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Pennsylvania's Manufacturing Exemption-Policy-Precedent-Practicality

Louis F. Del Duca

PENNSYLVANIA'S MANUFACTURING EXEMPTION POLICY—PRECEDENT—PRACTICALITY

BY LOUIS F. DEL DUCA *

The Pennsylvania Selective Sales and Use Tax Act is a broad-based tax imposed generally on industrial, merchant and private consumers. The revenues derived therefrom are specifically and exclusively ear-marked for education.[1] For policy reasons, the Legislature has seen fit to grant certain exemptions from the tax among which are purchases by non-profit educational institutions,[2] charitable, and religious organizations,[3] the United States,[4] the Commonwealth itself and its local governmental subdivisions and instrumentalities,[5] etc. The only notable relief from the tax allowed to private citizens is on purchases of food (other than from eating places or caterers)[6] and clothing.[7] Merchants, (*i.e.* business firms generally described as merchandising or commercial establishments) and persons engaged in industrial operations pay the tax on property they buy for their use in the same manner as ordinary private citizens.[8] Also for policy reasons, the Legislature has seen fit to grant exemptions to certain industrial users. Farmers,[9] dairymen,[10] public utilities,[11]

* A.B., 1950, Temple University; LL.B., 1952, Harvard University; 1953, Hague Academy of International Law; LL.D., 1954, University of Rome; Professor of Law, Dickinson School of Law, member Pennsylvania Bar; Consultant to the Bureau of Sales and Use Tax of the Department of Revenue. The views expressed herein are those of the Author and do not necessarily represent those of the Commonwealth.

[1] The title of the Selective Sales and Use Tax Act of March 6, 1956 (P. L. 1228) was amended to read as follows:

"[A]n Act to provide revenue for [Commonwealth] purposes *of public education* by imposing tax on . . ." Act of April 15, 1959, P. L. 20. See also PA. STAT. ANN. tit. 72, § 3403-604.1 (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-709.

[2] PA. STAT. ANN. tit. 72, § 3403-203(e)(1959), CCH Pa. Sales Use Tax Rep. Par. 97-583.

[3] *Ibid.*

[4] PA. STAT. ANN. tit. 72, § 3403-203 (i)(1959), CCH Pa. Sales and Use Tax Rep. Par. 97-587.

[5] *Ibid.*

[6] PA. STAT. ANN. tit. 72, § 3403-2(l)(17)(1959), CCH Pa. Sales and Use Tax Rep. Par. 97-554.

[7] Clothing is not inclduded within any of the 20 categories of tangible personal property presently contained in PA. STAT. ANN. tit. 72, § 3403-2(l) (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-538 to 97-555 and is therefore not subject to tax. See PA. STAT. ANN. tit. 72, § 3403-201 (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-575.

[8] The tax is imposed generally on *all* vendors and purchasers of tangible personal property or taxable services by Section 201 of the Act. PA. STAT. ANN. tit. 72, § 3403-201(A) (1959), CCH Pa. Sales and Use Tax. Rep. Par. 97-575.

[9] PA. STAT. ANN. tit. 72, § 3403-2(j)(b) (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-532; PA. STAT. ANN. tit. 72, § 3403-2(m)(c)(ii) (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-562.

[10] *Ibid.*

[11] PA. STAT. ANN. tit. 72, § 3403-2(j)(b)(c) (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-533; PA. STAT. ANN. tit. 72, § 3403-2(n)(c)(iii) (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-562.

publishers and printers,[12] persons engaged in mining operations,[13] builders and repairers of ships of registered tonnage of fifty tons or more[14] and persons engaged in product development research[15] are among those specifically exempt from tax on their purchase of services, machinery, equipment and supplies used directly in such operations. The Legislature has never granted a blanket exemption to all industrial users. Its specific enumeration under the Selective Sales and Use Tax Act of types of industrial operations entitled to exemption is, by itself, indicative of an intent not to exempt all industrial operators.[16] It is clear, therefore, that, except for specifically delineated exemptions, the tax is imposed on all consumers—private, commercial and industrial.

The overall policy considerations that both legislators and administrators must consider in imposing and administering the tax and granting and interpreting exemptions therefrom are, on the one hand, the necessity for raising needed revenues for maintaining an adequate educational program throughout the Commonwealth and, on the other hand, the public advantages to be gained by granting the type of exemptions mentioned above. Legislative intent concerning the applicability of the tax in specific situations must be determined from the entire language of the act in accord with accepted principles of statutory construction, particularly the well established principle that provisions imposing tax and provisions granting relief from tax must both be strictly construed[17] (as well as the previously mentioned principle that inclusion of specific items in a class is presumed to exclude all other items not specifically included).[18]

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[12] PA. STAT. ANN. tit. 72, § 3403-2(c) (2) (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-508; PA. STAT. ANN. tit. 72, § 3403-2(j)(b)(a) (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-531; PA. STAT. ANN. tit. 72, § 3403-2(n)(c)(i) (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-562.

[13] PA. STAT. ANN. tit. 72, § 3403-2(c)(3) (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-509; PA. STAT. ANN. tit. 72, § 3403-2(j)(b)(a) (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-531; PA. STAT. ANN. tit. 72, § 3403-2(n)(c)(i) (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-562.

[14] PA. STAT. ANN. tit. 72, § 3403-2(c)(4) (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-510; PA. STAT. ANN. tit. 72, § 3403-2(j)(b)(a) (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-531; PA. STAT. ANN. tit. 72, § 3403-2(n)(c)(i) (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-562.

[15] PA. STAT. ANN. tit. 72, § 3403-2(c)(5) (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-511; PA. STAT. ANN. tit. 72, § 3403-2(j)(b)(a) (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-531; PA. STAT. ANN. tit. 72, § 2(n)(c)(i) (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-562.

[16] Scott Township Appeal, 388 Pa. 539, 543, 130 A. 2d 695 (1957), Lemoyne Borough Annexation Case, 176 Pa. Super. 38, 107 A. 2d 149 (1954).

[17] PA. STAT. ANN. tit. 46, § 558-3, 558-5 (1937).

[18] *Supra* note 16.

The particular question herein considered concerns the scope of the exemption granted to manufacturers by a provision in the tax statute which defines "manufacture" as follows:

> Manufacture. The performance of manufacturing, fabricating, compounding, processing or other operations, engaged in as a business, which place any personal property in a form, composition or character different from that in which it is acquired. . . .[19]

It has been contended that exemption of all industrial processors from sales and use tax is required under the above quoted definition. One hundred years of judicial experience in the Pennsylvania courts in developing a definition of the term "manufacturing" which rejects the grant of such a broad exemption has recently been challenged. This article takes the position that the judicial definition developed and applied by the Pennsylvania courts for more than a century has proven to be a wise and practical one. It further takes the position that the Pennsylvania General Assembly has enacted legislation incorporating this judicial definition into the statute. It is also the position of the writer that elimination of the so-called "transformation" or "new and different product" test for determining whether a particular industrial operation constitutes "manufacturing" would in effect grant the exemption to almost every business which involves work upon personal property. *The Legislature clearly had no intention of imposing the broad-based sales and use tax only on private citizens and merchants and granting a special preference in the form of complete immunity from tax to persons engaged in industrial operations.*

Pennsylvania's exemption for manufacturers is broad with respect to the types of property included in the exemption. It includes both capital machinery, equipment and supplies,[20] rather than just expendables [21] and the exemption is complete rather than just a reduction in rate,[22] or an exemption for pur-

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[19] PA. STAT. ANN. tit. 72, § 3403-2(c) (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-511.

[20] PA. STAT. ANN. tit. 72, § 3403-2(j)(b) (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-530.

[21] For example, see CONN. GEN. STAT. 12-412 (1959), 2 CCH All State Sales Tax Rep. Par. 27-048; and ME. REV. STAT. Ch. 17, § 2 (1955), 2 CCH All State Sales Tax Rep. Par. 41-028. Compare resale exemption contained in PA. STAT. ANN. tit. 72, § 3403-2(k) (1959), Pa. Sales and Use Tax Rep. Pars. 97-520, 97-521.

[22] For example Alabama generally imposes a 3% tax rate but imposes a 1½% tax rate on the sale or purchase of manufacturing machinery or parts therefor. 2 CCH All State Sales Tax Rep. Par. 20-039, 20-218(a). This 1½% tax rate was imposed in 1959. Prior thereto no tax was imposed on the sale or purchase of manufacturing machinery or parts therefor. See Alabama Code, tit. 51, § 755 (p) (1959); Alabama v. Brady, 264 Ala. 397, 87 So. 2d 852 (1956).

chases over or below a certain amount,[23] or for property not readily obtainable in the state.[24] Of all the approximately thirty-six sales and use tax states, *only seven other states grant an exemption on purchases of such capital machinery and equipment.*[25] It should also be noted that Pennsylvania's exemption covers manufacturing whether for sale or use by the manufacturer,[26] whereas many states limit the exemption to manufacturing for sale.[27]

The scope of Pennsylvania's exemption with respect to the types of businesses included in the exempt class is a different matter. Except for certain businesses specifically enumerated for exemption, the Pennsylvania exemption is limited to those businesses which produce new and different products, *i.e.,* to *manufacturing* firms in the common dictionary sense of that term. Certain other states which provide tax exemptions for business firms have granted an exemption to processors—firms which perform various operations on personal property—in addition to manufacturers. This, as many of the cases reveal, is a matter of state policy often with the view of luring new businesses into the state where they will be "subject to other taxation." [28] The effect of granting exemptions to all processors is to remove from taxation almost every business which involves work upon personal property thereby completely exempting all industrial operations since anyone whose operations effect changes in personal property is a "processor." "Language which relieves from tax must be strictly construed." [29] *If the Legislature had intended such a drastic change of precedent and curtailment of the Commonwealth's revenue, it is reasonable to assume that it would have expressly abolished or eliminated the "transformation" or "new and different product" test* from the definition of manufacturing contained in the Selective Sales and Use Tax Act and thereby

[23] For example, the Florida exemption is limited to tax in excess of a tax of $1,000 on a single sale. FLA. STAT. of 1949, tit. 133212.08 (1957), 2 CCH All State Sales Tax Rep. Par. 30-099. The Mississippi exemption is limited to sales in excess of $500, Miss. Code of 1942, tit. 40, § 10116 (1958), 3 CCH All State Sales Tax Rep. Par. 46-081.

