

1984

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Herman C. McCloud

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Recommended Citation

Herman C. McCloud, *Sales Tax and Use Tax: Historical Developments and Differing Features*, 22 Duq. L. Rev. 823 (1984).

Available at: <https://dsc.duq.edu/dlr/vol22/iss4/3>

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Duquesne Law Review

Volume 22, Summer 1984, Number 4

Article

Sales Tax and Use Tax: Historical Developments and Differing Features

*Herman C. McCloud**

State sales taxation came into vogue in the United States during the Depression.¹ Faced with a sharp decline in revenue and increasing pressure on the property tax, states were forced to turn to new sources of revenue to meet the challenges of their expanding role and increased expenditures.² Thus, in 1930 only two states levied sales taxes, by 1933 the number had grown to fifteen, and by 1976, forty-four states and the District of Columbia imposed sales and use taxes which have become the most significant source of

* B.A., 1942, Allegheny College; LL.B., 1950, Duquesne University; member, Pennsylvania bar. The author is the former Manager of the Sales and Use Tax division for the United States Steel Corporation. The writer acknowledges with appreciation the assistance of G.H. Danvers, a fourth year evening law student at the Duquesne University School of Law, in the preparation of this article.

1. For a general discussion of the development of state sales and use tax law, see Studenski, *Characteristics, Developments and Present Status of Consumption Taxes*, 8 *LAW & CONTEMP. PROB.* 417 (1941); Pierce, *The Place of Consumers' Excises in the Tax System*, 8 *LAW & CONTEMP. PROB.* 430 (1941); Due, *The Nature and Structure of Sales Taxation*, 9 *VAND. L. REV.* 123 (1956).

2. Facing equal pressure, Congress considered a federal sales tax on manufacturers in the 1931-32 session, but subsequently defeated the bill and modified it to include excise taxes on certain selected commodities only such as lubricating oils, malt, furs, jewelry, sporting goods, automobiles, admissions and gasoline. Many of these provisions survive today. See 26 U.S.C. §§ 4001-4503 (1976 & Supp. V 1981).

state revenue.³

The expression "sales tax" or "consumption tax" includes within its scope a wide variation of levies according to the activity or transaction taxed.⁴ Although termed "bewilderingly various" by one commentator,⁵ a general observation concerning the sales tax can be made, particularly to distinguish the use tax. Broadly speaking, sales taxes are considered to be those imposed upon the sale of tangible personal property at either the retail or wholesale level and on certain services within the state.⁶ Legislators recognized the political benefit of adopting new sales taxes rather than raising rates of existing taxes or imposing individual income taxes. Advantages of the sales tax alternative include: (1) relief to property owners from tax rate increases; (2) imposition on the general populace at a uniform, low rate; (3) minimizing impact by application to each purchase; (4) avoiding criticism of regressiveness by allowing exemptions for food and clothing; (5) facilitating collection procedures by requiring retailers to collect and remit the tax.

Since it was thought that sales taxes could constitutionally reach only those transactions or sales within the state, the perceived loss of revenue due to out-of-state purchasing was remedied by the passage of use taxes.⁷ Generally, use taxes are normally those imposed upon the use, storage or consumption of tangible personal property not subject to state sales tax; most importantly, property purchased outside the state.

Neither the sales tax nor the use tax are considered to be property taxes. Rather, they are construed to be taxes on the privileges of selling, buying, ownership, possession or use.⁸ While a sales and use tax are intended to be complementary and are usually embodied in one statute, there are significant differences between them with respect to exemptions,⁹ time of payment,¹⁰ and application of

3. Those states having no sales or use taxes although some have local sales taxes are Alaska, Delaware, Hawaii, Montana, New Hampshire and Oregon. In 1976, general sales, use and gross receipts taxes provided 30.6 percent of the total state tax collections, while individual and corporate income taxes yielded 32.1 percent. See J. HELLERSTEIN & W. HELLERSTEIN, *STATE AND LOCAL TAXATION* 2-6 (4th ed. 1978).

4. Sales taxes have been grouped into various categories. See, e.g., HAIG & SHOUP, *THE SALES TAX IN AMERICAN STATES* 3-4 (1934).

5. Northrup, *The Measure of Sales Taxes*, 9 VAND. L. REV. 237, 238 (1956).

6. One early commentator noted five distinguishing characteristics of the sales tax. See Studenski, *supra* note 1, at 419.

7. See *infra* notes 27-30 and accompanying text.

8. See *infra* notes 27-46 and accompanying text.

9. See, e.g., OHIO REV. CODE ANN. § 5741.02(c)(4) (Page 1982) which exempts from use tax property purchased from outside of the state which is temporarily stored within the

constitutional provisions.¹¹ The two taxes must be equal as to application of rate and basis of measurement.¹² In other words, the tax burden borne by the local merchant or customer can be no less than the burden borne by the out-of-state merchant, or purchaser of foreign goods.

This article is not intended to be a comprehensive review of the law of state sales and use tax. Rather, the author focuses on the historical development of principles and distinctions between sales taxes and use taxes. After consideration of constitutional issues involved, the article brings forth some recent problems in the areas of interstate sellers, government contractors, major service providers and manufacturer-users.

I. CONSTITUTIONAL CONSIDERATIONS

A. Sales Taxes

Article I, section 8 of the United States Constitution provides that Congress shall have the power "to regulate commerce . . . among the several states."¹³ Consequently, no state was permitted to tax interstate commerce, and with several exceptions,¹⁴ interstate sales enjoyed considerable immunity from state sales taxes.¹⁵

state for subsequent use outside of the state. No such temporary storage exemption exists for sales tax.

10. In the case of sales tax, the tax is paid at the time of the purchase to the vendor. *See, e.g.,* OHIO REV. CODE ANN. § 5739.12 (Page 1982). In the case of use taxes, the tax may be returned after the purchase in the taxpayer's return. *See, e.g.,* OHIO REV. CODE ANN. § 5741.12 (Page 1982).

11. *See infra* text accompanying notes 13-95.

12. *See infra* notes 49-78 and accompanying text.

13. U.S. CONST. art I, § 8, cl. 3.

14. *See, e.g.,* *Wiloil Corp. v. Pennsylvania*, 294 U.S. 169 (1935) (no immunity from sales tax where contract does not require or contemplate shipment in interstate commerce); *Superior Oil Co. v. Mississippi ex rel. Knox*, 280 U.S. 390 (1930) (parties cannot contract place of passage of title so as to avoid local sales tax); *Banker Bros. Co. v. Pennsylvania*, 222 U.S. 210 (1911) (sale of automobile wholly intrastate was held subject to sales tax despite the fact that the goods were manufactured in another state and purchaser obtained warranty from manufacturer and paid freight from place of manufacture). *See generally*, Lockhart, *Sales Tax in Interstate Commerce*, 52 HARV. L. REV. 617 (1939).

15. This immunity was thought to derive from the broad rule of *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489 (1887) in which the Court stated:

Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce. . . . The negotiations of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce.

Id. at 497. *Robbins* struck down as an obstacle to interstate commerce the state "drummer" taxes which imposed licenses upon itinerant salesmen of goods shipped through interstate commerce as a condition precedent to soliciting in the state. The broad holding of *Robbins*

In 1940, however, a sharply divided Court in *McGoldrick v. Berwind-White Coal Mining Co.*¹⁶ upheld a New York sales tax measured by the gross receipts of an interstate sale on the grounds that the tax did not discriminate against interstate commerce and that interstate commerce should "bear its fair share of the state tax burden."¹⁷ The sales tax challenged was adopted by New York City and imposed a tax on purchases for consumption of tangible personal property at the rate of two percent on the amount of the receipts from every sale in the city,¹⁸ to be paid by the purchaser to the seller.¹⁹ In *Berwind-White*, contracts for the sale of coal were made in New York but delivery was made directly to the customer in New York from the mines in Pennsylvania. The respondent argued that the "interstate character of the transaction [was] the essence of it"²⁰ and the sales tax thus discriminated against interstate commerce. The Court, however, rejected this interpretation on the ground that the taxable event was the transfer of possession to the purchaser within the state.²¹ Noting that "equality is the theme,"²² Justice Stone, writing for the majority, found no advantage to intrastate commerce under the sales tax which "laid upon every purchaser, within the state . . . regardless of whether [the goods for consumption] have been transported in interstate commerce."²³ In dissent, Chief Justice Hughes attacked the majority opinion as opening the door for multiple tax burdens on interstate commerce.²⁴

was subsequently narrowed by the Court to fixed-sum licenses levied on the business of soliciting orders for the purchase of goods in interstate commerce. See *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 57 (1940).

16. 309 U.S. 33 (1940).

17. *Id.* at 49.

18. *Id.* at 42-43. Under the statute, sale was defined as "any transfer of title or possession, or both . . . in any manner or by any means whatsoever for a consideration or any agreement therefor." *Id.*

19. *Id.* at 43. The Court noted that the ultimate burden was on the buyer while the duty for collection and payment to the city rested with the seller. *Id.* at 43-44.

20. *Id.* at 39.

21. *Id.* at 49.

