atty. Gen. Ill. to Director of Finance on this question, Nov. 8, 1933.

⁴⁰ A related class of occupations includes doctors, dentists, architects, title abstracters, and others, who transfer tangible personal property to consumers, the value of which, however, is

in. Shoe-, auto-, furniture-, jewelry-, fur-repair, and other classifications of repairmen have not been uniformly dealt with by the several state tax authorities. Illinois, New York, Michigan, California, Oklahoma, Missouri and Iowa authorities, for example, have been in agreement in ruling that sales to shoe repairmen of leather, soles, heels and like shoe findings for use in performing their repair services are sales at retail to consumers.⁴¹ They have not held shoe repairers liable for any tax with respect to their receipts from such repair services on the reasonable theory that the delivery of goods involved in shoe repair work is incidental to the rendering of service. Here, as is the case with other rulings, practical administrative considerations have wielded large influence and case law is lacking. The Michigan State Board of Taxation, facing an unfavorable decision by the Circuit Court for Wayne County which had the effect of holding the shoe repairman liable for tax on the ground that he was not the consumer but the retailer of shoe soles, heels and other findings, has reversed its previous ruling, and now imposes the tax upon shoe repairers.⁴²

New York administrative authorities have adopted a "blanket ruling" with respect to repair occupations of all kinds to the effect that repairmen become ultimate consumers of all tangible personal property used in connection with the performance of repairs to tangible personal property belonging to others, when they do not separately bill the tangible items involved in the job to customers. On the other hand, they are deemed under this ruling to be sellers at retail of tangible personal property and liable for payment of tax with respect to proceeds or receipts from the tangible parts of the job, if they do make segregations on their bills of charges for tangible personal property and for labor or time.⁴³ The distinction as to whether or not any particular repairman is liable for tax is thus made to depend upon the mere accident of billing. A more substantial and practical criterion for determining whether or not the members of any given repair occupation shall be held liable for a sales tax appears to be (1) the relative importance of the value of tangible personal property ordinarily used in connection with repair work compared with the total charges therefor, and (2) the trade practices customarily followed in connection with billing in that occupation. The New York type of regulation appears to create a

the result of large expenditures of labor on materials of small value. On the whole, this class of occupations has been regarded as one rendering services and not selling goods.

⁴¹ Ill. Rules & Regs. no. 3, sp. rule 13; N.Y. Sales Tax Regs., p. 44; Mich. Supp. Regs. & Decs., Trade Rule 28; Okla. Rules & Regs., May 1, 1934, no. 26; Mo. Rules & Regs., Jan. 15, 1934, no. 29; Iowa Rules & Regs., April 1, 1934, no. 19.

⁴² *W. H. Atkinson Co. v. State of Michigan*, (C. C. Wayne County, Mich., Jan., 1934).

⁴³ Rules & Regs., N.Y. Dept. of Finance and Taxation, Nov. 11, 1933, art. 24.

legally unnecessary and impractical difficulty for the tax administrators in determining precisely what sales of tangible personal property to repairmen are for resale and what are at retail, inasmuch as different individuals in the same repair occupation frequently follow different methods of billing customers. More feasible in operation would appear to be the rulings of Illinois, Michigan, California and other states, under which each repair occupation (such as fur-, auto-, watch-, furniture-, or shoe-repair) is ruled on separately and specifically on the basis of its own peculiar circumstances and trade practices. For example, under regulations of the Illinois Department of Finance *all* persons falling within the class of auto repairmen are required to pay tax measured by receipts from parts or accessories sold to auto owners in connection with repair work and must bill the same separately to avoid paying tax on their total charge—a simple rule following trade practices and precluding misinterpretation by non-erudite taxpayers.⁴⁴

CONSTRUCTION CONTRACTORS

Construction contractors have proven to be a somewhat difficult occupation, with reference to definition of status under retail sales tax laws. This circumstance arises from the fact that the occupation involves not only use of tangible personal property in connection with the completion of contracts to construct or improve real property, but it likewise frequently involves the reselling of tangible personal property (*i.e.* construction materials) as such. In addition to this factor, there is frequent difficulty in determining precisely at what point personal property becomes real property, and which among a series of sales is the last or ultimate sale of tangible personal property with respect to which tax must be paid. In general, the different state tax authorities have ruled uniformly that where contractors enter into contracts to construct, improve, or repair and sell real property for a lump-sum amount, the building material supply houses selling items of tangible personal property to contractors for such uses are liable for tax on the theory that the materials become so annexed to the realty that title is transferred by accession and not by sale.⁴⁵ This

⁴⁴ Ill. Rules & Regs., Dept. of Finance, issued Feb. 1, 1934, sp. rule 10.