[24] For example, see provision of North Dakota statute, N. D. REV. CODE tit. 57, § 57-4001 (1955), 3 CCH All State Sales Tax Rep. Par. 59-204.

[25] 1 CCH All State Sales Tax Rep. Par. 7-200.

[26] PA. STAT. ANN. tit. 75, § 3403-2(j)(b)(a) (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-531, PA. STAT. ANN. tit. 75, § 2(n)(c)(i), CCH Pa. Sales and Use Tax Rep. Par. 97-562.

[27] For example, see provision of the Ohio Statute at OHIO REV. CODE tit. 57, § 5739.01 (1959), 3 CCH All State Sales Tax Rep. Par. 60-026 and the Maine statute at ME. REV. STAT. Ch. 17, § 2 (1955), 2 CCH All State Sales Tax Rep. Par. 41-028.

[28] Stone v. Friedman, 219 Miss. 388, 68 So. 2d 473 (1953). See also editorial reprinted in *Harrisburg Patriot,* March 9, 1960, page 10, col. 4. In discussing the implications of Mississippi tax concessions on Minnesota's tax program this editorial notes that federal aid to education proposals would subsidize such things as school construction and school salaries in Mississippi at the rate of 23 federal dollars for every single dollar contributed by Mississippi. It further observes "While it (Mississippi) is being subsidized in that fashion, it would be cutting its income taxes to compete for industry with the very states that were helping to foot its education bills. This would be nice for Mississippi but hardly a cause for rejoicing among the states whose industries were being lured away."

[29] Commonwealth v. Lowry-Rodgers Company, 279 Pa. 361, 366, 123 Atl. 855, 856 (1924).

unequivocally indicated that *all* processing, fabricating and compounding qualified for the manufacturing exemption irrespective of whether or not a "new and different product" was created. The Legislature did not do this. Instead, the Legislature preserved the "transformation" test by its inclusion of the requirement that the personal property be placed in a *"form, composition or character"*[30] different from that in which it is acquired.

The statutory test stated in Section 2(c) of the Selective Sales and Use Tax Act is substantially the same as that expressed in 1856 in the leading case of *Norris Brothers v. The Commonwealth,*[31] which has been cited and quoted throughout the last century. In that case the court expressed the test for determining whether operations are manufacturing as follows: "It generally consists in giving *new shapes, new qualities or new combination* to matter which has already gone through some other artificial process." [32] (Emphasis added.)

In subsequent cases, quoting the above language of the *Norris* case, the supreme court has restated the test as follows:

> *Or, in other words,* the process of manufacture brings about the *production of some new article* by the application of skill and labor to the original substance or material out of which the new product emerges.[33] (Emphasis added.)

From the very outset when the "new and different product" test was first formulated by the supreme court, it was recognized that not only products "made by hand" were entitled to the manufacturing exemption. The *Norris* case held that a firm making locomotives who used some component parts made by other persons was a manufacturer. Of course, *Norris* used machinery in his locomotive making.

Some seventy-five years after the *Norris* decision, the court stated:

> It is error to say that the signification of the word has been in recent times extended or enlarged. What has happened is that a multitude of events, the fruits of invention, and the recognition of modern modes of living, have been brought within the old and ordinary sense of the term, and, by reason of their manner of making, by machinery or by hand, are recognized and designated as "manufactured". There has been but one change and enlargement in the meaning of the word. When machinery began to be a tremendous agency in supplying the needs and luxuries of mankind, the ancient original import

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[30] PA. STAT. ANN. tit. 72, § 3403-2(c) (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-507.
[31] 27 Pa. 494 (1856).
[32] 27 Pa. 494, 496 (1856).
[33] Commonwealth v. Weiland Packing Co., 292 Pa. 447, 450, 141 Atl. 148, 149 (1928).

> of the term "made by hand" was extended to include articles created by machinery as well as by manual labor and so the word is currently used today.[34]

Numerous cases have been decided by Pennsylvania courts using the "transformation" or "new and different product" test. The writer has found and examined more than eighty such cases. These cases do not, as has been recently intimated, present a blurred and confusing picture regarding the meaning of manufacture. Instead, they indicate that our courts have consistently *adhered to the common dictionary definition of "manufacturing" and have held that it includes only those business activities which produce a new and different product having a distinctive name, character and use different from the materials from which the product was made.*

The courts have also held that *in addition* to meeting the "new and different product" requirement, the activity in question must also be of a kind popularly regarded as manufacturing to qualify for the exemption.[35] For a period of more than one hundred years with the experience gained in deciding whether particular operations constitute manufacturing, this same basic test has been evolved and refined.

Merely cutting and curing meat has been established not to qualify for the manufacturing exemption.[36] In so holding, the court noted that bringing about merely a superficial change in the original materials and no substantial change in forms, quality and adaptability for use does not constitute manufacture. In so holding, the court also stated:

> Nor is it of legal significance . . . that the operations . . . require large and extensive plants and organizations, trained men and intricate machinery, for even though the labor be skilled, the operations delicate, a large plant involved, and expensive machinery utilized, such factors, neither individually nor collectively, convert what is essentially a mere processing operation into a manufacturing operation.[37]

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[34] Commonwealth v. Wark Co., 301 Pa. 150, 154, 151 Atl. 786, 788 (1930).

[35] Commonwealth v. Marsh, 3 Pa. Dist. Rep. 489, 491 (1894), Commonwealth v. Weiland Packing Co., 292 Pa. 447, 141 Atl. 148 (1928), Commonwealth v. Wark Co., 301 Pa. 150, 151 Atl. 786 (1930), Commonwealth v. Boon & Sample, Inc., 35 Dauph. 404 (Pa. 1932), Commonwealth v. Paul Bounds, 316 Pa. 29, 30, 173 Atl. 633 (1934), Commonwealth v. Trinity Court Studios, 39 Dauph, 244 (Pa. 1934), Mt. Vernon Corp. v. Revenue Commissioner, 11 Pa. D. & C. 2d 479 (1957), Pittsburgh v. Electric Welding Co., 394 Pa. 60, 64, 145 A. 2d 528 (1958).

[36] Commonwealth v. Consolidated Dressed Beef, 242 Pa. 163, 88 Atl. 975 (1913), Commonwealth v. Weiland Packing Co., 292 Pa. 447, 141 Atl. 148 (1928), Armour & Co. v. Pittsburgh, 363 Pa. 109, 69 A. 2d 405 (1949).

[37] Armour and Company v. Pittsburgh, 363 Pa. 109, 116, 69 A. 2d 405, 408 (1949), see also HARRY, *Manufacturer's Exemption from the Pennsylvania Capital Stock and Franchise Taxes,* Taxes—THE TAX MAGAZINE 26, 30 (1958).

With respect to construction activity, the supreme court has held that the production of materials culminating in the construction of bridges is manufacturing.[38] However, in applying the basic "new and different product" test to construction work generally, the court has ruled that in *addition* to the "new and different product" test, the operation in question must qualify as manufacturing within the layman's understanding of the term. Construction of buildings, therefore, has been held not to qualify for the exemption.[39]

The court has not considered that a distinctive new product has emerged merely because the combination of certain materials are referred to in their final form as a "system," or "assembly." [40]

The above mentioned, along with many other specific applications of the "new and different product" test by the courts have established qualitative standards which make it possible in most cases to predict with comparative ease whether particular operations constitute or do not constitute manufacturing.[41] Over a hundred years of judicial experience and wisdom have gone into the refinements of this definition. It should not lightly be cast aside.

"Manufacturing, fabricating, compounding, processing, or other operations" as used in Section 2(c) of the Selective Sales and Use Tax Act all refer to methods of making tangible personal property. Standard dictionary definitions of these words support this statement. The first source to be used in determining the meaning of words in a statute is the dictionary. Although this rule must be qualified to the extent that the Legislature may adopt a special definition of its own for any term it uses in a statute, the words of which a statutory definition is composed are to be read in the light of the general rule that common meanings are intended.[42] The dictionary definition of the terms fabricating, compounding, and processing used in the statutory definition of "manufacture" all refer to making by assembling or combining

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[38] Commonwealth v. Keystone Bridge Company, 156 Pa. 500, 27 Atl. 1 (1893), Commonwealth v. Pittsburgh Bridge Company, 156 Pa. 507, 27 Atl. 4 (1893).

[39] In Commonwealth v. Wark, 301 Pa. 150, 154, 151 Atl. 786, 788 (1930), the supreme court stated, "Both the popular and technical use and meaning of the word (manufacture) are and have been for centuries at complete variance with that attributed to it by appellant . . . the clause in [the] charter which reads *'manufacture of buildings'* is an anomaly, which no standard dictionary of our language has ever accepted, and which ordinary popular usage has never sanctioned . . ." (Emphasis supplied.) See note 35 *supra.*

[40] Commonwealth v. Boyer Plumbing Company, 23 Dauph. 296 (Pa. 1920), Commonwealth v. Boon and Sample, Inc., 35 Dauph. 404 (Pa. 1932), Commonwealth v. Taylor-Davis, 37 Dauph. 391 (Pa. 1933), Pittsburgh v. Electric Welding Company, 394 Pa. 60, 145 A. 2d 528 (1958).