22. *Id.* at 48. Among those taxes cited by Justice Stone as unconstitutional obstacles to interstate commerce were levies which "aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey." *Id.*

23. *Id.*

24. *Id.* at 68-69 (Hughes, C.J., dissenting). In this case, the Chief Justice noted that "[i]f New York can tax the delivery, Pennsylvania can tax the shipment and New Jersey the transshipment." *Id.* at 69 (Hughes, C.J., dissenting). Apportionment of the burden, however, might eliminate the burden of multiple taxation. *Id.*

Under the doctrine of *Berwind-White* and its companion cases,²⁵ the immunity of goods flowing in interstate commerce from state sales tax was extremely narrowed, and the taxing power of the states expanded. Interstate commerce was now required to bear its fair share of the cost of local government whose protection it enjoyed. The broad rule of equality emerged: so long as interstate commerce was not placed at a competitive disadvantage to local business by virtue of the tax, it was subject to the taxing power of the state. Application of this principle to particular factual situations, however, has produced a host of varying decisions due largely to the interstate character of the transaction involved.²⁶

B. Use Tax Legislation

A levy on the use, storage, or consumption of personal property within a state enables the taxing authority to reach, as a source of revenue, extra-territorial sales otherwise immune under the Constitution.²⁷ Additionally, use or compensation taxes protect local retailers from loss of business to foreign merchants.²⁸ As early as 1868, the Court recognized these principles of compensating taxation.²⁹ Unlike the varied application of the interstate commerce

25. On the same day that the Court decided *Berwind-White*, it also denied two other challenges to the New York City sales tax. See *McGoldrick v. Felt & Tarrant Mfg. Co.*, 309 U.S. 70 (1940), and *McGoldrick v. A.H. DuGrenier, Inc.*, 309 U.S. 70 (1940). In contrast to *Berwind-White*, the contracts for sale in these cases were made outside of New York. On the authority of *Berwind-White*, however, the Court sustained the imposition of sales tax to these transactions as well.

26. See, e.g., *Dunbar-Stanley Studios, Inc. v. Alabama*, 393 U.S. 537 (1969) (five dollar per week tax on transient out-of-state photographers not disproportionate to tax imposed on local photographers); *McLeod v. J.E. Dilworth*, 322 U.S. 327 (1944) (where title passed in the state of manufacture upon delivery of goods to carrier, state to which goods shipped for delivery to purchaser could not exact sales tax); *Eastern Air Transp. Inc. v. South Carolina Tax Comm'n*, 285 U.S. 147 (1932) (mere purchase of supplies of equipment for use in conducting interstate commerce is not so identified with that commerce as to make the sale immune).

27. The commerce clause and the due process clause limit the ability of states to tax sales not within their jurisdiction. See, e.g., *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954); *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944).

28. See, e.g., *Atlantic Gulf & Pacific Co. v. Gerosa*, 16 N.Y.2d 1, 209 N.E.2d 86, 261 N.Y.S.2d 32 (1965), cert. denied, 382 U.S. 368 (1966). See generally, Hartman, *Sales Taxation in Interstate Commerce*, 9 VAND. L. REV. 138, 164-65 (1956).

29. See *Hinson v. Lott*, 75 U.S. (8 Wall.) 148 (1868). In *Hinson*, Alabama levied a tax on liquor brought into the state for sale, but did not levy against local liquors. The Court held that such legislation, making the tax equal on all liquors sold in the state regardless of whether manufactured within the state or imported, was not discriminatory against the products of the other states and therefore did not violate the commerce clause. *Id.*

clause to state sales taxation,³⁰ there is more consistency in the constitutional analysis of state and local use tax schemes.

The validity of use taxes levied on articles used in interstate commerce was first challenged in *Helson & Randolph v. Kentucky*.³¹ A three cent per gallon tax was levied by Kentucky on all gasoline sold or used within the state.³² The taxpayer, a citizen of Illinois, was engaged in the exclusive interstate business of operating a ferry boat between Illinois and Kentucky and purchased all of the gasoline for his business in Illinois.³³ The Court struck down the tax as a direct burden on interstate commerce³⁴ and denied the states the power to tax articles, supplies, or equipment which was actually used in interstate commerce.

Although *Helson* immunized the use of articles within the stream of commerce from use taxation, nevertheless, once the articles come to rest, they shed their interstate character and are subject to use taxation.³⁵ Consequently, the issue becomes what constitutes taxable use within the state.³⁶

30. See *supra* notes 13-26 and accompanying text.

31. 279 U.S. 245 (1929).

32. *Id.* at 247-48.

33. *Id.* at 248. It was stipulated that 75 percent of the gasoline was consumed in Kentucky. *Id.*

34. *Id.* at 252. The Court stated:

The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. . . . A tax, which falls directly upon the use of one of the means by which commerce is carried on, directly burdens that commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this Court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected.

Id.

35. See, e.g., *United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1973) (storage and withdrawal of aviation fuel consumed in interstate flights was a taxable use). *Southern Pacific Co. v. Gallagher*, 306 U.S. 167 (1939) (upholding tax on storage and use of railroad equipment purchased outside the state and brought into the state for use in the operation of an interstate railroad); *Pacific Tel. & Tel. Co. v. Gallagher*, 306 U.S. 182 (1939) (retention and installation of equipment purchased outside and brought into state for operation of business is right of ownership which is subject to use tax); *Nashville, C. & St.L. Ry. v. Wallace*, 288 U.S. 249 (1933) (tax on storage and withdrawal of gasoline for use in interstate railroad upheld). See Hartman, *supra* note 28, at 159-64.

36. State use tax statutes vary in their definitions of "use." See, e.g., N.Y. TAX LAW § 1101(7) (McKinney 1975) which provides:

(7) Use. The exercise of any right or power over tangible personal property by the purchaser thereof and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time, withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property.

Id. 72 PA. CONS. STAT. ANN. § 7201(o)(1) (Purdon's Supp. 1983) which provides: "(1) The exercise of any right or power incidental to the ownership, custody or possession of tangible personal property and shall include, but not be limited to transportation, storage or con-

The Supreme Court considered this issue in *Henneford v. Silas Mason Co.*,³⁷ where the State of Washington levied a use tax on the privilege of using tangible personal property within the state, at the rate of two percent of the purchase price.³⁸ The taxpayer was engaged in the construction of the Grand Coulee Dam and brought into Washington machinery, materials and supplies purchased at retail in other states for use in the construction.³⁹ The company protested the use tax on the grounds that it violated the commerce clause. On appeal, the Supreme Court reversed the district court's ruling that the tax was unconstitutional, reasoning that the tax was not upon the operations of interstate commerce but upon the privilege of use after commerce had ended.⁴⁰ Further, the tax upon the use after the property came to rest in Washington did not discriminate against interstate commerce.⁴¹ Although the subjects of the tax encompassed only articles purchased out of state or in interstate commerce, the Court was unpersuaded that it burdened interstate commerce. Rather, the sales and compensating use tax scheme equally burdened all owners, whether by virtue of

sumption." *Id.* TEX. TAX CODE ANN. § 151.011 (Vernon 1982) which provides:

(a) Except as provided by Subsections (b) and (e) of this section, "use" means the exercise of a right or power incidental to the ownership of tangible personal property over tangible personal property and . . . includes the incorporation of tangible personal property into real estate or into improvements of real estate whether or not the real estate is subsequently sold.

(b) "Use" does not include the sale of tangible personal property in the regular course of business or the transfer of tangible personal property as an integral part of a taxable service performed in the regular course of business.

(c) Except as provided by Subsections (d) and (e) of this section, "storage" means the keeping or retaining for any purpose in this state of tangible personal property sold by a retailer.

(d) "Storage" does not include the keeping or retaining of tangible personal property for sale in the regular course of business

(e) Neither "use" nor "storage" includes the exercise of a right or power over, or the keeping or retaining of, tangible personal property for the purpose of:

(1) transporting the property outside the state for use solely outside the state; or

(2) processing, fabricating, or manufacturing the property into other property or attaching the property to or incorporating the property into other property to be transported outside the state for use solely outside the state.

Id.

37. 300 U.S. 577 (1937).

38. *Id.* at 580. Included in the price was the cost of transportation from the place where the article was purchased. *Id.* Among the exclusions from imposition of the tax were property not purchased at retail and the use of property the sale or use of which had already been subject to a tax by another state. *Id.* at 580-81.

39. *Id.* at 579.

40. *Id.* at 582.

41. *Id.* at 583.

the sales tax on local activity or the tax on the privilege of use of property purchased outside the state.⁴² Since goods acquired through interstate commerce may be subject to property tax once they become part of the "common mass of property within the state of destination,"⁴³ under similar reasoning they may be subject to a tax on their use or enjoyment once they are at rest within the taxing authority.⁴⁴ In this case, the machinery and equipment were no longer within the stream of commerce but had come to rest within the state. The definition of use under the Washington statute instructed that:

Property is put to use by the first act after delivery is completed within the state by which the article purchased is actually used or is made available for use with intent actually to use the same within the state . . . and includes the exercise of any right or power over tangible personal property preparatory to actual use . . . such as keeping, storing, withdrawing from storage, moving, installing or performing any act by which dominion or control over the property is assumed by the purchaser.⁴⁵

By definition, items or articles in interstate commerce were excluded from use taxation and only when the goods became part of the "common mass of property within the state of destination" could they become the proper subjects of taxation. This definition of use, according to the Supreme Court, is wholly acceptable within the commerce clause requirements.⁴⁶

While absolute equality of treatment between local merchants and interstate commerce is probably impossible,⁴⁷ discriminatory treatment is certainly unconstitutional. Although *Henneford* approved a sales and use tax scheme which imposed a uniform tax burden on all tangible personal property used or consumed within a state, merely applying one uniform rate to sales within the state and use of property acquired without the state may not achieve the

42. *Id.* at 584. Justice Cardozo, in his well-known poetic style, noted that "the stranger from afar is subject to no greater burden than the dweller within the gates." *Id.*

43. *Id.* at 582.