⁴⁵ Cal. Sp. Rules, State Board of Equalization, Sept. 25, 1933, "Materials and supplies sold to owners, contractors and sub-contractors," par. a, b, c and d; Ill. Rules & Regs., Dept. of Finance, Feb. 1, 1934, sp. rule 6; N.Y. Regs., State Tax Comm., art. 21 (Revised Oct. 6, 1933), 22 and 23, Official Questions and Answers as amended Nov. 8, 1933; Okla. Rules & Regs., Okla. Tax Comm., Dec. 22, 1933, § 5(36); Ariz. Op. Atty. Gen. to Lyle V. Owens, July 8, 1933.

In *Bradley Supply Co. v. K. L. Ames, Jr.*, Super. Ct. Cook County, Ill., No. 34S2009, the court held that plumbing supply houses sell for resale when selling to plumbing contractors who annex personal property to the real property of customers. This decision has been appealed to the Illinois Supreme Court.

construction has been affirmed in a recent federal case.⁴⁶ Administrative bodies in several states have further held that if materials used in connection with a contract for the construction, improvement or repair of real property are billed separately to the property owners from time and labor involved in the job, the contractor and not the person selling construction materials to such contractor is liable for tax with respect to receipts from the sale of these materials.⁴⁷

A more fundamental distinction than the mere circumstances of billing, for purposes of fixing tax liability relative to sales of construction materials, appears to be the nature of the contract between construction contractor and property owner. If such contract obligates the contractor to construct, improve, renovate or repair real property, and does not require the other party to purchase any tangible personal property as such, then the contractor should be regarded as the user or consumer of all tangible personal property purchased for completing the contract, notwithstanding that these construction materials may be billed separately from time or labor to the property owner, or that the consideration fixed in the contract or price may be computed on a "cost-plus," "fixed fee" or other basis where the quantity of materials used partially determines the contract price. On the other hand, if such a contract provides for the sale of construction materials as such, and labor is contracted for separately, the contractor should clearly be held liable for tax as a "retailer" of tangible personal property. New York⁴⁸ and Illinois⁴⁹ regulations are in harmony with this latter theory.

FEDERAL RECEIVERS

A further question until recently a subject of dispute is whether or not receivers appointed by federal courts to operate businesses engaged in sell-

⁴⁶ *Meyer Construction Co., et al. v. Corbett, et al.*, 7 F. Supp. 616 (D. C. Cal., 1934). The plaintiff construction company alleged that it had contracts with the United States Government to erect buildings and constructions for the Department of War, and that persons selling materials to it for use in fulfilling such contracts refused to sell the materials unless the plaintiff paid the California Sales Tax. (California Regulations permit the addition of the tax to selling prices as a separate item.) The court held that the plaintiff was not a retailer of tangible personal property and was, therefore, not a proper person to be heard to oppose the Sales Tax Statute upon ground of its repugnance to the Federal Constitution. It further held that the plaintiff was not an agency or instrumentality of the United States.

⁴⁷ Ky. Retail Merchants' License (Gross Sales) Tax, Rulings & Explanations, Op. Atty. Gen., interpreting Act, Sept. 4, 1933; Mich. Regs., State Board of Tax Administration, revised Jan. 1, 1934, art. 31, 32; Utah, Regs., Utah Tax Comm., c. 20 Laws of Utah, Aug. 4, 1933, Reg., art. 12; Wash. Official Instructions, Tax Comm., Wash. Laws (1933), c. 191 § 7, par. 5, 6.

⁴⁸ N.Y. Rules & Regs., Tax Comm., art. 21, revised Oct. 6, 1933, art. 22 and 23, Official Questions & Answers, as amended Nov. 8, 1933.