[41] For example, see Pennsylvania State Chamber of Commerce, *"The Manufacturers' Exemption from the Pennsylvania Capital Stock-Franchise Taxes,"* Bulletin 155 (Dec. 1957).

[42] PA. STAT. ANN. tit. 46, § 533 (1937); Hazen Engineering Co. v. Pittsburgh, 189 Pa. Super. 531, 151 A. 2d 855 (1959); Pittsburgh v. Electric Welding Co., 394 Pa. 60, 145 A. 2d 520 (1958).

parts or elements or through any series of acts or operations.[43] However they may or may not result in making a "new and different product." [44] Some form of fabricating, compounding, or processing is involved in most, if not all, manufacturing operations.

A careful examination of the general definition of manufacturing contained in the Selective Sales and Use Tax Act establishes that the words "fabricating, compounding, or processing" in the Act are merely examples of operations or methods of manufacturing (in the customary sense of the term as used in other tax exemption provisions). This is clearly established by the qualifying phrase "or other operations . . . engaged in as a business which place any personal property in a form, composition or character different from that in which it is acquired." [45] This phrase immediately follows, modifies and limits the phrase "fabricating, compounding, processing or other operations" in Section 2(c) of the act. The precise technical label of the operation is unimportant regardless of whatever term by which it is designated in the trade. Only if it meets the required "transformation" or "new and different product" test regarding the articles handled, is it entitled to an exemption.

The Legislature's choice of words, and their arrangement, clearly indicate that they should be interpreted together in determining their true meaning. The Indiana Gross Income Tax Act of 1933 was considered by the Indiana Supreme Court in *Indiana Creosoting Co. v. McNutt.*[46] That statute con-

[43] See the definitions of these terms in Webster's International Dictionary, Second Edition (1960).

[44] Fabrication of bridges (Commonwealth v. Keystone Bridge Co., 156 Pa. 500, 27 Atl. 1 (1893); Commonwealth v. Pittsburgh Bridge Company, 156 Pa. 507, 27 Atl. 4 (1893) and fabrication of awnings (Koolvent Aluminum Awning Co. of Pittsburgh), 186 Pa. Super. 233, 142 A. 2d 428 (1958) have been held to be manufacturing. In holding a stone work contractor not to be a manufacturer the Supreme Court stated, "The word fabricating in the context in which it is used (in the charter) does not mean manufacturing at all." Commonwealth v. Paul W. Bounds Co., 316 Pa. 29, 31, 173 Atl. 633, 634 (1934). Compounding various ingredients to make syrup and flavoring extracts has been held to be manufacturing (Commonwealth v. S. Frank and Sons, Inc., 43 Dauph. 51 (Pa. 1936). In Suburban Propane Gas Corp. v. Tawes, 205 Md. 83, 106 Atl. 2d (1954), the Maryland Court acting under a use tax exemption for persons engaged in "manufacturing" or "compounding" held the "compounding" exemption was properly denied to a person who mixed with propane certain other gases for safety and anti-freezing purposes because no new gas was formed. The same test was used for determining whether an operation is "manufacturing." In Commonwealth v. Weiland Packing Co., 292 Pa. 447, 450, 141 Atl. 148, 149 (1928), the Supreme Court stated, "Or, in other words, the *process* of manufacture brings about the production of some new article by the application of skill and labor to the original substance or material . . ." (Emphasis supplied.) In Gulf Oil Corp. v. Philadelphia, 357 Pa. 101, 111-112, 53 A. 2d 250, 255 (1947), the supreme court stated, "Processing is a flexible term . . . There is no warrant either in law or lexicology for holding that it excludes the idea of manufacturing by the use of machines and machinery . . . When wet clothes are placed on the lines to dry they are being processed . . . When wood pulp is being converted into paper, the process is . . ."

[45] *Supra* note 30.

[46] 210 Ind. 656, 5 N. E. 2d 310 (1936).

tained a provision imposing a lower rate of tax upon persons "engaged in the business of *manufacturing, compounding, or preparing* for sale, profit or use, any article or articles. . . ." (Emphasis added.) After finding that claimant, who creosoted railroad ties by injecting oil into them through a complicated mechanical process, was not a "manufacturer" under the new and different product test but merely performed a service, the court considered the argument that it was a "compounder":

> If we were to consider the word "prepare" alone, and unconnected with the words "manufacturing" and "compounding," there might be some reason for the appellant's construction of this part of Section 2(a). *We think however, that all of the language must be construed together to determine the meaning of Section 3(a).* The meaning of a word used in a statute must be construed with reference to all other words used therein and with which it is associated. . . . We *think the words "manufactured," "compound," and "prepared," as used in the statute must be construed in connection with each other.*[47] (Emphasis added.)

In the Pennsylvania case of *Armour Co. v. Pittsburgh,*[48] claimant, a meat processor, claimed exemption under the provisions exempting from tax ". . . any person vending or disposing of articles of his own growth, produce and manufacture . . ." The court stated:

> It was held in Rieck-McJunkin Dairy Co. v. Pittsburgh School District, 362 Pa. 13, 66 A. 2nd 295, that *neither the word "growth" nor the word "produce" as used in the Act qualified or enlarged the word "manufacture": here, therefore, as in that case, our discussion may be confined to the import and application of the word "manufacture."* [49] (Emphasis added.)

In considering the same act in *Rieck-McJunkin Dairy Co. v. Pittsburgh School District,*[50] the court earlier had come to the same conclusion, giving the following reasons:

> The word "product," of course, may have a very general meaning such as the product of a factory or of an industry, but we doubt whether it was the intention of the Legislature to so regard it in this particular taxing act, and if it were given this general definition, there would be very little that would be left as subject to this taxing Act.[51]

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[47] *Id.* at ——, 5 N. E. 2d at 314-315. For a later case affirming the proposition and applying it to the above mentioned "prepared for sale" provision, see Suabedissen-Wittner Dairy Inc. v. Indiana, 105 Ind. 626, 16 N. E. 2d 964 (1938).

[48] 363 Pa. 109, 69 A. 2d 405 (1949).

[49] 363 Pa. 109, 114, 69 A. 2d 405, 408 (1949).

[50] 362 Pa. 13, 66 A. 2d 295 (1949).

[51] 362 Pa. 13, 17, 66 A. 2d 295, 296 (1949).

Authority for the proposition that fabricating, compounding and processing as used in Section 2(c) of the Selective Sales and Use Tax Act are examples of types of operations which may qualify as manufacturing is also derived from the well established principal of statutory construction that "General words shall be construed to take their meanings and be restricted by preceding particular words." [52] Manufacturing is a word of specific and particular meaning; fabricating, compounding and processing are words of general meaning.

Much is made of the fact that the definition of "manufacturing" in the Selective Sales and Use Tax Act as initially enacted March 6, 1956, P. L. 1228, did not contain the words "fabricating, compounding, processing" and that these words were added to the statute 2½ months after its initial enactment. The Selective Sales and Use Tax Act was first enacted after approximately fifteen months of legislative debate and more than six months after the Consumers Sales Tax Act and the Use and Storage Tax Act of 1953 had expired. The Selective Sales and Use Tax Act was enacted 11: 53 p. m., March 6, 1956 to be effective 12: 01 a. m., March 7, 1956. Many drafting niceties which would have served to clarify the meaning of the Act were sacrificed for the sake of making it possible for the Commonwealth immediately to recommence collecting badly needed revenues. To round out and more clearly state the intent of this original enactment which was passed in haste and in incomplete form, the Legislature on May 24, 1956 enacted a whole series of amendments of a clarifying nature.

For example, the imposition section of the original act did not even expressly impose a tax upon sales of personal property, but merely upon the use of personal property. (The intent of the Legislature that vendors would collect tax at the time of sale was elsewhere clearly indicated in Section 546 which placed upon all vendors the duty to collect tax imposed by this act.) Section 201 of the amendatory Act of May 24, 1956, P. L. 1707 expressly imposed tax on vendors as well as users. The essentially clarifying nature of the May 24, 1956 amendment is also indicated by the provision of the act which stated:

> This act shall take effect immediately and its provisions shall be retroactive to March 7, 1956, except that it shall not be construed to impose a tax retroactively with respect to any tangible personal property not subject to tax under this act prior to the effective date of this amendment.[53]

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[52] PA. STAT. ANN. tit. 46, § 533 (1937).

[53] Section 19, Act of May 24, 1956, P. L. 1707.

With regard to the Legislature's May 24, 1956 amendments to the definition of manufacture, it should also be noted that the Legislature added the words, "as a business" to make it clear that the exemption was intended to be applied only to business operations of each person claiming the exemption. Furthemore, in amending the definition, the Legislature stated in separate, numbered paragraphs, the specific provisions with respect to the publishing of books, refining, exploring, mining, etc. in order to more clearly indicate that these operations are exempt irrespective of whether or not they comply with the basic qualitative tests for determining what are "manufacturing operations." [54]

It has also been contended that it would be extremely illogical to conclude that the Legislature intended exactly the same exclusion by a reference to "manufacturing, fabricating, compounding, processing or other operations" in the Selective Sales and Use Tax legislation as it did by the bare reference "manufacturing" in capital stock tax legislation.