44. *Id.* The Court noted that a tax on the privilege of use or storage when the chattel had ceased to be in transit "is now an impost so common that its validity has been withdrawn from the arena of debate." *Id.* at 583.

45. *Id.*

46. *Id.* *Henneford* is credited with obviating the necessity for legislation sought by the Association of State Tax Administrators in the 73rd through the 76th Congress to permit states to extend their sales taxes to certain interstate transactions. See H.R. REP. NO. 565, 89th Cong., 1st Sess. 613-15 (1965).

47. See *Nippert v. City of Richmond*, 327 U.S. 416, 432 (1946). See also Warren & Schlesinger, *Sales and Use Taxes: Interstate Commerce Pays Its Way*, 38 COLUM. L. REV. 49, 70-74 (1938).

desired equality of burden. Consequently, courts have focused on the entire sales and use tax legislative scheme in order to determine whether in practical effect, interstate commerce is burdened to the advantage of the local merchant.⁴⁸

The issue of equality between sales and use tax applications, in the face of a uniform rate, was before the Court in *Halliburton Oil Well Cementing Co. v. Reily*.⁴⁹ Under its legislation, Louisiana taxed sales within the state at the rate of two percent of the retail sales price and imposed a use tax at the rate of two percent of the cost price on property used but not sold in the state.⁵⁰ The taxpayer was an oil well driller and servicer who manufactured specialized equipment for its own use at its Oklahoma location and permanently brought such equipment into Louisiana to drill and service oil wells. It paid use taxes on the value of the raw materials and other articles used in the manufacture of the equipment, but did not include the value of labor and shop overhead attributable to such items.⁵¹ The use tax was levied on the *full* computed value of the assembled equipment, including the labor and shop overhead costs, although the state admitted that such costs would not be included in the levies against in-state manufacturers whose sales taxes were limited to the purchase price of materials only.⁵² While the trial court found the assessment discriminatory, the Louisiana Supreme Court upheld the tax, characterizing the discrepancy in application of the sales and use taxes as "incidental."⁵³ In reversing, the United States Supreme Court found such application to discriminate against interstate commerce to the advantage of the local merchant.⁵⁴ Since local manufacturer-users would not be subject to sales or use tax on the labor and shop overhead, the

48. See, e.g., *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389 (1952); *Best & Co. v. Maxwell*, 311 U.S. 454 (1940); *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932).

49. 373 U.S. 64 (1963).

50. *Id.* at 65-66. The use tax was to be reduced by the amounts of any similar tax paid in another state. *Id.* at 66.

51. *Id.* at 66-67.

52. *Id.* at 67. It was stipulated that:

If Halliburton had purchased its materials, operated its shops, and incurred its Labor and Shop Overhead expenses at a location within the State of Louisiana, there would have been a sales tax due to the State of Louisiana upon the cost of materials purchased in Louisiana and a Use Tax on materials purchased outside of Louisiana; but there would have been no Louisiana sales tax or use tax due upon the Labor and Shop Overhead.

Id.

53. *Id.* at 68.

54. *Id.* at 73.

burden was unequal, favoring the local manufacturer-user and encouraging the foreign merchant to locate within Louisiana.⁵⁵ Noting that "equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state"⁵⁶ and that dollars and cents and not legal abstractions is the measure of equality, the Court calculated that the disparity in treatment in this case amounted to \$1,547,109.70.⁵⁷ The inclusion of labor and shop overhead in the cost price of the items taxed resulted in a heavier burden on the foreign manufacturer-user which was hardly incidental.⁵⁸ In concurring, Justice Brennan indicated that Louisiana, or any other state, could legislatively provide for a tax on the full value of use, but only if it were equal to the sales tax applied to similar value.⁵⁹

A further interesting facet of *Halliburton* concerned a ruling of equality between sales tax and use tax transactions, but on rather unusual facts. *Halliburton* had purchased, for use in Louisiana, an airplane from a New York manufacturing company and some cementing service units from a Texas drilling company, neither of which company was engaged in the business of selling such items.⁶⁰ The Louisiana sales tax statute exempted isolated sales of articles within the state by persons not regularly engaged in the business of selling such articles.⁶¹ The Court struck down the assessments against these items, briefly stating that such a determination was also a discriminatory violation of the commerce clause since the practical effect of the tax was to favor the local second-hand market.⁶²

Disparity among sales and use tax legislation also exists at the local level of government. For example, an Ohio sales and use tax statute authorized individual counties to levy one-half percent sales and use taxes on property purchased or used within their boundaries,⁶³ in addition to a state sales and use tax levied at the

55. *Id.* at 72.

56. *Id.* at 70.

57. *Id.* at 70-71.

58. *Id.*

59. *Id.* at 77 (Brennan, J., concurring).

60. *Id.* at 67-68. No Louisiana use tax was declared or paid by *Halliburton* on these items. Had these acquisitions been made within the state, they would not have been subject to tax. *Id.* at 68.

61. *Id.* The use tax contained no equivalent exemption for isolated sales of second-hand articles. *Id.*

62. *Id.* at 73-74.

63. OHIO REV. CODE ANN. § 5739.021 (Page 1980).

rate of four percent.⁶⁴ Exemptions from state taxes also applied to the county taxes.⁶⁵ Although intended to achieve uniformity among sales and use tax assessments at the local level, the statute did not succeed. Thus, in a taxing county, items used there but purchased in another Ohio county without the tax were not subject to the local tax since property purchased in Ohio was exempt from state use tax.⁶⁶ In contrast, items purchased outside Ohio and used in the taxing county were subject to the county use tax. This taxing scheme was invalidated on constitutional grounds by the Ohio Supreme Court in *American Modulares Corp. v. Lindley*.⁶⁷ In examining the effect of the tax on interstate commerce,⁶⁸ the court found that the statute provided a "direct commercial advantage to local purchases" and invidiously discriminated against out-of-state acquisitions.⁶⁹ Although the statute appeared on its face to provide a uniform burden, similarly used property in a taxing county was taxed at different rates according to its origin of purchase, unconstitutionally impeding the free flow of commerce between the states.⁷⁰

While *American Modulares* required equality of treatment between in-state and out-of-state acquisitions in a taxing county, a further problem remained with respect to tax treatment of purely in-state acquisitions. A purchase in a county adopting the tax for shipment into a nontaxing county is taxable under the state sales tax and the county tax. However, goods sold in a nontaxing county but used or consumed in a taxing county are subject only to the state sales tax, since the state use tax exempts property purchased in-state. Whether the interstate commerce clause applies to this purely in-state situation is doubtful. "Local" merchants in a nontaxing county, however, are surely favored by their local governments to the disadvantage of "foreign" merchants in another county adopting the tax. Possible grounds for such a protest might include denial of due process and violation of the equal protection

64. Id. at §§ 5741.02 and 5739.02. The Ohio State sales and use tax has been amended to provide for a taxing rate of five percent. OHIO REV. CODE ANN. § 5739.025 (Page Supp. 1984).

65. Id. at § 5739.021(C).

66. Id. at § 5741.02(C)(1).

67. 54 Ohio St. 2d 273, 376 N.E.2d 575, cert. denied, 439 U.S. 911 (1978).

68. See *supra* note 48 and accompanying text.

69. 54 Ohio St. 2d at 278, 376 N.E.2d at 577. The court relied on *Best & Co. v. Maxwell*, 311 U.S. 454 (1940), for the principle that such discrimination is unconstitutional even if it occurs merely in practical operation.

70. 54 Ohio St. 2d at 278, 376 N.E.2d at 578.

clause.⁷¹

A similar situation occurred under a Texas statute which permitted cities to tax sales according to the shipping location of the Texas vendor.⁷² Shipments from outside Texas into cities adopting the tax were subject to the city use tax.⁷³ However, shipments from in-state nontaxing cities into cities assessing the sales and use tax were exempt. Faced with a constitutional challenge to their taxing scheme⁷⁴ similar to that in *American Modulares*,⁷⁵ the Texas legislature subsequently remedied the problem, authorizing cities imposing the tax to assess use tax on articles purchased in nontaxing cities.⁷⁶

Adoption of the use tax by states to achieve economic equality between sales within its state and out-of-state sales, particularly where the state is bordered by other states with no sales tax on the item or a lower tax, is a valid exercise of state power so long as the burden borne by each owner is relatively equal. Such "protective tariffs" however will not be sustained if the state discriminates between products of its state and the products of sister states. Thus, a provision in a sales and use tax scheme exempting trade-in al-

71. Such intrastate discrimination was upheld in *Spatt v. City of New York*, 14 A.D.2d 30, 218 N.Y.S.2d 409 (1961), *aff'd*, 13 N.Y.2d 618, 191 N.E.2d 91 (1963), *appeal dismissed*, 375 U.S. 394 (1964). In *Spatt*, a New York City use tax measured by the full purchase price, including trade-in, on an automobile purchased by a resident in a nontaxing city was sustained despite exclusion of the trade-in allowance in computing the base of the city sales tax on automobiles purchased within the city. The court determined that a reasonable basis existed for the distinction between sales and use taxes. *See Note*, 37 N.Y.U.L. Rev. 307 (1962).

The Texas city sales and use tax has other aspects which may be violative of due process but for which the question has never been raised. One questionable provision involves the direct payment procedure which permits the purchaser to accrue the tax and pay it directly to the taxing authority rather than to the vendor. TEX. TAX CODE ANN. § 151.417 (Vernon 1982). Such a procedure is particularly useful to a consumer whose purchases could either be taxable or nontaxable depending on their use. However, applicants for Direct Pay Permits must show \$800,000 in annual purchases which appears to discriminate against lower volume purchases. *Id.* at § 151.419(b)(3) (Vernon 1984). Another questionable provision provides that direct payment permittees pay self-declared use but not sales tax. *Id.* at § 151.419 (b)(1). Obviously these discriminatory provisions result in substantial dollar benefits to companies which have manufacturing facilities in "industrial areas" not within city boundaries. Of course, the beneficiaries will not complain even though it is probable that many have facilities both within and without cities having the tax, so it is a matter of "take what you can get."