⁴⁹ Ill. Rules & Regs. no. 3, Dept. of Finance, Feb. 1, 1934, sp. rule no. 6.

ing tangible personal property at retail should be held liable for filing returns and payment of tax. The Department of Finance of Illinois ruled that where such receivers do so engage in business they come within the purview of the law. This ruling was made on the assumption that such receivers ought not to be discriminated in favor of as against other persons engaging in such businesses, notwithstanding that they operated by virtue of appointment by federal courts. The doctrine of federal instrumentalities was considered to be not properly extensible to include such receivers, for if carried to this length, it would create an obvious discrimination. In a decision recently handed down by a United States District Court in Illinois relative to a case arising under the Motor Fuel Tax Act of that state this view was sustained.⁵⁰ A contrary view was taken by the United States District Court for the Western District of Missouri⁵¹ but its decision was reversed by the United States Court of Appeals. New York has not issued a regulation on this specific subject.⁵² California⁵³ and Oklahoma⁵⁴ authorities have interpreted their laws similarly to the Illinois regulation.

The doubt on this problem of interpretation has been dispelled by the enactment at the last session of Congress of a federal law making any receiver, liquidator, referee, trustee or other officers or agents appointed by any United States Court, who is authorized by said court to conduct any business, or who does conduct any business, subject to all state and local taxes applicable to such business to the same extent as if such business were conducted by an individual or corporation.^{54a}

INTERSTATE COMMERCE

The definition of interstate commerce is probably the most important subject with which state administrative authorities have dealt in construing retail sales tax laws, but this problem has been simplified by reason of precedents in the form of Federal court decisions dealing with state excise taxes in relation to interstate commerce. In accordance with that provision of the Federal Constitution reserving to the Congress of the United

⁵⁰ *Howe v. Atlantic, Pacific & Gulf Oil Co.*, Dist. Court for Northern District of Ill. Eastern Division, no. 11268, May 4, 1934.

⁵¹ *Howe v. Atlantic, Pacific & Gulf Oil Co. (State of Missouri Intervenor)*, 4 F. Supp. 162 (D.C. 8th 1933).

⁵² N.Y. Letter from John H. Thompson, Deputy Comm'r., State Tax Comm., Sept. 29, 1933.

⁵³ Cal. Letter of Frank M. Keeling, Asst. Director, Sales Tax Division, State Board of Equalization, Oct. 24, 1933.

⁵⁴ Okla. Rules & Regs., Okla. Tax Comm., Dec. 22, 1933, § 5 (33).

^{54a} H. B. 8544, Public Act 392, approved by President, effective June 18, 1934.

States power to regulate commerce among the states,⁵⁵ and well-settled doctrines enunciated by the United States Supreme Court as to what transactions constitute interstate commerce with reference to state taxing statutes, all the statutes under present consideration have in general terms exempted retailers from tax as to any business conducted in interstate commerce.⁵⁶ State legislatures, in failing to enact more detailed and specific descriptions of types of business or transactions that fall within the exempt category, have thrust this task upon the tax administering authorities who have, however, acted with substantial uniformity in promulgating regulations on the subject.

The limitation on the states' power to impose excise taxes on, or measured by transactions in interstate commerce, is unquestionably one of the most fundamental defects inherent in state-levied sales taxes, and the most compelling argument for a Federal sales tax which is not subject to this limitation. It results in an indefensible discrimination in favor of persons selling and shipping merchandise interstate, and against other persons similarly situated who enter into similar transactions on an intrastate basis within any state imposing a sales tax. The *raison d'être* of the federal constitutional provision reserving congressional authority respecting interstate commerce was the thought of the constitutional fathers that no state should be permitted to impose discriminatory taxes or duties against, or otherwise obstruct the free movement into it of the wares or manufactures of other states. It is anomalous to reflect that the present effect of this provision is a discrimination *against* sales of merchandise within any state imposing a sales tax. Where the rates of tax range as high as 3 per cent of the gross amount of sales, the differential between prices fixed on a taxable and a non-taxable basis is undoubtedly sufficient to divert a large volume of business from persons doing business in intrastate to those doing business in interstate commerce. Furthermore, from a fiscal standpoint it should be observed that where a sale is in interstate commerce neither the state of the vending retailer from which the goods were shipped (hereafter for convenience called the "state of origin"), nor the state of the purchaser for consumption, to which the merchandise was shipped (hereafter termed the "state of destination") is able to impose a sales tax with respect thereto. Thus a substantial but undetermined fraction of the potential tax base is lost.