In evaluating this contention it should be noted that the Selective Sales and Use Tax Act as originally enacted on March 6, 1956, P. L. 1228 defined "manufacture" in Section 2(h) as "The performance of manufacturing *or operations which place tangible personal property in a form different from that in which it is acquired.*" (Emphasis added.) On the other hand, the exclusionary language in the Capital Stock Tax Act as set forth in the Act of March 16, 1956, P. L. 1285 states that the capital stock tax shall:

> . . . not apply to the taxation of capital stock of corporations, limited partnerships and joint stock associations organized for *manufacturing* purposes which is invested in and actually and exclusively employed in carrying on manufacturing within the state. . . .[55] (Emphasis added.)

Since the Captial Stock Tax Act merely granted the exemption to manufacturers and did not attempt in any way to define the term manufacturing, it takes no great effort to reach the obvious conclusion that the traditional definition of manufacturing developed and used by the courts since the decision in 1856 in the *Norris* case was intended to be applicable.

However, the original Selective Sales and Use Tax Act defined manufacture as the "performance of manufacturing or operations which place tangible personal property in a form different from that in which it is acquired."

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[54] Mining has been held not to constitute manufacturing. Commonwealth v. Lackawanna I & Co., 129 Pa. 346, 18 Atl. 1120 (1889), Commonwealth v. Savage Fire Brick Co., 157 Pa. 512, 27 Atl. 374 (1893), See also Commonwealth v. Juniata Coke Co., 157 Pa. 507, 27 Atl. 373 (1893).

[55] PA. STAT. ANN. tit. 72, § 1871 (1956).

(Emphasis added.) By its addition of language which paraphrased the manufacturing definition language contained in the *Norris, Weiland* and numerous other cases decided by the Pennsylvania courts, the Legislature undertook to codify the definition which the courts had developed and refined over the period of the preceding one hundred years. This technique of clarification and incorporation of prior case law by means of codification has been and is frequently used in modern legislation. The Uniform Commercial Code, one of the most far reaching and significant legal documents of our time, illustrates this in numerous sections.[56]

The Capital Stock Tax Legislation of the 1956 session needed no clarification regarding the meaning of manufacturing since much of the case law developed by the Pennsylvania courts during the prior century involved Capital Stock Tax litigation. On the other hand, the May 24, 1956 amendments to the Selective Sales and Use Tax Act added the words "fabricating, compounding, processing" to the March 6, 1956 statutory definition of manufacturing as *illustrations* of types of *operations* (the word "operations" was contained in the definition of manufacture from the time the Selective Sales and Use Tax Act was first enacted) which sometimes place tangible personal property in a form, character or composition different from that in which it is acquired, thereby creating a new and different product and enabling the operation to qualify for the manufacturing exemption.

It has been contended that the "transformation" or "new and different product" test were not recognized by the Consumers Sales Tax Act [57] and the Use Tax Act of 1953 [58] or regulations or rulings issued thereunder. The definition of "Sale at Retail" [59] and its counterpart "Use at Retail" [60] under these acts excluded the sale or purchase of tangible personal property:

> . . . (i) which is to be used in fabricating, compounding, or manufacturing tangible personal property . . . to be sold ultimately at retail . . . which . . . becomes an ingredient or component part of the fabricated, compounded or manufactured tangible personal property or public utility product, . . . or is consumed in the process of fabrication, compounding, manufacturing or producing . . .

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[56] "[O]f the 111 Sections in Article 2, Sales, 37 have no prior statutory counterpart. The Code, therefore, answers, roughly, 50% more questions than our present Sales Act, and it does so in the light of over a half century of experience under the older act." National Conference of Commissioners on Uniform State Laws, *Connecticut Enacts the Uniform Commercial Code,* 15 (1959).

[57] PA. STAT. ANN. tit. 72, § 3407-101 *et seq.* (1953).

[58] PA. STAT. ANN. tit. 72, § 3406-101 *et seq.* (1953).

[59] PA. STAT. ANN. tit. 72, § 3407-102 (7)(o) (1953).

[60] PA. STAT. ANN. tit. 72, § 3406-102 (4)(m) (1953).

Unlike the Selective Sales and Use Tax Act, there is no exemption under the Consumers Sales Tax Act or Use and Storage Tax Act for capital equipment and machinery used by manufacturers in their operations. Only materials which become a part of the finished product or supplies and articles which are consumed are exempt.[61] No definition of the term "manufacturer" is set forth in these earlier statutes. However, the manufacturing regulation issued thereunder clearly incorporated the traditional "transformation" or "new and different product" requirement for qualifying for the exemption from the time it was first promulgated. That regulation reads as follows:

> Regulation 262—*Manufacturing.* As used in this Regulation, manufacturing means the working of raw materials or partially finished goods into *products of a different character or making* any combination of materials, *the inherent nature of which is* changed, or the finishing of goods by hand or machine. *Compounding and fabricating means the putting together, combining or uniting of diverse elements, ingredients, or parts to form a new product.* The use of the word "manufacture" in the following regulation includes fabricators and compounders.[62] (Emphasis added.)

It has been intimated that such industries as electroplating, galvanizing, and canning were exempt under the Consumers Sales Tax Act and Use and Storage Tax Act and regulations and rulings issued thereunder. The writer, after careful examination of the Regulations and Rulings issued under the Consumers Sales Tax Act and the Use and Storage Tax Act, has been unable to find any ruling or regulation granting such an exemption. On the contrary, an examination of applicable rulings and regulations discloses that a Legal Unit Interpretation issued by the Department of Revenue on March 25, 1954 expressly provided as follows:

> Electroplating Service—A company which performs the service of electroplating property owned by other persons is not a manufacturer but is engaged in the rendering of a personal service and therefore is considered the consumer of the tangible personal property used by him in the performance of that service. The serviceman should pay a tax on all materials which he uses in rendering his service, regardless of the intended use of the property which is electroplated.[63]

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[61] Regulation 262 issued under the Consumers Sales Tax Act and Storage Tax Act provided in part as follows:

> "Materials, tools, fuel and other tangible personal property will be regarded as being consumed and their purchase exempt from the tax when the normal useful life of the same is less than one year or when the cost of the same is allowed as a deduction for Federal income tax purposes as an ordinary and necessary business expense. If such items are disallowed as a deduction the purchase of them will be subject to tax." Prentice-Hall, Pa. Consumers Sales and Use Tax Rep. Par. 22, 640.45.

[62] Prentice-Hall, Pa. Consumers Sales and Use Tax Rep. Par. 22,640.5.

[63] Prentice-Hall, Pa. Consumers Sales and Use Tax Rep. Par. 21,215.156. Orders of the Board of Finance and Revenue are not relevant because they are all *ad hoc* administrative dis-

Under the Selective Sales and Use Tax Act[64] the manufacturing and other industrial operations exemptions are limited to property *used directly* in the exempt business operations, but they generally include capital machinery and equipment as well as expendables. Unlike the Consumers Sales Tax Act and Use and Storage Tax Act, under the Selective Sales and Use Tax Act the Legislature has granted a broad resale exemption which includes not only property purchased for resale in its original form, but all property for resale, including materials used as components or ingredients of personal property to be sold at retail in the regular course of business.[65] Under the Consumers Sales Tax Act and Use and Storage Tax Act, a resale exemption was granted only on purchases of property used for resale in its original form.[66] Under these earlier acts, the purchase of materials to be incorporated into a finished product was therefore exempt only if the purchaser thereof qualified for exemption as a manufacturer. Under both the Selective Sales and Use Tax Act and the earlier Consumers Sales Tax and Use and Storage Tax Acts, the resale exemption clearly exempts from tax wholesalers and retailers to the extent that they purchase inventory for resale purposes. However, only under the Selective Sales and Use Tax does the resale exemption exempt both manufacturers and non-manufacturers on purchases of materials which become components or ingredients of the product which the manufacturer or non-manufacturer sells.

Comparison with other states shows that the exemption granted by Pennsylvania to manufacturers is broader than that granted in most states. Often the manufacturing exemptions do not include capital machinery and equipment. In many instances the exemption available to manufacturers is limited to materials that are to become components or ingredients of a product to be sold.[67] (In other words, the equivalent of the resale exemption in the present form in which it appears in the Pennsylvania Selective Sales and Use Tax Act).

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positions of particular cases for which merely an order indicating the amount of tax due (if any) is handed down. The Board recognizes that its orders are not intended to serve as precedents No supporting opinion accompanies these orders. It is therefore impossible in many cases to ascertain their specific grounds. For example, reduction of a use tax assessment against a canner, electroplater, etc. might have been based on the theory that the particular operation produced a "new and different product", or that the "new and different product" test was inapplicable or possibly some other reasons.

[64] PA. STAT. ANN. tit. 72, § 3403-1 to 195 (1959).

[65] PA. STAT. ANN. tit. 72, § 3403-2(h) (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-520, 97-521.

[66] PA. STAT. ANN. tit. 72, § 3407-102(7)(a) (1953), Prentice-Hall, Consumers Sales and Use Tax Rep. Par. 22,802.42, PA. STAT. ANN. tit. 72, §3406-102(3)(a) (1953), Prentice-Hall, Consumers Sales and Use Tax Rep. 22,902.30.

[67] *Supra* note 21.

The manufacturing exemption and the resale exemption are not always clearly distinguished. It is very important that they be distinguished because, as has been indicated, all commercial and industrial operators are entitled to the resale exemption on all property purchased or used for resale. (Under the Selective Sales and Use Tax Act, this includes all property, whether resold in its original form or in a changed form irrespective of whether they qualify for the manufacturing or any one of the other industrial exemptions on their purchases of machinery and other items not for resale.) However, in order to qualify for exemption on purchases of machinery, equipment and supplies and other items not for resale, a person must establish that he performs the manufacturing, mining, dairying, farming, public utility or one of the other industrial operations which are granted an exemption under the Selective Sales and Use Tax Act.