72. TEX. STAT. ANN. art. 20.01-20.17 (Vernon 1969).

73. *Id.* at art. 20.03.

74. *United States Steel Corp. v. Bullock* (District Court of Travis County, Tex. No. 282,395, 261st Dist. 1981).

75. *See supra* notes 63-70 and accompanying text.

76. TEX. REV. CIV. STAT. ANN. art. 1066c (Vernon 1984).

lowances from the purchase price for the purpose of the sales tax, with no equivalent provision for calculation of the use tax, is an unconstitutional burden on interstate commerce.⁷⁷ Similarly, a state cannot exempt domestic goods from sales tax while subjecting similar goods imported for use within the state to taxation.⁷⁸ So long as in "practical operation" the tax does not cause interstate commerce to bear more than its fair share of the cost of local government whose benefits it enjoys, these schemes are within the requirements of the Constitution.

C. Collection by Out-of-State Vendors: Nexus

Since collection of use tax by the out-of-state vendor is an efficient administrative device, under what circumstances can a state constitutionally require these sellers to collect its use tax? Generally, constitutional challenges to the state's right to require compliance have proceeded under the due process and commerce clauses. The Supreme Court has held, however, that where a sufficient "nexus" exists between the taxing state and the nonresident vendor, a requirement that the vendor collect the tax on purchases for delivery in the taxing state does not violate any constitutional requirements. Consequently, the issue has become: What constitutes sufficient nexus consistent with due process?

One of the turning point cases to consider this issue was *General Trading Co. v. State Tax Commission*,⁷⁹ in which the Court held that mere solicitation by traveling salesmen with order acceptance and shipment by common carrier taking place outside the state, was sufficient to invoke jurisdiction over every retailer maintaining a place of business in the state. The argument that the Iowa Tax Commissioner exceeded his authority by imposing the *use* tax on purchases made in interstate commerce and in reaching beyond the state's territorial borders to enforce it against a seller was found by the Court to not diminish the protection afforded to the seller's in-state activities.

In *Miller Brothers Co. v. Maryland*,⁸⁰ a Delaware furniture

77. See *Matthews v. State of Colorado, Dept. of Revenue*, 193 Colo. 44, 562 P.2d 415 (1977); *Commonwealth v. Smith*, 75 Dauph. Co. Rep. 23 (Pa. 1960). See also *Memphis Steam Laundry v. Stone*, 342 U.S. 389 (1952).

78. See, e.g., *Hale v. Bimco Trading Co.*, 306 U.S. 375 (1939); *Gray v. Oklahoma Tax Comm'n*, 379 P.2d 843 (Okla. 1963).

79. 322 U.S. 335 (1944). The Court recognized that "[t]o make the distributor the tax collector for the State is a familiar and sanctioned device." *Id.* at 338.

80. 347 U.S. 340 (1954).

merchant who was neither qualified to do business nor employed salesmen or agents in Maryland was required to collect taxes on retail purchases for delivery in that state.⁸¹ The firm did not accept mail or telephone orders and advertised only in Delaware media which indirectly reached some Maryland residents.⁸² On these facts, the Court was unable to find a nexus sufficient to meet the due process requirement that there exist "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."⁸³

Previously, the Court had sanctioned the collection of state use tax by nonresident vendors where the vendor was qualified to do business in the state or derived substantial benefits by virtue of its activities within the state.⁸⁴ *Miller Bros.* appeared to lessen the requirements of due process in this area by requiring only minimum contacts with the state imposing the duty to collect. One commentary observes, however, that this minimum contact requires the physical presence of the nonresident vendor within the state, either through traveling salesmen, local agents, retail stores or independent brokers.⁸⁵ Whether this observation remains true in an increasingly technologically advanced society remains to be tested. To date, however, the Court has refused to find a sufficient nexus where a foreign merchant conducts a substantial business with residents of the taxing state exclusively through a mail-order house.⁸⁶ The "virtual welter of complicated obligations" that would result if every political subdivision in the country were empowered to impose such a collection duty would nullify the purpose of the commerce clause to permit the free flow of trade between the states.⁸⁷ Consequently, if a business is conducted exclusively through instrumentalities of interstate commerce, it is immune from the duty to collect use taxes. However, if "the state has given anything for which it can ask return"⁸⁸ the due process hurdles may be over-

81. *Id.* at 346-47.

82. *Id.* at 341.

83. *Id.* at 344-45.

84. *See, e.g.,* *International Harvester Co. v. Indiana*, 322 U.S. 340 (1944) *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373 (1941); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941); *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62 (1939); *Monamotor Oil Co. v. Johnson*, 292 U.S. 86 (1934).

85. *See* Springer & O'Byrne, *Have States Overextended Their Rights to Collect Use Tax from Out-of-State Sellers?* 36 J. TAX'N 58, 58-59 (1972).

86. *See* *National Bellas Hess v. Department of Revenue of Ill.*, 386 U.S. 753 (1967).

87. *Id.* at 759-60.

88. *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940).

come. The question remains, however, whether the benefit bestowed must relate to the transaction or person sought to be taxed.⁸⁹

The most recent pronouncement in this questionable area is *National Geographic Society v. California Board of Equalization*.⁹⁰ National Geographic, a nonresident, nonprofit corporation maintained two offices in California for the sole purpose of soliciting advertisement for its monthly magazine. From its District of Columbia headquarters, the company conducted a national mail-order business for the sale of its maps, atlases, globes and books.⁹¹ National Geographic argued that it could not be obligated to collect use tax on its mail-order sales to California residents since due process required not only a relationship between the seller and the taxing state, but also between the activity of the seller sought to be taxed and the seller's activity in the state.⁹² In rejecting this argument, the Court stated that such "dissociation" does not bar the imposition of the collection duty.⁹³ Further, it was noted that:

The relevant constitutional test to establish the requisite nexus for requiring an out-of-state seller to collect and pay the use tax is not whether the duty to collect the use tax relates to the seller's activities carried on within the State, but simply whether the facts demonstrate 'some definite link, some minimum connection, between [the State and] the person . . . it seeks to tax.'⁹⁴

Since the Court refused the "slightest presence" test under which

89. Two state courts considering this question have reached opposite results. Compare *Reader's Digest Ass'n v. Mahin*, 44 Ill. 2d 354, 255 N.E.2d 458, cert. denied, 399 U.S. 919 (1970) (activities of subsidiary within taxing jurisdiction constitutionally sufficient to require absent parent to collect use tax on wholly unrelated sales) with *Montgomery Ward v. State Bd. of Equalization*, 272 Cal. App. 2d 728, 78 Cal. Rptr. 373 (1969), cert. denied, 396 U.S. 1040 (1970) (no relationship between seller's general activities within the state and sales beyond its borders to authorize it to collect use tax).

90. 430 U.S. 551 (1977).

91. *Id.* at 552. California required every "retailer engaged in business in this state and making sales of tangible personal property for storage, use or other consumption in this state to collect from the purchaser a use tax in lieu of the sales tax imposed upon local retailers." *Id.* at 553.

92. *Id.* at 560. As authority for its position, National Geographic relied on *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941) and *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373 (1941). 430 U.S. at 560-61.

93. 430 U.S. at 560.

94. *Id.* at 561 (quoting *Miller Bros.*, 347 U.S. 340, 344-45 (1954)). Since the California offices, without regard to the nature of the business conducted there, enjoyed fire and police services as they would have if they assisted the mail-order business, due process was not offended. 430 U.S. at 561.

the California Supreme Court analyzed the problem,⁹⁵ it is yet unclear what constitutes this minimum connection.

Historically, the decisions seem to recognize the social, economic and cultural development of our country and to react accordingly. Early decisions strictly protected the interstate seller from any duty to collect taxes. However, technological and other business developments are such that the bases for earlier decisions have eroded to the extent of permitting states to impose their requirements on interstate commerce. It is probable that some of this change has been fostered by liberal jurists as well as the revenue considerations of the taxing jurisdiction. It appears now that unless the state has absolutely no contacts with the nonresident vendor, it may impose a registration and collection duty on vendors who are not engaged exclusively in interstate commerce.

II. CONSTRUCTION OF SALES AND USE TAX STATUTES

A. *Governmental Immunity Exemption*

The immunity of the federal government from taxation by states includes, of course, exemption from sales tax on sales directly to the United States government or its agencies.⁹⁶ Questions arise, however, as to purchases by contractors for use in performing contracts for the government, or an agency thereof, complicated by contractual arrangements designed to make the contractor an agent, or to pass title of materials used in the contract directly to the government upon purchase. A particular problem arises in real estate construction since the contractor is the *consumer* of the tangible personal property through his converting it into "real estate." Another problem is that of the contractor using or possessing the material, even though owned by the government, since many state use taxes apply to mere possession or *right* to use, store or consume. The question of whether added cost to the government would make the tax invalid seems to have been well-settled, since such a tax is not a *direct* cost to the government anymore than are increased social security taxes on a contractor's payroll, increased freight rates, or payroll cost of living increases, most of which are

95. *Id.* at 556. To the Court, National Geographic's activities in California established a *substantial* presence in that state. The two offices of the Society, plus the activities conducted there, sufficiently established a constitutional nexus. *Id.*

96. For an excellent discussion of the history and development of this immunity see Rice & Estes, *Sales and Use Taxes as Affected by Federal Governmental Immunity*, 9 VAND. L. REV. 204 (1956).

provided for under given contracts.