⁵⁵ Art. I, par. 8, cl. 3.

⁵⁶ The opinions of the court in the cases of *Brown v. Maryland*, 12 Wheat. (U.S.) 419 (1827); *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292 (1917); *Sonneborn Bros. v. Cureton*, 262 U.S. 506 (1923); and *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932) contain reviews of the leading decisions on this subject.

A plan for meeting this defect of state-levied sales taxes has been sponsored by the Department of Revenue of North Carolina. It is proposed that the Congress enact a law permitting states to impose excise taxes on, or measured by, sales in interstate commerce, providing that such taxes do not at any time discriminate against interstate as against intrastate transactions, and that the particular state wherein merchandise moves to purchasers for use or consumption be permitted to impose its retail sales tax, if any, with respect to such transactions on vendors of such merchandise wherever situated.⁵⁷ Under this authority each state possessing a retail sales tax would be legally entitled to a tax with respect to *all* sales of merchandise to consumers within its borders, instead of merely sales made by local merchants within that state, as heretofore. It is plausibly argued that the Congress possesses constitutional powers to enact such a law.⁵⁸

A sales tax imposed by the federal government would be free from this defect. Assuming that such a taxation measure administered by the federal government with proceeds distributed in whole or in part back to the states or in proportion to population, retail sales as reflected in the United States Census, or some other acceptable basis is not presently feasible, the proposed legislation offers an attractive alternative. Yet it is not amiss to point out crucial difficulties in the application of this plan. Chief of these is the means by which collection of the tax can be enforced by the state of destination against the retailer located in the state of origin of the mer-

⁵⁷ The relevant provisions of the bill passed by the Senate on March 15, 1934, as S. B. 2897 are:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That all taxes or excises levied by any State upon sales of tangible personal property, or measured by sales of tangible personal property, may be levied upon, or measured by, sales of like property in interstate commerce, by the State into which the property is moved for use or consumption therein, in the same manner, and to the same extent, that said taxes or excises are levied upon or measured by sales of like property not in interstate commerce and no such property shall be exempt from such taxation by reason of being introduced into any State or Territory in original packages or containers, or otherwise; provided, that no State shall discriminate against sales of tangible personal property in interstate commerce, nor shall any State discriminate against the sale of products of any other States: Provided, further, that no State shall levy any tax or excise upon, or measured by, the sales in interstate commerce of tangible personal property transported for the purpose of resale by the consignee; provided, further, that no political subdivision of any State shall levy a tax or excise upon, or measured by, sales of tangible personal property in interstate commerce. For the purposes of this Act a sale of tangible personal property transported, or to be transported, in interstate commerce shall be considered as made within the State into which such property is to be transported for use or consumption therein, whenever such sale is made, solicited, or negotiated in whole or in part within that State." This bill died in House Committee.

⁵⁸ See Perkins, *The Sales Tax and Transactions in Interstate Commerce*, 12 N.C. L. Rev. 99 (1934), for a discussion of the constitutionality of such proposed legislation.

chandise. For example, how shall the state of Utah effectively enforce collection of its retail sales tax against a mail-order concern located in Illinois, due on account of the sale and shipment of tangible personal property by the latter to a consumer in Utah? Even assuming that adequate means of legally compelling an out-of-state vendor to pay a sales tax may be devised, how may any state practicably determine the correctness of amounts of taxes so paid without incurring inordinate auditing expense? These may not be inherent or insuperable obstacles, but they will require ample consideration and the formulation of solutions before such legislation may be used to advantage.

The collection difficulty can be avoided by framing the Congressional Act to permit non-discriminatory taxation of interstate commerce, *not* by the state of destination, *but* by the state of origin of the merchandise. That is, each state shall impose its tax on vendors within its borders to the extent of their interstate in addition to their intrastate retail sales. This plan is objectionable, in turn, in aggravating the handicap suffered by merchants selling interstate in competition with merchants in states not levying a sales tax.