It has been contended that the fact that mining, quarrying, refining, exploring, building and repairing of vessels of more than 50 tons and product research development, etc., have been expressly included in the definition of manufacturing is indicative of a legislative intent to exempt all producers. This is clearly contrary to the well known rule of statutory construction that inclusion of specific items in a general category is indicative of a legislative intent to exclude all items not specifically included in the general category.[68] If the above mentioned general definition of manufacturing in the Selective Sales and Use Tax Act so clearly includes all processors, compounders and fabricators, irrespective of whether or not a "transformation" or "new and different product" has been produced, why would the Legislature concern itself with specifically including within the definition of manufacturing not only a general definition but also exploring, mining, and quarrying, building and repairing vessels of more than 50 tons and product research development, etc.? Is it not more reasonable to conclude that the Legislature intended to grant the exemption only to fabricating, compounding, processing or other operations which place tangible personal property in a form different from that in which it is acquired, and that for reasons of its own it wanted to unequivocally grant the exemption to these other specifically mentioned types of operations irrespective of whether or not they "place tangible personal property in a form different from that in which it is acquired." [69]

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[68] *Supra* note 16.

[69] In this connection the mining cases cited at note 54 *supra* are particularly relevant. The status of natural resource exploration activities and product development research in the absence of their *specific* inclusion within this definition should also be considered. The fact that the Legislature having decided to grant comparable exemptions to mining firms, persons engaged in research, etc., accomplished their exemption through the device of specifically including these activities as additions to the general definition of "manufacture" merely indicates a legislative

Much has been made of the fact that the statutory definition of manufacturing expressly excludes construction or repairing of real estate and repairing, servicing, or installing of personal property. Numerous cases have held that construction of real estate does not constitute manufacturing.[70] It is also abundantly clear that painting or repairing or cleaning or otherwise servicing or installing personal property does not constitute manufacturing. It was this kind of clarification that the Legislature had in mind in specifically excluding from the term manufacturing, ". . . constructing, altering, servicing, or improving real estate or repairing, servicing or installing personal property." [71]

Argument has been advanced that the definition of "manufacturing" contained in the first Manufacturing Regulation [72] issued by the Department of Revenue under the Selective Sales and Use Tax Act did not require compliance with the "transformation" or "new and different product" test in order for an operation to qualify for the manufacturing exemption. Careful examination of the language of this Regulation clearly establishes the contrary. The Regulation opened with a definition of manufacturing as follows:

TEMPORARY REGULATION-b-225

PROPERTY USED DIRECTLY IN MANUFACTURING PRODUCTION

(a) "Manufacturing" Defined. For the purpose of this regulation, "manfacturing" is defined as the performance as a business of activities *which place personal property in a form different from that in which it is acquired.* Fabricating, compounding and processing are considered to be manufacturing activities. The term "manufacturing" does not include construction, altering, servicing, repairing, or improving real estate." (Emphasis added.)

It is vitally important in interpretating this Manufacturing Regulation (issued July 16, 1956) to note carefully its *title.* It must be observed that the title is: "Property Used Directly in *Manufacturing Production.*" The extent of the industrial exemption discussed by this regulation is *not* referred

intent to grant the exemption to the specifically listed activities irrespective of their consituting "manufacturng" within the general definition of this term contained in the statute.

"The specific designaion by the General Assembly of a particular business (a dairy) as a manufacturer, without more, in no way changes the principles to be applied in determining what constitutes manufacturing." Prentice v. City of Richmond, 197 Va. 724, 90 S. E. 2d 839, 840 (1956).

[70] See cases cited at note 39 *supra.*

[71] PA. STAT. ANN. tit. 72, § 3403-2(c) (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-512.

[72] Temporary Regulation-b-225—PROPERTY USED DIRECTLY IN MANUFACTURING PRODUCTION.

to as "Property Used Directly in *Production.*" It *is* referred to as "Property Used Directly in *Manufacturing Production.*" This is clearly a recognition of the fact that all production activities are not entitled to the manufacturing exemption. It is an equally clear recognition of the fact that *only* production activities which also qualify as manufacturing activities are entitled to the manufacturing exemption.

The *definition* of manufacturing contained in Sub-section (a) of Temporary Regulation-b-225 also incorporates the "transformation" or "new and different product" test as a requirement for the granting of the manufacturing exemption. It states that "For the purpose of this regulation, 'manufacturing' is defined as the performance as a business of activities *which place personal property in a form different from that in which it is acquired.*" (Emphasis added.) In the context of such language and such a title, can it be *seriously* contended that *all* fabricating, compounding, and processing qualify for the manufacturing exemption irrespective of whether or not the operations in question meet the "transformation" test by producing a "new and different product?"

As would naturally be expected, the regulation subsequently issued by the Department of Revenue [73] discussed the applicability of the manufacturing exemption to particular operations more specifically than the earlier regulation. Similarly the "transformation" or "new and different product" test was defined in greater detail therein.

Much has also been made of a document [74] which allegedly proves that the Department of Revenue at one time had administratively abolished the

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[73] Regulation 225—Manufacturer's Regulation—CCH Pa. Sales and Use Tax Rep. Par. 60-210.

"REGULATION 225—MANUFACTURER'S REGULATION

(A) Taxpayer's Business Must Be Manufacturing

(1) *"Manufacturing"* is the performance as a business of an integrated series of operations which place personal property in a *form, composition or character different from* that in which it was acquired. The change in *form, composition or character must be a substantial change, and it must result in the transformation of property into a new and different product having a distinctive name, character and use. Operations such as compounding, fabricating or processing are illustrative of the type of operation which may result in such a change, although any operation which has such a result may be a manufacturing operation.* (Emphasis supplied.)

(a) Mere changes in chemical composition or slight changes in physical properties are not sufficient.

(b) A "manufactured product", further, is substantially different from component materials used.

(c) However, a taxpayer claiming the manufacturer's exemption need not start from basic elements, so long as a new and different product is made.

(d) The courts have extensively described manufacturing, . . ." (A list of products the making of which has been held to be "manufacturing" is next set forth in the Regulation. This is followed by a list of products, the making of which has been held not to be "manufacturing".)

[74] Analysis of House Bill 337 (Printer's No. 160) Session of 1957, March 28, 1957.

"new and different product" test as a requirement for granting the manufacturing exemption. If this were true, it would raise a serious question of the right and power of an administrative agency or department[75] to grant an exemption broader than that permitted by the applicable statute. However, it is clear that the Department never abolished or purported to abolish the "new and different product" requirement. Actually, the document in question does not purport to be either a formal or an informal opinion of the Attorney General. Even if it represented an opinion of the Attorney General, its use in the frame of reference in which it has been cited would be improper since neither the Attorney General nor attorneys in the Department of Justice or any other administrative department of the Commonwealth are authorized to render legal opinions or advice to anyone other than administrative agencies and officers of the State Government.

> Each administrative department shall have as its head an officer who shall, either personally, by deputy, or by the duly authorized agent or employe of the Department, and subject at all times to the provisions of this Act, exercise the powers and perform the duties by law vested in and imposed upon the Department.
>
> (a) The following officers shall be the heads of the administrative departments following their respective titles: . . .
> Attorney General, of the Department of Justice: . . . .
>
> The Department of Justice shall have the power, and its duty shall be:
>
> (a) To furnish legal advice *to the Governor and to all administrative departments, boards, commissions, and officers of the State Government,* concerning any matter or thing arising in connection with the exercise of the official powers or the performance of the official duties of the Governor or such administrative departments, boards, commissions or officers: . . . .[76] (Emphasis added.)

Administrative departments of the Government and the heads thereof have only such powers as are conferred upon them by the Legislature, and since the Legislature has not authorized the Department of Justice to render legal opinions or advice to persons other than the officials of the State Government, any statement that purports to be such an opinion or advice is nugatory.

Moreover, the Supreme Court of Pennsylvania has held that in interpreting a statute even journals and committee reports of the Legislature and

[75] See for example, Michigan Sport Service v. Nims, 319 Mich. 561, 30 N. W. 2d 281 (1948).

[76] PA. STAT. ANN. tit. 71, § 66 (1957); PA. STAT. ANN. tit. 71, § 292 (1929); See also Green v. Mills Central Commission, 340 Pa. 1, 16 A. 2d 9 (1940); Nevins v. State Board of Pharmacy, 51 Dauph. 264 (Pa. 1941); Commonwealth v. Central Railroad Company of New Jersey, 358 Pa. 326, 328-29, 58 A. 2d 183 (1948).

proclamations and messages of the Governor "should be wholly disregarded" because they are "not only of no value but . . .delusive and dangerous." [77]

A single legislator's statement [78] made in the heat of legislative debate in a subsequent session of the Legislature almost a full year after the May 24, 1956 amendments to the Selective Sales and Use Tax Act has been invoked as an authoritative source of legislative intent concerning the meaning of these amendments. It must first be noted that these statements were made in the midst of discussion concerning inclusion of "packaging" in the manufacturing exemption whereas the issue presently under discussion is whether fabricating, compounding and processing operations must produce a "new and different product" in order to qualify for the manufacturing exemption.

It is the right and duty of each member of a democratic society to express his opinion on matters of public interest.[79] It is particularly the right and duty of members of a legislative body to express the opinions and represent the interests of the constituents and groups which they represent. However, it is with commendable concern that the Pennsylvania courts have ruled that statements made in legislative debate are not relevant in court proceedings.[80] The courts, quite properly, must distinguish between the statements made in the heat of partisan debate by protagonists representing specialized points of view from the statements of research committees which service the legislature by providing it with objective findings.