Contracts with the government are usually written in language which purports to vest title to personal property in the government upon purchase, thereby avoiding state sales or use taxes. Most of these questioned contracts are cost-plus (i.e., fixed costs plus variable costs plus a percentage factor for profit, sometimes not to exceed a certain maximum). One of the earlier cases dealing with this matter is that of *Alabama v. King & Boozer*,⁹⁷ in which the contractor had a cost-plus contract with the United States to construct an army camp. Title to purchases of materials made by the contractor for use in construction, was to pass to the government upon delivery, inspection and acceptance of material by the government at the building site. The contractor would subsequently be *reimbursed* for his cost (including taxes as applicable).⁹⁸ The state of Alabama contended that the sale was taxable because the contractor was the purchaser and the real party in interest who was paying for the material, only to be reimbursed by the government.⁹⁹ The contractor argued primarily that the legal incidence of the tax fell upon the government, and that the latter was constitutionally exempt from state taxation.¹⁰⁰ In essence, the only real issue in the case was whether the government or the contractor was the "purchaser" under Alabama state law, so as to be liable for the tax.¹⁰¹ Mr. Chief Justice Stone, writing for the majority, indicated that the mere circumstance that title to the lumber vested in the government upon delivery was not sufficient to shift the legal incidence of the tax away from the contractor.¹⁰² The legal effect of the contract with the government was to oblige the contractor to pay for the lumber.¹⁰³ The Court also indicated that simply because the economic burden of the tax passed to the government, it was not thus unconstitutional.¹⁰⁴ This decision set the stage for disallowing mere assignability of a contract, or of reimbursement subsequent to a contract's execution, as the sole basis for claiming governmental immunity.

97. 314 U.S. 1 (1941).

98. *Id.* at 10.

99. *Id.* at 7-8. 1939 Ala. Acts 18, § II imposed the tax on the seller who is deemed the "taxpayer," and § XXVI imposed the duty on the seller to collect the tax from the "purchaser." 314 U.S. at 7.

100. *Id.* at 9.

101. *Id.* at 9-10. See *supra* note 99.

102. 314 U.S. at 13-14.

103. *Id.* at 12.

104. *Id.* at 8,14.

In *Kern-Limerick v. Scurlock*,¹⁰⁵ an Arkansas Gross Receipts Tax (sales tax) imposed a two percent tax on all retail sales, collectible from the purchaser.¹⁰⁶ The contractor had a cost-plus fixed-fee contract providing that he was to be the purchasing agent for the United States, with title to such purchases passing directly to the government; payment of the purchase price to the vendor was then to be made by the government.¹⁰⁷ The state assessed a tax on the purchase of two tractors for use in constructing an ammunition dump for the United States Navy, arguing that the Navy could not delegate its authority. The Supreme Court, however, held that the imposition of such a tax was unconstitutional, since the government was clearly disclosed as being the purchaser, and that no liability of the purchasing agent to the seller was created by the transaction.¹⁰⁸ *King & Boozer* was distinguished as an instance when the legal incidence of tax fell upon the contractor and not upon the United States.¹⁰⁹

An ingenious approach to the definition of "use" appeared in the government's argument in *United States v. Boyd*.¹¹⁰ Under cost-plus contracts, several contractors agreed to provide managerial and construction services for the Atomic Energy Commission at its Oak Ridge, Tennessee facility. According to its terms, property for the performance of the contract was to be purchased with government funds and title vested directly in the United States.¹¹¹ Tennessee taxed a contractor's use of property in the performance of his contract, regardless of who owned the property.¹¹² The United States opposed the exaction of these use taxes, claiming immunity. Since it had previously been determined that a contractor's use of property while engaging in business for profit was a taxable event,¹¹³ the government argued that the contractors in this situation were not engaged in commercial activity for profit, were paid

105. 347 U.S. 110 (1953).

106. *Id.* at 111.

107. *Id.* The statute indicated that gross receipts were exempt when derived from sales to the United States government. *Id.* at 112.

108. *Id.* at 121.

109. *Id.* at 122.

110. 378 U.S. 39 (1964).

111. *Id.* at 41-43.

112. *Id.* at 40. This legislation followed the repeal of that section of the Atomic Energy Act which exempted private companies from state tax on property used in fulfilling contracts with the Atomic Energy Commission. *Id.* The purpose of the repeal was to place AEC contractors on the same footing with all other government contractors. *Id.* at 50.

113. See, e.g., *United States v. Township of Muskigon*, 355 U.S. 484 (1958); *Curry v. United States*, 314 U.S. 14 (1941).

for services only, did not stand to gain or lose by their efficient or inefficient use, and had no investment or risk in the project.¹¹⁴ The Court was unpersuaded by this reasoning and found that indeed the contractors were using the property in connection with their own commercial activities—the provision of services.¹¹⁵ The tax was held not to be directly imposed on the United States and thus was valid, since the contractors had not become “instrumentalities” of the government.¹¹⁶ In contrast, the sales tax was a direct imposition on the government under the holding of *Kern-Limerick*.¹¹⁷

A new dimension of use tax application was thus drawn by the Court. The use of government-owned property by a federal contractor for his own profit or gain was determined to be a separate taxable event, despite the fact that the tax is ultimately borne by the United States. Further, it is immaterial whether the contract is for the provision of services or the sale of a product. Apparently, the *Boyd* case has been limited in its application to federal contractors only. Otherwise, it could be possible that use tax would be assessed on personal property owned by anyone and merely serviced by an artisan or mechanic for a fee or profit.

The Michigan Supreme Court reviewed state taxation of government contractors, but in a different setting. In *Knapp-Stiles, Inc. v. Michigan Department of Revenue*,¹¹⁸ Michigan asserted that use tax was due from a contractor on his purchases of materials for use in performing a federal government construction contract.¹¹⁹ Michigan exempted such purchases for contracts with the state or its political subdivisions, but did not grant an equivalent exemption

114. 378 U.S. at 44.

115. *Id.* at 45-46.

116. *Id.* at 48. Although the use taxes would increase the cost of the atomic energy program, the Court noted that Congress was cognizant of this effect when repealing the immunity. *Id.* at 49-50.

117. This determination was made by the Tennessee Supreme Court and left undisturbed by the Court on appeal. *See id.* at 43 & n.5.

118. 370 Mich. 629, 122 N.W.2d 642 (1963).

119. With respect to the application of the sales tax, Michigan also asserted that the contractor was not exempt since its contractual relationship and building operations were with a private corporation and not with the federal government or an agency thereof. *Id.* at 632, 122 N.W.2d at 644. The contract required the contractor to form a Delaware corporation for the purpose of securing insurance and mortgage financing from the FHA, but upon completion of the project all of the stock was to be delivered to the government. *Id.* at 631, 122 N.W.2d at 643. In piercing the corporate veil to get to the true substance of the arrangement, the court determined that the contract was with the federal government and sales were thus exempt. *Id.* at 633, 122 N.W.2d 645.

for federal construction contracts.¹²⁰ In declaring the taxing scheme invalid, the court held "[t]hat such distinction [was] arbitrary, unreasonable and discriminatory is evident."¹²¹

B. *Recent Interpretations of Sales and Use Taxes*

Most state tax statutes provide for sales tax application on any transfer of title or possession of tangible personal property,¹²² and use tax application on the storage, use or consumption of tangible personal property.¹²³ Additionally, exemptions from state taxation are also provided according to the state's particular taxing and social policies.¹²⁴ However, determining the appropriate tax base for application of the sales or use tax, or their exemptions, does not easily follow from these definitions. A brief survey of some recent decisions will serve to highlight some of the problems of statutory interpretation in this area.¹²⁵

1. *Use, Storage and Consumption: Bullock v. Lone Star Gas Co.*

*Bullock v. Lone Star Gas Co.*¹²⁶ concerned the liability for use taxes by a gas company which imported pipe from Europe for use in intrastate sale and distribution of gas. While Texas contended that state and local taxes were due on the sale, use and storage of the pipe,¹²⁷ the taxpayer argued that no taxable events arose by virtue of the use tax exemption for licensed and certificated carri-

120. *Id.* at 633, 122 N.W.2d at 645.

121. *Id.* at 636, 122 N.W.2d at 647. The court relied on the holding in *Phillips Chem. Co. v. Dumas Indep. School Dist.*, 361 U.S. 376 (1959). For a case holding that a distinction between sales to charitable organizations and sales to the federal government is reasonable, see *United States v. Department of Revenue of Ill.*, 202 F. Supp. 757 (N.D. Ill. 1962).

122. See, e.g., 72 PA. CONS. STAT. ANN. §§ 7201(k)(1), 7202 (Purdon 1983); OHIO REV. CODE ANN. § 5739.02(A) (Page 1983).

123. See *supra* note 40.

124. See, e.g., 72 PA. CONS. STAT. ANN. §§ 7204 (Purdon 1983), which exempts isolated sales at retail or use of tangible personal property or services sold by a person who is not a vendor with respect to such property or services; temporary storage not to exceed 7 days; the sale at retail or use of coal, water, mail order catalogs and direct mail advertising literature.

125. For a more general discussion of these issues, see Ball, *What is a Sale for Sales Tax Purposes?* 9 VAND. L. REV. 227 (1956); Hellerstein, *The Scope of the Taxable Sale under Sales and Use Tax Act: Sales as Distinguished from Services*, 11 TAX L. REV. 261 (1956); Wahrhaftig, *Meaning of Retail Sale and Storage, Use or Other Consumption*, 8 LAW & CONT. PROB. 543 (1941).