Only a few comments will be made herein in reference to regulations on interstate commerce, as conflicting interpretations have not been numerous. State sales tax authorities have generally looked to the physical movement of merchandise in reaching a determination as to the taxability of particular transactions, and correctly so. Place where contract was entered into, or purchase price paid, or where the vendor or purchaser reside or do business have been regarded as incidental factors. Regulations on this subject may be conveniently divided into two divisions, namely: (1) regulations respecting when interstate commerce ends, relating to movements of goods *into* a taxing state and (2) regulations respecting when interstate commerce begins, relating to movements of goods *out of* a taxing state. Where both state of origin and state of destination impose sales taxes, it will be readily understood that sales in interstate commerce between them involve one of these classes of regulations for one state and the reciprocal class for the other.

The regulations of the states are in unanimous agreement that a sale which involves shipment or delivery of the goods from a vendor's stock to a purchaser in a second state is a transaction in interstate commerce, and that the state of origin cannot impose a tax with respect to such a sale.⁵⁹ Likewise, there is general agreement that with respect to this same transac-

⁵⁹ N.Y., Ill., Mich., Okla., Cal. rulings specifically adhere to this general principle, and the remaining states inferentially so.

tion, the state of destination cannot impose its tax.⁶⁰ Michigan rulings constitute an exception. While construing a transaction whereunder a person in Michigan buys merchandise by letter, telephone or telegram from a merchant in another state, which merchandise is shipped directly to the purchaser, as a transaction in interstate commerce, the Michigan construction further provides:⁶¹

"If sales are made within the State of Michigan by representatives of parties living without the State of Michigan and delivered in the State of Michigan, the sale is taxable."

This interpretation is of dubious validity, if merchandise is shipped directly from an out-of-state vendor to a purchaser in Michigan pursuant to sale. Such transactions were clearly held to be in interstate commerce in recent and authoritative decisions of the United States Supreme Court.⁶² The mere circumstance that the sale is negotiated or an order taken personally by a representative of the out-of-state vendor and is not transmitted by mail does not serve to make the transaction an intrastate one.

CONCLUSION

Instances of divergence in the construction of similar provisions of state sales tax statutes might be multiplied well-nigh indefinitely. This is particularly true if regulations on such comparatively specialized subjects and occupations as pawnbrokers, containers, installment finance institutions, restaurants, photographers, freight and transportation charges, artists, rental libraries, sales of feeds to live stock feeders, auctioneers, and other subjects were subjected to comparative analysis. Herein, the endeavor has been to concentrate attention on the legally and fiscally more important subjects of interpretation. As a sample, characteristic of conditions permeating the entire field of constructions of sales tax statutes, it emphasizes need for standardizing and making uniform such interpretations insofar as they relate to identical provisions of law, not only on the same subjects as between states, but likewise on different subjects *within* each state. This latter aspect is not treated herein not for lack of importance, but for want of space.

It is believed that divergencies frequently develop because of an incomplete knowledge by courts and tax officials of the actions of courts and

⁶⁰ In *Vaught v. Bailey*, the West Virginia Supreme Court of Appeals, July 31, 1934, recently held that the West Virginia Gross Sales Tax was not applicable to a motor vehicle purchased outside the State and brought within the State by the purchaser for registration.

⁶¹ Rules & Regs., State Board of Tax Adm., effective Jan. 31, 1934.

⁶² Especially *Stewart v. Michigan*, 232 U.S. 665 (1914), and *Sonneborn Bros. v. Cureton*, 262 U.S. 506 (1923).

administrative officers in other states. It is suggested that a secretariat or clearing house be established and operated by the different states imposing sales (including gross income) taxes, whose function would be the collection, clearing and prompt dissemination of all information relating to the administration and operation of sales tax laws. Each member state should be required to file with such a clearing house with due dispatch copies of all rules, regulations or administrative interpretations of law, opinions of attorneys general, relevant records of court proceedings, or court decisions relating to its sale tax for immediate reproduction and distribution to member states. It is suggested that a permanent organization be maintained, financially supported by the member states with funds to be obtained by legislative appropriation for that purpose. The existence of such an institution could not fail to promote uniformity in construction of similar provisions of laws, and perhaps eventually result in uniformity in the statutes themselves, to the material benefit of tax officials and taxpayers alike.