A single legislator's reference [81] in 1957 to fruit and vegetable canners (which no rule or regulation of the Department had ever held exempt) as an illustration of the "manufacturer" who should be entitled to the exemption on packaging, then under consideration, is again an example of personal preference rather than legislative intent and, in any event, could hardly be expected to supply the intent for a 1956 enactment. It *is* significant, however, that the language chosen by the General Assembly in its April 4, 1957, amendment employed the "new and different product" concept. The broad provision in which packaging was included in the exemption stated that "manufacture" shall include "every operation commencing with the first *production* stage and ending with the *completion of personal property* having the physi-

[77] Bank of Pennsylvania v. Commonwealth, 19 Pa. 144, 156 (1833); See also Lenhart v. Cambria County, 216 Pa. 25, 64 Atl. 876 (1906); Commonwealth v. Quaker City Cab Company, 287 Pa. 161, 134 Atl. 404 (1926).

[78] 1957 Legislative Journal—Senate, p. 663.

[79] Perhaps the classic exposition of the value to society of free, responsible discussion and competition of ideas was expressed by John Stuart Mill in his essay "On Liberty." MILL, ON LIBERTY AND OTHER ESSAYS, (Macmillian 1925).

[80] See cases cited *supra* note 77.

[81] *Supra* note 78.

cal qualities (including packaging, if any, passing to the ultimate consumer) which it had when transferred by the manufacturer to another." [82] (Emphasis added.) Clearly, this entire provision contemplates only those operations which produce a completed item of personal property, and lends no support to the argument that all processes or services of altering personal property are "manufacture."

The "new and different product" test may entitle two or more persons to the manufacturing exemption or grant the exemption to one and deny it to another with respect to similar operations depending upon the total effect of *all* the user's business operations. It has been contended that the maker of spark plugs would be denied the manufacturing exemption under the "new and different product" test if his entire operation consists of producing spark plugs. It is argued that the same operation of making spark plugs would be granted the manufacturing exemption under the "new and different product" test, if the taxpayer produced spark plugs in connection with the production of automobiles. No such differences result from the application of the "new and different product" test. The courts have consistently recognized that:

> More than one person or corporation can be engaged in the manufacturing of a single article and thus more than one person or corporation otherwise subject to taxes here involved may not be subject to the taxes because they are both manufacturers of the article.[83]

The making of an automobile clearly constitutes the transformation of personal property into a "new and different product." The making of spark plugs clearly constitutes the transformation of personal property into a "new and different product." Therefore, both operations are entitled to the manufacturing exemption, irrespective of whether or not the spark plugs are made by a manufacturer of automobiles.

Does it therefore follow that the firm which does nothing but paint furniture for another firm qualifies for the manufacturing exemption? The painting firm produces no "new and different product" and therefore is not entitled to the manufacturing exemption. Is the firm which transforms lumber into furniture and also paints the furniture to be granted the manufacturing exemption on all of the equipment it uses directly in making the furniture except its painting equipment? The latter firm produces a "new and different product" and therefore is entitled to the manufacturing exemption on all of

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[82] PA. STAT. ANN. tit. 72, § 3403-2(c)(i) (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-507a.

[83] Hazen Engineering Co. v. Pittsburgh, 189 Pa. Super. 531, 539, 151 A. 2d 855, 858 (1959).

the equipment it uses directly in making the furniture, including painting equipment.

In considering this problem in numerous cases our courts have found no violation of any constitutional provisions and have held the fact that one performs services upon personal property which is in the stream or process of manufacturing does not qualify him for the exemption unless his own operations effect a "transformation" of property into a "new and different product." Thus the courts have held that a defendant's operations upon cloth did not entitle it to an exemption because "defendant was not manufacturing," notwithstanding that defendant's work upon the cloth together with the work performed by other persons, produced clothing.[84] In a similar case where a firm bought shirtings, designed them and cut them to pattern and then forwarded them to a manufacturing firm where they were made into finished shirts, it was held that the designing and cutting services performed on the materials did not qualify the firm for the manufacturing exemption.[85] Similarly the Pennsylvania Supreme Court in applying an exemptive provision in a city mercantile license tax prohibiting the taxation of any privilege, act or transaction related to the business not only of manufacturing, but also of processing of natural resources by manufacturers and producers, held that such exemption did not give relief to a firm whose own operations did not effect the requisite transformation of property.[86] The superior court has within the past year held that an engineering firm which specially designed recuperators for particular furnaces and which under arrangement with another company had the recuperators built in said company's manufacturing plant, was not entitled to a manufacturing exemption. The engineering firm was denied the exemption despite the fact that the recuperators were built of steel and raw materials furnished by it and despite the fact that one of the engineering company's employees who was present at the plant most of the time during the making of the recuperators carefully supervised their construction and tested them in a testing furnace owned by the engineering company located on the construction site.[87] In so holding the court cited the *Norris* case and followed the familiar test of whether the person claiming the exemption produced a "new and different product." The court further observed in upholding the denial of exemption that:

> *Doing the same thing by different people under different circumstances has been held to be manufacturing in one case and not manufacturing in the*

[84] Philadelphia School District v. Mutual Trimming and Binding Co., 14 Pa. D. & C. 2d 207, 211 (1957).
[85] Commonwealth v. Lichtman, 36 Pa. D. & C. 301, 302 (1939).
[86] General Foods Corp. v. Pittsburgh, 383 Pa. 244, 118 A. 2d 572 (1955).
[87] Hazen Engineering Co. v. Pittsburgh, 189 Pa. Super. 531, 151 A. 2d 855 (1959).

> *other.* For example, a person in constructing a building may take stone, sand, cement and water, mix them in a machine and place the product as concrete in the building as a component part of it. The law treats him as a building constructor and not as a manufacturer. Commonwealth v. Wark Co., 301 Pa. 150, 151 A. 786 (1930). On the other hand, if a person measures, weighs and mixes these same ingredients and delivers them in a plastic state by a transient-mixer to the site of construction where the building constructor uses the mix in the construction of the building, then the process person delivering the material to the building contractor is recognized by the law as a manufacturer. Commonwealth v. McCrady-Rogers Co. Supra, 316 Pa. 155.[88] (Emphasis added.)

Since the courts of this Commonwealth for over a century have applied the practical "new and different product" test to determine what constitutes "manufacturing" under the Commonwealth's taxing statutes, if any ambiguity exists in the exempting language of the Sales and Use Tax Act, it must be presumed that the Legislature intended the same test to apply. Only in the face of the strongest language is departure from a century-old principle warranted. Such departure would require interpretation of the statute in a manner which would impose upon courts and the taxing agency the duty of applying two standards to determine the scope of the manufacturing exemption. The supreme court has stated:

> It is not within the province of a court of law to recognize affirmatively and adopt judicially a new and unusual limitation, extension or modification of the meaning of a word in a statute which is of common usage, inwrought for centuries into our language, to apply it to a matter or situation where neither custom, common sense nor necessity requires or authorizes such application . . . .[89]

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[88] Hazen Engineering Co. v. Pittsburgh, 189 Pa. Super. 531, 540-541, 151 A. 2d 855, 859 (1959).

The Legislature has written the same personal application of the manufacturing exemption into Section 2(c) of the Selective Sales and Use Tax Act, PA. STAT. ANN. tit. 72, § 3403-2(c) (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-507, by placing the words "engaged in as a business" between the word "operations" and the words "which place any property in a form, composition or character different from that in which it is acquired, . . ." Even, in the absence of these words, practical administration of sales and use tax laws would dictate such a limitation. The bulk of such taxes are collected by vendors, or not collected as the case may be, according to exemption certificates furnished by purchasers to their vendors certifying to the nature of the purchaser's operations in which the property is to be used. PA. STAT. ANN. tit. 72, § 3403-546(c) (1959), CCH Pa. Sales and Use Tax Rep. Par. 97-646. The exemption certificate system is basic to the practical administration and enforcement of a tax. Reliance on exemption certificates which certify to facts known by the purchaser and which represent his own conclusions regarding a claimed exemption is reasonable. Exemption certificates which purported to describe the operations and claimed tax status, not of the purchaser, but of other persons with whom the purchaser deals, would obviously not furnish a reliable or workable basis for allowing exemptions and would greatly complicate the vendor's task at the vital collection-on-sale stage of the tax program.

[89] Commonwealth v. Wark Co., 301 Pa. 150, 156, 151 Atl. 786, 788 (1930).

Here, moreover, the language which the Legislature chose to use in defining manufacturing— ". . . which place any personal property in a form, composition or character different from that in which it is acquired . . ." (Section 2(c))—far from evidencing a clear intent to depart from the century-old test, incorporates almost verbatim the language which the courts have consistently used to express the exemption test.

Actually, any test for determining what constitutes manufacturing, other than the new and different product test or the exemption of virtually all business activities, would involve the use of a quantitative standard and thereby contravene constitutional requirements of uniformity.