126. 567 S.W.2d 493 (Tex. 1978).

127. *Id.* at 496. Texas imposed a four percent tax on the receipts from the sale at retail of all taxable items in the state. *Id.* An excise tax was imposed on the storage, use or other consumption of taxable items purchased for storage, use or consumption. *Id.*

ers of persons or property.¹²⁸ In sustaining the tax, the Texas Supreme Court separated from the collective term "use tax" the elements of use, storage and consumption, each of which were deemed unique privileges and thus separate taxable events.¹²⁹ Consequently, it was concluded that the exemption of certificated and licensed carriers from "use" did not carry over to the privilege of storage. Since the statute only exempted use by licensed or certificated carriers, the company was liable for storage tax because the pipe had been stored for the period of time when it had reached the end of its international transportation but prior to its exempt use.¹³⁰

This interpretation by the Texas Supreme Court is wholly distinguishable from those cases it relied on which determined when an item in interstate commerce is subject to the state's jurisdiction for tax purposes.¹³¹ Under these holdings, it was determined that the use of property in interstate commerce could not be taxed. More importantly, the use in these decisions was not excluded on legislative policy grounds, but on constitutional grounds.¹³² In order that the state might tax these transactions, the privilege of use was separated from the privilege of storage or withdrawal. In *Lone Star*, however, the Texas legislature had determined, as a matter of state policy, to exclude from the use tax, defined as use, storage or consumption,¹³³ use by a licensed and certificated carrier. Therefore, it was the legislature's judgement that purchases in interstate commerce should not share equally in the tax burden with local purchases in this specific instance.¹³⁴ This policy would appear to be tortured by the decision of the Texas Supreme Court

128. Art. 20.02(G)(3)(a) of the Limited Sales, Excise and Use Tax Act exempted from use tax tangible personal property acquired outside of the state and used as a licensed and certificated carrier of persons or property. 567 S.W.2d at 496. See TEX. REV. CIV. STAT. ANN. art. 20.02(G)(3)(a) (Vernon 1969).

129. 567 S.W.2d at 497. The court noted that when the Texas legislature intended to exempt all of the activities, it specifically provided for use, storage and consumption. *Id.*

130. *Id.* at 497. The court relied on *Southern Pacific Co. v. Gallagher*, 306 U.S. 167 (1939) for the proposition that a tax on storage could be validly imposed on that "taxable moment" when goods purchased in interstate commerce had reached the end of their interstate journey and had not yet begun to be used in interstate operation. See 306 U.S. at 177.

131. In addition to *Southern Pacific Co. v. Gallagher*, 306 U.S. 167 (1939) the court relied on *American Airlines Inc. v. State Bd. of Equalization*, 216 Cal. App. 2d 180, 30 Cal. Rptr. 590 (1963); *Northern Natural Gas. Co. v. Lauterbach*, 251 Iowa 885, 100 N.W.2d 908 (1960); and *Pacific Tel. & Tel. Co. v. Gallagher*, 306 U.S. 182 (1939).

132. See, e.g., *Helson & Randolph v. Kentucky*, 279 U.S. 245 (1929), *supra* notes 35-38 and accompanying text.

133. See 567 S.W.2d at 496.

134. See *supra* notes 27-29 and accompanying text.

that the storage of articles prior to their exempt use is not concomitantly exempt. Perhaps the court was annoyed by the company's assertion that to hold this transaction taxable would make "nullities" of the exemption sections.¹³⁶ In any event, the effect of the decision was to interpret the preparatory step toward exempt use as a purchase *for* storage. If carried to its infinite possibilities, such an interpretation would certainly reduce the exemption to insignificance. If the pipe laid for several days beside the ditch before being put into the ground, under the *Lone Star* decision this could be considered storage subject to tax.

2. *Computer Software: What Constitutes Tangible Property*

As a result of the development of modern technology and the rapid expansion of the computer industry, an interesting issue in state taxation arises with respect to the sale and use of computer software and printouts. Since most states do not generally tax personal services, intangible personal property or materials directly used in manufacturing, the question becomes whether computer software and printouts are included within these exemptions. Because of the significant revenues to the state that would result from the recognition of computer related products as taxable items, a growing number of state statutes or regulations provide that software is tangible personal property subject to tax.¹³⁶ Where courts have considered the issue, however, the majority have concluded that the software is an intangible item exempt from taxation.¹³⁷ The difficulty in resolving these conflicting interpretations was specifically acknowledged by one court.

Computer services, particularly software and information services, are different from other property rights. It is not sensible to apply concepts such

135. See 567 S.W.2d at 497.

136. See, e.g., 61 PA. CODE § 31.32(d) (1983) which provides that "[t]he sale or lease of applied or operating programs [software] is a sale at retail. . . ." See also TENN. CODE ANN. § 67-6-102(B) (Michie 1983) providing that "[s]ale shall also mean such transfer of customized or packaged computer software. . . . For such purpose, computer software shall be considered tangible personal property. . . ." For a recent review of the various state sales and use taxes on computer software, see Note, *Sales and Use Tax of Computer Software—Is Software Tangible Personal Property?* 27 WAYNE L. REV. 1503, 1531-36 (1981).

137. See, e.g., *James v. Tres Computer Systems, Inc.*, 642 S.W.2d 347 (Mo. 1982); *First National Bank of Springfield v. Illinois Department of Revenue*, 85 Ill. 2d 84, 421 N.E.2d 175 (1981); *Spencer Gifts, Inc., v. Director, Division of Taxation*, 182 N.J. Super. 179, 440 A.2d 104 (1981); *Janesville Data Center, Inc., v. Wisconsin Dep't. of Revenue*, 84 Wis. 341, 267 N.W.2d 656 (1978); *Bullock v. Statistical Tabulating Corp.*, 549 S.W.2d 166 (Tex. 1977); *Alabama v. Central Computer Services, Inc.*, 349 So. 2d 1160 (Ala. 1977); *District of Columbia v. Universal Computer Associates, Inc.*, 465 F.2d 615 (D.C. Cir. 1972).

as tangible and intangible, applicable to a very different world, to the computer world. Even the distinction between property and services is not helpful here where definitions appropriate to the subject matter of the tax are needed. Significant tax burdens should not be predicated on largely irrelevant concepts developed in different times for different purposes.¹³⁸

Initially, courts which struggled with the application of traditional legal principles to the technologies of the computer justified the abatement of the tax on computer software imposed by the state on several grounds. Typical of these cases is *Commerce Union Bank v. Tidwell*,¹³⁹ which found the transfer of magnetic tapes and punch cards to be "merely incidental to the purchase of the intangible knowledge and information stored on the tapes."¹⁴⁰ In support of its conclusion that the object of the purchase was intangible knowledge and not tangible personal property, the court highlighted several factors unique to this transaction. First, it was noted that alternative methods were available for accomplishing the same transfer of knowledge without the assistance of tangible media such as tapes and cards. For example, the same information could be transferred to the user by telephone transmission or via direct programming into the user's computer by the program originator.¹⁴¹ Second, the court was persuaded by the fact that once the information was transferred, the tapes and cards lost their value to the user and were either destroyed or returned to the seller.¹⁴² What actually remained was the intangible knowledge. The enormously enhanced value of the tapes and cards once the information has been coded thereon also appeared to be a significant factor in the court's analysis.¹⁴³ Finally, the court distinguished the

138. *Spencer Gifts, Inc. v. Director, Division of Taxation*, 182 N.J. Super, 179, 209, 440 A.2d 104, 120 (1981).

139. 538 S.W.2d 405 (Tenn. 1976). Tennessee imposed a sales or use tax on "every person . . . who engages in the business of selling tangible personal property at retail . . . or who uses or consumes . . . any item or article of tangible personal property . . ." *Id.* at 406. Tangible personal property was statutorily defined as "personal property, which may be seen, weighed, measured, felt, or touched, or is in any other manner perceptible to the senses." *Id.*

140. *Id.* at 408. The court relied in part on the decision in *Washington Times-Herald, Inc. v. District of Columbia*, 213 F.2d 23 (D.C. Cir. 1954) (abating tax on sale of newspaper mats containing cartoons since newspaper was purchasing the right to reproduce cartoons and not the mats).

141. 538 S.W.2d at 408.

142. *Id.*

143. *Id.* at 407. The court noted that the cost of punch cards was approximately \$1.30 per thousand and about 4,000 to 6,000 cards were required for a program. Further, costs for the magnetic tapes were approximately \$11.00 per reel. However, the taxpayer's cost for the programs ranged from \$700 to \$60,000.

analogy of this transaction to the sale of phonograph records and motion picture films declared to be taxable. Since "without the film there could be no movie" and the purchaser of a phonograph record has no other viable way of "bringing the music . . . into his living room," these crucial differences justified the distinction.¹⁴⁴ Further, the court noted that records and films do not lose their value to the user after use and are complete and ready for use at the time of purchase.¹⁴⁵ In response to this decision, the Tennessee legislature rejected the notion that software was an intangible and specifically provided for its taxability.¹⁴⁶ Despite the fact that this case is now moot, a variety of other courts continue to rely on the reasoning employed to justify their holdings that software is not taxable as an item of tangible personal property.

This analysis has also been extended to transactions involving the lease of computer information. In *Spencer Gifts, Inc. v. Director, Division of Taxation*,¹⁴⁷ the taxpayer's lease of computer software containing mailing list information was held not to be taxable since the tapes were only an inconsequential element of the transaction whose real object was obtaining information.¹⁴⁸ Noting that the form of delivery of information should not control its taxability,¹⁴⁹ the New Jersey Tax Court relied on those factors highlighted in the *Tidwell* decision.¹⁵⁰

Spencer Gifts is even more significant in that it also involved the interpretation and application of a state regulation which taxed the sale of computer prepared mailing lists.¹⁵¹ The court found no statutory basis for the ruling if it was intended to tax the transfer of tangible personal property as an inconsequential element of a personal service transaction.¹⁵² Additionally, to the ex-

144. *Id.* at 407-08. The court acknowledged that the sound emanating from the record was the object of the purchase; however, no other alternative method existed to accomplish the same purpose.

145. *Id.* at 408. The court's basis for distinguishing this aspect of software was that the information on the tape must be translated into the computer's language before it can be used.

146. See TENN. CODE ANN. § 67-6-102(B)(Michie 1983), reproduced in pertinent part, *supra* note 136.

147. 182 N.J. Super. 179, 440 A.2d 104 (1981).

148. *Id.* at 204, 440 A.2d at 118. To the court, the tangible personal property which transmitted the information was incidental to the underlying transaction between the parties.

149. *Id.*

150. See *supra* notes 139-145 and accompanying text.

151. 182 N.J. Super. at 205, 440 A.2d at 118.

152. *Id.* at 206, 440 A.2d at 118.

tent the regulation taxed mailing list data on computer tapes, the court found the regulation to be beyond the scope of the sales tax act and therefore invalid.¹⁵³ However, the question was left open as to whether computer printed mailing lists could be validly taxed under the statute or the regulation.

Whether computer programs are unique to fit the specialized needs of the individual user or are standard programs did not appear to be a significant factor in those early cases deciding whether the transaction involved tangible personal property. In *First National Bank of Fort Worth v. Bullock*,¹⁵⁴ the fact that the taxpayer had purchased standardized or "canned" programs did not prevent the court from declaring software to be an intangible item exempt from taxation. The *First National Bank* court employed all of the same rationales of the *Tidwell* court in reaching its conclusion, emphasizing the loss of value of the tapes after use and the availability of alternative methods of transfer. Accordingly, the test of these transactions was whether the object of the sale was tangible personal property.¹⁵⁵ More recently, however, the distinction between customized and canned programs appears to be growing in significance. Those states which tax computer software often exempt customized software from taxation.¹⁵⁶ A recent Michigan court explained, "[c]ustomized computer software programs should be distinguished from canned software programs, e.g., TV games, albums, and cassette tapes, because the latter are all end products in themselves."¹⁵⁷

The most recent decision to consider this issue, *Comptroller of the Treasury v. Equitable Trust Co.*,¹⁵⁸ not only held canned programs to be taxable but also rejected all of the prior arguments supporting the conclusion that all software is intangible personal property. In *Equitable Trust*, the taxpayer, through license agree-

153. *Id.*, 440 A.2d at 118. It was not clear to the court whether the regulation covered sales and leases of tapes with mailing list information or merely taxed tangible mailing lists produced by the computer.

154. 584 S.W.2d 548 (1979). The four programs totalling approximately \$109,000.00 enabled the taxpayer to perform deposit and lending function and to process general accounting.

155. 584 S.W.2d at 550. The court rejected that state's argument that the personal service characteristic was present only in the case of customized programs.

156. See Note, *supra* note 136 at 1531-36, indicating that of the 34 states taxing software, only 10 taxed canned software exclusively.

157. *Maccabees Mutual Life Ins. Co. v. Michigan Dep't. of Treasury, Revenue Division*, 122 Mich. App. 660, 332 N.W.2d 561, 564 (1983). The issue of tangibility in this case was decided on a motion for summary judgment.

158. 296 Md. 459, 464 A.2d 248 (1983).

ments, acquired the right to use several prepackaged, canned programs in its business.¹⁵⁹ While Maryland argued that the acquisition of the tapes constituted a sale, the taxpayer argued that the essence of the transaction was the acquisition of intangible personal property—knowledge.¹⁶⁰ In refusing to “conceptually sever” the information on the tape from the tangible medium itself to hold the transaction exempt, the court declined to adopt as part of the state’s sales tax law “a principle that the buyer’s predominant purpose for a transaction controls the classification . . . as either tangible or intangible.”¹⁶¹

The basis for the decision was primarily twofold. First, the sales tax statute itself evidenced a legislative intent to include computer software as a taxable item. Since by statutory definition “price” included the “value in money . . . of a retail sale without deduction . . . on account of the cost of the property sold, cost of materials used, labor or service cost, or any other expense whatsoever,”¹⁶² to sever the insignificant blank tape from the valuable program copy would be contrary to legislative policy.¹⁶³ Moreover, since the legislature had specifically exempted cartoon mats,¹⁶⁴ and the lease of motion picture films by persons subject to amusement tax, it was obvious to the court that absent such exemptions, the artistic content or the right to exhibit the film would not be severed from its tangible medium.¹⁶⁵ Such an inference was further

159. *Id.* at 461-62, 464 A.2d at 249.

160. *Id.* at 466, 464 A.2d at 251-52. In an amicus brief, the Data Processing Management Association argued that what was acquired in the transaction was a license to use the program and that such a right was intangible property. *Id.*, 464 A.2d at 251. However, the court quickly rejected this argument since a patent or copyright was not involved. Rather, the “licenses simply erect[ed] contractual limitations on the use which Equitable might otherwise make of the statutorily unprotected program copies it acquired. . . .” *Id.* at 467-68, 464 A.2d at 252.

161. *Id.* at 468, 464 A.2d at 253. The court noted that the taxpayer’s dominant purpose in the transaction was to obtain a copy of the programs. *Id.* at 470, 464 A.2d at 254.

162. *Id.*, 464 A.2d at 253.

163. *Id.* *Tidwell* and other decisions recognized the insignificant value of the blank tapes as an element in determining the real object of the purchase. *See supra* note 143.

164. In identifying this particular exemption, the court was attempting to establish the inconsistencies of Maryland sales tax law with the decisions in *District of Columbia v. Universal Computer Associates, Inc.*, 465 F.2d 615 (D.C. Cir. 1972) and *Washington Times-Herald v. District of Columbia*, 213 F.2d 23 (D.C. Cir. 1954). In contrast to these decisions, enactment of the exemption indicated the legislative recognition that the purchase of cartoon mats was a taxable event. 296 Md. at 481, 464 A.2d at 259.

165. *Id.*, 464 A.2d at 259. As additional support for this conclusion, the court interpreted its own dicta in *Greyhound Computer v. Maryland*, 271 Md. 674, 320 A.2d 52 (1974) to permit taxation of computer software, although courts in most other jurisdictions had construed *Greyhound* to reach an opposite result. *See* 296 Md. at 481 n.10, 464 A.2d at 259

supported by the fact that Maryland's sales tax statute had never conceptually severed the copy of the artistic performance from the phonograph record, and there appeared no legally significant difference between canned software and the record to justify severance in this instance.¹⁶⁶

The second basis for the court's decision was its rejection of the "technological underpinnings" of the prior cases declaring software to be intangible. While several courts found that what actually remained in the computer after the tapes and cards were destroyed or returned to the seller was knowledge,¹⁶⁷ the *Equitable Trust* court reasoned that "[w]hat rests in the programmed memory is not 'knowledge' . . . but machine instructions."¹⁶⁸ Under this analysis, taxability of software should not turn on whether the program is stored in memory nor on the capacity of the user's computer to store the information.¹⁶⁹ Likewise, the court also rejected the alternative methods approach which recognized that a computer may be programmed without the use of tangible media.¹⁷⁰ Although a taxable transaction might be structured in a nontaxable form, this approach does not take into account the actual facts of the transaction nor control its taxability.¹⁷¹ With respect to the prior reasoning which recognized as a significant fact the loss of value after use and the return of the tape to the seller or destruction of the program after entry into the buyer's machine, the *Equitable Trust* court flatly stated that "intangibility should not be determined by the extent of use."¹⁷²

n.10. The *Equitable Trust* court read *Greyhound's* suggestion of a distinction in property tax valuation between operational and applicational software as enabling the conclusion that both were taxable for sales tax purposes. *See id.* at 481-83, 464 A.2d at 259-61.

166. *Id.* at 484-85, 464 A.2d at 261. The court acknowledged, however, that a different result might be reached if the information was transferred directly to the user's computer by keyboard input or through electronic transmissions. *Id.* at 484, 464 A.2d at 261.

167. *See, e.g.,* *District of Columbia v. Universal Computer Associates*, 465 F.2d 615, 618 (1972) ("[w]hat rests in the machine, then, is an intangible—'knowledge'—which can hardly be subject to a personal property tax."); *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405, 408 (Tenn. 1976) ("what actually remains in the computer is intangible knowledge; this is what was purchased, not . . . tapes or the punch cards.").

168. 296 Md. at 472, 464 A.2d at 255.

169. *Id.* Accordingly, a tax system cannot be administered on whether the purchaser intends to store the program continuously in memory. *Id.*

170. *Id.* at 473, 464 A.2d at 255. *See supra* note 141 and accompanying text.

171. 296 Md. at 473, 464 A.2d at 255. Subsequently, however, the court did note that a different result might be reached if tangible media were not used in the transaction. *See supra* note 166 and accompanying text.

172. 296 Md. at 473, 464 A.2d at 255. In this case, the court noted, the taxpayer retained possession of the tapes after use.