In a long line of cases the courts in Pennsylvania have been called upon to decide whether certain business activities fall within the scope of a taxing provision or a tax exempting provision and whether legislative or regulatory distinctions in tax treatment are valid. In these appeals, the courts have been mindful of the limitations on the exercise of the taxing power expressed in Article IX, Section 1, of the Constitution of Pennsylvania, which provides in part: "Section 1. Taxes to be uniform; exemptions. All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax . . ." and have held, the Legislature may validly make classifications for purposes of tax imposition and exemption provided such classifications are based upon real and substantial differences between the subjects separately classified.[90]

> There is a guiding principle which runs through all of them: Is there such a difference between the entity taxed and the one not levied upon, with relation to the act in respect to which the classification is proposed, as justified the Legislature in fixing the classes which it did? If there is, the statutory provision is valid, if not, it is void. . . . "Classification . . . is essentially unconstitutional, unless a necessity therefor exists—a necessity springing from manifest peculiarities clearly distinguishing those of one class from each of the other classes." [91]

Throughout the line of cases involving the scope of manufacturing exemptions, the courts have applied the practical test of whether the operations in question produce a "new and different product." Where the effect of the

[90] In Fidelity-Philadelphia Trust Co. v. Hines, 337 Pa. 48, 57, 10 A. 2d 553, 557 (1940), the court held that a classification for purposes of taxation ". . . must rest upon a distinction which is real and which bears a realistic relation to the tax. . . ." See also, New Castle v. Cutler, 15 Pa. Super. 612 (1901); Turco Paint and Varnish Co. v. Kalodnor, 320 Pa. 421, 184 Atl. 37 (1936); Kelly v. Kalodnor, 320 Pa. 180, 181 Atl. 598 (1935); American Stores v. Boardman, 336 Pa. 36, 6 A. 2d 826 (1939).

[91] Commonwealth v. Girard Life Insurance Co., 305 Pa. 558, 562-63, 158 Atl. 262, 263 (1932). See also Allentown School District Mercantile Tax Case, 370 Pa. 161, 87 A. 2d 480 (1952); Brooks Building Tax Assessment Case, 391 Pa. 94, 137 A. 2d 273 (1958).

total operation is to form a new and different product in contrast to the materials with which it is made, the operation has been held to be within the class of activities exempted as manufacturing processes. On the other hand, where the processes under review make changes of varying degree in or upon personal property, but do not have the effect of producing a new and different product, the processes have been held not to be in the exempt class of operations.

In many of the cases in which the claimed exemption has been denied, the operations in question made *substantial changes* in the nature, attributes and value of the materials upon which the work was performed. *The degree or quantity of change* has not been considered significant, however, in the absence of a conversion of the original materials into a new kind of product. Courts of other states also have recognized that a quantitative test of the changes made to personal property is not adequate and that the real test is a qualitative one: *i.e.,* one which considers whether there has been a transformation of materials into an article of a different character.[92]

For example, the Supreme Court of Virginia, in dealing with this problem, has stated:

> While we agree with Prentice that the elements of his quantitive [sic.] definition of manufacturing should receive consideration in determining whether a particular processing operation constitutes manufacturing within the meaning of the tax ordinance, we are of the opinion that in his processing operation, the *necessary qualitative element of manufacturing* is lacking. There is no change or transformation of the live poultry into an article or product of substantially different character. . . .[93] (Emphasis added.)

The Pennsylvania Supreme Court has ruled that any attempt to differentiate between processes affecting changes in personal property solely on the basis of quantitative changes would be invalid on the grounds that: "A pretended classification that is based solely on a difference in quantity of precisely the same type of property is necessarily unjust, arbitrary, and illegal."[94] The court reasoned that such a classification would therefore be violative of the uniformity clause of Section 1, Article IX of the Constitution. Recently, this principle has been reaffirmed in *Murray et ux. v. Philadelphia et al.*[95] where the court in invalidating a quantitative standard, concluded that: "The ordi-

[92] Prentice v. City of Richmond, 197 Va. 724, 90 S. E. 2d 839, 840 (1956).

[93] Prentice v. City of Richmond, 197 Va. 724, 90 S. E. 2d 839, 843 (1956).

[94] Cope's Estate, 191 Pa. 1, 43 Atl. 79 (1899).

[95] Murray *et ux.* v. Philadelphia *et al.,* 363 Pa. 524, 70 A. 2d 647 (1950).

nance contains no justification for taxation on so vague and capricious a standard and would be bad if it did." [96]

The Pennsylvania Supreme Court has already spoken on an attempted exemption based upon a quantitative distinction in the application of a sales and use tax. In *Blauners, Inc. v. Philadelphia*[97] it held that such a distinction was violative of the rule requiring uniformity in taxing statutes.

If the Legislature itself cannot validly establish tax classifications solely on the basis of quantitative differences between the classes, manifestly such differences between tax imposition and tax exemption cannot be created by the taxing agency's interpretation of legislative enactments.

In the manufacturer's exemption cases, the classification of businesses on the basis of the new and different product test conforms to the fundamental principle that taxing and tax-empting classifications must be practicable and real, as well as reasonable. A test which purported to classify business according to the amount and relative complexity of the processes performed upon property would not meet the requirements of a real and practical classification.

Unlikely as it is to occur, it may be conceded that, as far as *constitutional* principles are concerned, an all-inclusive business exemption could be validly enacted by the Legislature. It may be, in other words, that the Legislature could validly exempt, as a class, *all business operations* which effect any change in personal property, rather than limit the exemption to that class of operations which transform property into a new and different product. Clear it is, however, that there can be no third alternative; the constitution does not permit the pretended classification of operations into:

> (1) *An exempt class* of operations consisting of those operations which, without producing a new and different product, make some changes in personal property, and
>
> (2) *A taxable class* of operations consisting of those operations which, without producing a new and different product, make some changes in personal property *but not as much change* as required for exemption. (Emphasis added.)

Where a reasonable interpretation can be adopted which will save the constitutionality of a statute, resolution or ordinance, it is the court's duty to adopt it.[98]

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[96] Murray *et ex.* v. Philadelphia *et al.*, 363 Pa. 524, 533, 70 A. 2d 647 (1950).

[97] 330 Pa. 342, 198 Atl. 889 (1938).

[98] Allentown School District Mercantile Tax Case, 370 Pa. 161, 87 A. 2d 4 (1952); Col. *et al.* v. Duffield, 185 Pa. Super. 532, 138 A. 2d 303 (1958); PA. STAT. ANN. tit. 46, § 552 (3) (1937).

If it were decided that the Legislature intended the exemption to be all-inclusive, then the tax agency would be compelled to exempt all persons engaged in work which in any way alters personal property. It would have to treat as exempt any person who was engaged in "cutting the sides of leather into pieces and selling it"; also exempt would be "the clerks . . . in dry goods stores when they cut the silk or other dry goods into such pieces as the customer may desire." [99]

It is inconceivable that the Legislature intended to make this exemption so broad and general that "there would be very little that would be subject to this taxing Act." [100]

> When the words of a Law are not explicit, the intention of the Legislature may be ascertained by considering, among other matters — . . . (6) the consequences of a particular interpretation.[101]

The "consequences" of any interpretation other than the new and different product test, as described above, would be unreasonable.

> In ascertaining the intention of the Legislature in the enactment of a law, the Courts may be guided by the following presumptions among others:
>
> (1) That the Legislature does not intend a result that is absurd, impossible of execution or unreasonable.[102]

Any taxpayer claiming the benefit of an exemptive provision subject to these impediments has a heavy burden indeed.

> It is well settled that when a tax is clearly imposed by a general act, anyone claiming exemptions must show clearly that such exemption exists. The principle stated in Cooley on Taxation, 146 is this: "The intention to exempt must in any case be expressed in clear and unambiguous terms; taxation is the rule, exemption is the exception. All exemptions are to be strictly construed. They embrace only what is within their terms." [103]

It has been suggested that Pennsylvania might find a more practical solution to its problem of interpretation by referring to Ohio's interpretation of

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[99] Commonwealth v. Cover, 29 Pa. Super. 409, 413 (1905). See also Commonwealth v. Lowry Rodgers Co., 279 Pa. 361, 367, 123 Atl. 855, 856 (1924); Gulf Oil Corp. v. Philadelphia, 357 Pa. 101, 112, 53 A. 2d 250, 255 (1947); Department of Treasury of Indiana v. Ridgely, 211 Ind. 9, 4 N. E. 557, 559 (1936).

[100] Rieck-McJurkin Dairy Co. v. Pittsburgh School District, 362 Pa. 13, 17, 66 A. 2d 295, 297 (1949).

[101] PA. STAT. ANN. tit. 46, § 551 (1937).

[102] PA. STAT. ANN. tit. 46, § 552(1) (1937).

[103] Commonwealth v. Cover, 29 Pa. Super. 409, 414 (1905). See also Blauner's Inc. v. Philadelphia, 330 Pa. 342, 349, 198 Atl. 889 (1938); Sunbeam Water Co. v. Commonwealth, 284 Pa. 180, 183, 130 Atl. 405 (1925); Callery's Appeal, 272 Pa. 255, 272, 116 Atl. 222 (1922); PA. STAT. ANN. tit. 46, § 558(5) (1937).

its taxing provisions. These are allegedly simple in application and obvious in result, leaving little or no doubt that any processing operations which make changes in personal property are entitled to the *"manufacturing"* exemption. At the outset, it should be noted that our Pennsylvania Supreme Court for obviously good and sound reasons has held that the Ohio cases defining what constitutes "manufacturing" under Ohio statutes are not relevant in defining what constitutes manufacturing under Pennsylvania legislation.[104] Furthermore, very recent decisions in Ohio indicate that appellate bodies in that state do not consider the question of exemption a simple one, and that the Ohio Supreme Court has been less generous with exemptions than administrative tribunals.