Indeed, *Equitable Trust* provides several strong arguments for the taxability of canned computer programs. Under its analysis, however, customized programs would appear to be nontaxable by virtue of the personal services exemption. What is unsettling about this opinion is the court's expansive reading of the sales tax statute. If a taxing statute is to be strictly construed against the taxing authority and any ambiguities resolved in favor of the taxpayer,¹⁷³ it is difficult to understand how the *Equitable Trust* court determined that canned software was intended by the legislature to be included as a taxable item. At a minimum, the cases analyzed above reflect a sharp distinction among the courts and legislatures as to whether software is tangible or intangible. Much of this problem has resulted from statutes which are less than clear on this issue as well as the application of traditional legal principles to untraditional modern technology. Such policy determinations as to those articles to be granted an exemption and those to be taxed are perhaps more appropriate for legislative bodies.

Further, the court's basis for the distinction between software and knowledge is unclear at best. Simply by changing terms, the court transforms intangible "knowledge" into "machine instructions." The opinion, however, does not take that further step to explain how machine instructions transform the information conveyed into a tangible, taxable item. Such an undeveloped analysis is not unique to this case however. As one commentator has noted, the focus by reviewing courts on the tangible aspects of software rather than on its intrinsic nature—knowledge—has resulted in the application of sales and use tax according to the significance of the tangible aspects of the medium to the transaction.¹⁷⁴

The relevance of the tangible aspects of the software transaction to the sales and use tax applicability is no more apparent than in those cases where the transaction involves computer printouts as a consequence of the sale or use. The determination of liability for sales and use tax on computer printouts generally has turned on whether the printout is merely an element of a personal service transaction by the data processor or whether the printout was the real object sought by the customer. Thus, in *Citizens Financial Corp. v. Kosydar*,¹⁷⁵ the supreme court of Ohio focused on the essence of the transaction between the data processing company and

173. See *First National Bank of Fort Worth v. Bullock*, 584 S.W.2d 548, 555 (Tex. 1979). See also J. HELLERSTEIN & W. HELLERSTEIN, *supra* note 3, at 38-42.

174. See Note, *supra* note 136, at 1519.

175. 43 Ohio St.2d 148, 331 N.E.2d 435 (1975).

its savings and loan association customers to conclude that the real object sought by the customer was the use of the computer system to produce a journal of its savings and loan transactions. Since the data processor was neither consulted for analysis or problem solving, nor did it advise the savings and loan associations "what direction [they] should take in formulating their approach to the business world," a personal service transaction was not created between the taxpayer and his clients.¹⁷⁶

Consequently, something more than sorting, classifying and printing the raw data supplied by the customer is necessary to create a personal service transaction in order to exempt the computer printout from sales and use tax. If the written materials constitute more than an inconsequential element of the data processing services, the taxpayer-seller may be liable for sales tax.¹⁷⁷ Rather, the taxpayer must engage in some analysis of the data and perhaps assist in management decisions. Accordingly, some type of customized software appears to be indicated in these transactions. Precisely what degree of analysis the taxpayer must engage in is not clear from these decisions.

3. *Manufacturer's Own-Use Tax Base*

Since most states impose a sales or use tax on tangible personal property *purchased at retail*, such legislation permits a manufacturer, using his own manufactured product for a taxable purpose, the unique position of adopting as his tax base the price of the raw materials consumed in the manufacture of the article. Since withdrawals from inventory cannot be considered a sale at retail, such activity by the manufacturer-taxpayer eliminates from his tax base for sales and use tax purposes the costs of labor, overhead, transportation and other costs normally included in the retail price to the purchaser. Examples would include a business machines manufacturer using its own products in its offices, or the contracting division of a steel manufacturer using its own steel in the construction of buildings and bridges. Not only does this "self-produced" exception permit the taxpayer to reduce his sales and use tax lia-

176. *Id.* at 150, 331 N.E.2d at 437.

177. *See, e.g.,* Statistical Tabulating Corp. v. Lindley, 3 Ohio St.3d 23, 445 N.E.2d 1104 (1983). In this case, the data processor provided programming services to small and medium sized businesses including payroll, accounts receivable, general ledger, inventory and billing. The court determined that the sales were taxable since the real object of the transaction was the receipt of written reports, documents and payroll checks. *Id.* at 24, 445 N.E.2d at 1106.

bility, it allows him a competitive advantage in the marketplace as well, since he is able to pass his tax savings along to his customers.

Among the few cases considering this issue is *International Business Machines Corp. v. Charnes*.¹⁷⁸ In *IBM*, the manufacturer withdrew from its sales inventory several business machine products for its own use, paying a use tax calculated on the cost of the raw materials and component parts of the machines only.¹⁷⁹ Since the Colorado sales and use statute exempted purchases of property for resale and items used directly in manufacturing from the payment of tax, *IBM's* original purchase of the component parts for the machines was a nontaxable event.¹⁸⁰ Colorado, however, assessed use tax against the business machines calculated on the full value of the finished goods on the grounds that since the purchase was originally exempt, the transaction could not be later recharacterized in order to avoid tax liability.¹⁸¹ Further, the state argued that the withdrawal of the items from inventory triggered the use tax. The supreme court of Colorado disagreed and permitted the subsequent recharacterization of the transaction, the value for tax purposes to be calculated at the time of the original purchase.¹⁸² Withdrawal from inventory for intracompany use was not deemed analogous to the two-party sale since one cannot sell to himself.¹⁸³

Thus, transfers between departments or divisions are not sales within the definition of the statute. It should be noted, however, that this exception does not apply to transfers between parent and subsidiary corporations. Such transactions are considered sales between separate companies, despite the fact that the subsidiary may be wholly owned by the parent.¹⁸⁴

178. 198 Colo 374, 601 P.2d 622 (1979).

179. *Id.* at 376, 601 P.2d at 623-24. *IBM* did not factor in its own labor and overhead costs into the tax base, thus using the same tax base for each item as would have applied if the original purchase of that item's component parts had not been exempt from sales tax. *Id.*, 601 P.2d at 624.

180. *Id.*, 601 P.2d at 623-24.

181. *Id.* at 378, 601 P.2d at 625. The state was concerned that a purchaser might evade both sales and use taxes by purchasing an item at wholesale and then converting the item to its own use. In fact, under its regulation, tangible personal property, purchased tax free for resale or as an ingredient of a manufactured product, which was subsequently withdrawn from stock was to be taxed at the full finished goods cost. *Id.* at 375, n.1, 601 P.2d at 623 n.1.

182. *Id.* at 379, 601 P.2d at 625-26.

183. *Id.*, 601 P.2d at 625.

184. See, e.g., *Superior Coal Co. v. Department of Finance*, 377 Ill. 282, 36 N.E.2d 354 (1941) (sales of coal by wholly owned subsidiary to the parent taxable at retail). See generally Annot., 64 A.L.R.2d 769 (1959).

III. CONCLUSION

The distinction between sales tax and use tax is apparent from the historical development presented herein. The use tax is paramount in several states, imposed and due from the purchaser *unless* the tax has been satisfied by payment to the vendor of the sales tax (or use tax if an out-of-state vendor).¹⁸⁵

Use tax statutes generally include by definition three facets of "use"—storage, use or consumption. It seems absolutely paradoxical to equivocate this language by fragmentation into three separate and distinct propositions of law as done by the Texas court in *Lone Star Gas Co.*¹⁸⁶ Certainly any purchase for "use" incurs at least a moment of "storage" prior to use. Therefore, if the enigma of the Texas decision were proliferated it would render most statutory use tax exemptions of nugatory effect. If such fatuous philosophy is perpetrated again by any taxing authority, it must be relitigated to restore symmetry in use tax concepts.

Sales and use tax collection requirements for out-of-state vendors have been the subject of several law review articles or comments in earlier years when sales taxes were in infancy.¹⁸⁷ These articles were generally discourses on the legal ramifications and potentials of arguments as to the interstate aspects of subjugating interstate sellers to the status of state tax collectors. With these issues fairly decided, the questions now center around what activities by the nonresident seller will allow the taxing authority to require the collection of its use tax in the transaction. Of course, whether the transaction is sales or use tax depends upon the activity of the seller in the state concerned, but the court decisions clearly indicate the trend that *any* minimal "connection" appears to suffice for the granting of jurisdiction, whichever statute applies.¹⁸⁸

In our continually changing trade economy and advancements in

185. See, e.g., ILL. ANN. STAT. ch. 120, § 439.3 (Smith-Hurd 1974); OHIO REV. CODE ANN. § 5741.02(B) (Page 1983); 72 PA. CONS. STAT. ANN. § 7202(b) (Purdon 1983).

186. See *supra* notes 126-35 and accompanying text.

187. See generally Comment, *Compensating Use Taxes: Past and Present Constitutional Problems in Imposition and Collection*, 18 ARK. L. REV. 322 (1965); Powell, *Sales and Use Taxes: Collection From Absentee Vendors*, 57 HARV. L. REV. 1086 (1944); Warren and Schlesinger, *Sales and Use Taxes: Interstate Commerce Pays Its Way*, 38 COLUM. L. REV. 49 (1938).

188. Another very essential factor is the general rule that for sales claimed to be exempt from tax, a valid exemption certificate executed by the purchaser must be *timely* received by the seller to be effective. See, e.g., FLA. STAT. ANN. § 212.02(3)(a) (West 1984); ILL. ANN. STAT. ch. 120, §441c (Smith-Hurd 1974); OHIO REV. CODE ANN. § 5730.03 (Page 1983).

technological goods such as computer software and services, the area of sales and use tax law is very viable. This, plus the constant need of state and local taxing jurisdictions for increased revenue, promises more litigation in present and future years.