In *Allen V. Smith, Inc. v. Bowers,*[105] decided by the Ohio Board of Tax Appeals, a firm engaged in the processing of beans for sale claimed that its operations were "manufacturing" under a provision which exempted manufacturers. The firm received beans in 100-pound bags which were opened and dumped into a hopper from which they were elevated and discharged through an automatic weighing machine into 3,000-pound "tote" boxes. When received, the beans contained various "foreign and deleterious substances" such as dust, dirt, shell fragments, stones, sticks and twigs and pieces of metal. In the processing plant, these foreign substances were removed by lifting and inverting the "tote" boxes to a rotating device so that the beans were discharged over a "specific gravity destoning and aspiration machine." "By a complicated process this machine re-cleans the product and removes therefrom the foreign matter. . . . The bins are then caused to be placed close to a large magnet which removes the metallic matter. At this point, the appellant claims that the product is valuable, saleable and fit for human consumption." [106] Thereafter, the beans were processed through elaborate packaging machinery which placed and sealed them in various types and sizes of packages for sale.

The Ohio Board, in holding that this operation was "manufacturing" stated that the word "manufacturer" must be given the liberal meaning assigned to it by recent decisions of the Supreme Court of Ohio "even though

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[104] Rieck-McJurkin Dairy Co. *et al.* v. Pittsburgh School District *et al.*, 362 Pa. 13, 66 A. 2d 295 (1949).

[105] CCH Ohio State Tax Rep. Par. 200-959. The applicable (statute) defines "manufacturer" as follows:

"A person who purchases, receives or holds personal property for the purpose of adding to its value by manufacturing, refining, rectifying, or combining different materials with a view of making a gain or profit by so doing is a manufacturer." Ohio Revised Code tit. 57, § 5711.16 (1957), CCH Ohio Tax Rep. Par. 20-391.

[106] Allen V. Smith, Inc. v. Bowers, 3 CCH Ohio State Tax Rep. Par. 200-959, page 12, 263, Ohio Board of Tax Appeals, No. 39889 (1959).

that meaning is not one generally recognized." [107] It is noteworthy that the Ohio Board also referred to a decision of the Supreme Court of Ohio in which the court considered, by way of legislative history, the recommendation of a legislative committee "expressly stating the purpose of the amendment to be 'to equalize the taxes of manufacturers and agriculture, so that additional wealth may be developed in this state'." [108] Upon review however, the Supreme Court of Ohio reversed the decision of the Board and held that the company's operations were not "manufacturing" operations under the personal property tax exemption.[109]

In rendering its decision, the Ohio Supreme Court stated:

> At the outset of this opinion, we acknowledge that this court has experienced difficulty in determining where to draw the line between manufacturers and non-manufacturers, and it has even been admitted that this has resulted in "inconsistent decisions with respect to that statutory language. . . ." We have repeatedly admitted that what constitutes manufacturing can only be determined with difficulty, but we feel constrained to further observe that those difficulties are as nothing compared with those which would be encountered if this taxpayer's operations were held to be manufacturing. If such were to be our holding, where then would be the line of distinction in vast areas of the packaging industry? Would scrubbed and sacked potatoes then become the product of "manufacturing"? What then of the tomato boxed after burnishing only by the hand that picked it? And would we then be asked to delete even the packaging requirement and to hold the vendor a manufacturer who only polished an apple on his trouser leg before pyramiding it on his counter for display? [110]

In passing, the Ohio Supreme Court quoted from earlier decisions that no one has thought of a restaurant proprietor as a manufacturer and that "cooking is merely cooking." [111] One does not have to consider whether opening the exemption as requested by Pennsylvania firms would bring all of the restaurants and hotels of the state under the exemption; the extension of the exemption to all *industrial* processors alone obviously would have an enormous impact upon revenues and precedent in Pennsylvania. However, it is not farfetched to think of a claim for exemption by a restaurant operator. Within the past year, the Supreme Court of Ohio was called upon to decide this very

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[107] Allen V. Smith, Inc. v. Bowers, 3 CCH Ohio State Tax Rep. Par. 200-960, page 12, 264, Ohio Board of Tax Appeals, No. 39889 (1959).

[108] Allen V. Smith, Inc. v. Bowers, 3 CCH Ohio State Tax Rep. Par. 200-959, page 12, 265, Ohio Board of Tax Appeals, No. 39889 (1959).

[109] Allen V. Smith, Inc. v. Bowers, 170 Ohio St. 398, 165 NE 2d 638 (1960), 3 CCH Ohio State Tax Rep. Par. 201-070.

[110] Allen v. Smith, Inc. v. Bowers, 170 Ohio St. 165, 165 NE 2d 638, 640 (1960), CCH Ohio State Tax Rep. Par. 201-070, page 12, 491.

[111] *Ibid.*

question, and held that the processing of food by a restaurant operator is not manufacturing.[112]

It must also be noted that the Ohio Act grants the exemption only to those manufacturers and processors who are engaged *"in the production of tangible personal property for sale."* [113] (Emphasis added.) Accordingly the Ohio Supreme Court recently held that the exemption did not apply to a firm's production of tools for its own use.[114] In rendering this decision the court noted that property used in the production of tools to be used in a firm's primary manufacturing operations are not used directly in manufacturing, and in so doing, reversed the Ohio Board of Tax Appeals. This is a significant restriction of the exemption in contrast to the Pennsylvania provision granting the exemption to those engaged in the manufacture of personal property *"whether for sale or use."* [115]

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[112] Roberts v. Bowers, 170 Ohio St. 99, 162 N.E. 2d 858 (1959). In Pennsylvania other complications have arisen. In a 1951 case, (North Side Laundry Company v. Allegheny County Board of Property Assessment, 366 Pa. 636, 79 A. 2d 419 (1951), the Court considered whether establishments ". . . such as theaters, cab companies, service stations, automobile repair companies, restaurants, stores, office buildings, hotels, beauty shops, banks and self-service launderies" (366 Pa. 639) qualified for an exemption from local real estate tax granted to industrial plants, Pa. Stat. Ann., tit. 72, § 5020-201 (1933); United Laundry v. Board of Prop. Assess., 359 Pa. 195, 58 A. 2d 833 (1948). In refusing to extend the exemption granted to "industrial plants" to commercial establishments such as those just mentioned, the Supreme Court stated,

"Therefore, the fact that the businesses to which plaintiff referred are sometimes generally called 'industries' is irrelevant to the issue here raised. The question is whether these establishments are industrial plants.

"The answer to that question is self evident. By no stretch of the imagination could a bank building, a hotel, a theater or any of the other business establishments referred to by plaintiff be considered an industrial plant. It is true that we sometimes speak of the 'movie industry', the 'hotel industry' or 'the banking industry', but that is merely a loose use of language to convey the idea that the particular business is a sizeable one. In spite of that colloquialism, we do not speak of the buildings housing such businesses as 'industrial plants'. . . ." 366 Pa. 636, 639-40, 79 A. 2d 419 (1951).

In 1953, subsequent to this decision, the term "industrial establishment" was written into the exemption from local realty tax, (Pa. Stat. Ann., tit. 72, § 5020-201 (1954). One is presently left to ponder what types of enterprises are included within the term "industrial establishment".

[113] OHIO REV. CODE, § 5739.01(E) (1955), 2 CCH Ohio Tax Rep. Par. 60-209.

[114] General Motors Corp., Fisher Body Division v. Bowers, 169 Ohio St. 361, 159 N.E. 2d 739 (1959).

This decision of the Ohio Supreme Court leaves little room for doubt that the Ohio agency's long standing exemption of power producing machinery and equipment when purchased by a manufacturer to drive his manufacturing machinery has been out of line with the statutory exemptive provisions. (See Ohio Rule 39 (4), 2 CCH Ohio Tax Rep. Par. 60-210, exempting power producing equipment and machinery when purchased and used by manufacturers of personal property.)

This is not the first time that the Ohio Supreme Court's interpretation of an exemption has pointed the way to a more restrictive application than that of an administrative agency. The case of Roschez Bros., Inc. v. Bowers, 166 Ohio St. 396, 143 N.E. 2d 123 (1957) followed by the Dauphin Court in Commonwealth v. McHugh, — Dauph. — (Pa. 1960) held that the Public Utility exemption does not apply to property to be used in or upon facilities which are not in actual use in the production or rendition of public utility services. The agency had employed a less restrictive interpretation of this exemption prior to the April, 1959, amendments. In the same case the Court held that the resale exemption applies only when the property is purchased to be resold for a "purchase price" upon which tax is imposed. This is also a more restrictive interpretation than the Pennsylvania agency had applied.

[115] PA. STAT. ANN. tit. 72, § 3403-2(c) (1959), CCH Pa. Sales and Use Tax Rep. Par. 95-507.

It has been stated that no constitutional problem of uniformity, due process or equal protection arises under the Ohio interpretation of "manufacturing." This is so. The Ohio provision [116] which includes "processing" among the operations exempted from tax contains no language comparable to the Pennsylvania provision which expressly requires that such operations shall *"place personal property in a form, composition or character different from that in which it is acquired."* [117] (Emphasis added.) It is clear, therefore, that the Pennsylvania statutory language is more restrictive in this respect than the Ohio provision.

Under the Ohio statute no constitutional problems of uniformity, due process or equal protection in the application of the tax arise because the Ohio Legislature has granted a blanket exemption to *all* industrial processors who meet the qualitative production-for-sale requirement. The constitutional limitation imposed in Pennsylvania by the uniformity clause against quantitative classifications is not, therefore, even raised under the Ohio Act.

It has already been noted herein that the Pennsylvania Legislature could grant a similar blanket exemption if it so desired. From a drafting point of view uniformity requirements of the constitution as well as canons of interpretation such as those requiring restrictive interpretation of language which grants relief from tax are far from being insurmountable hurdles. If it so desired, the Legislature could readily, clearly and unambigously grant a complete exemption to all industrial operations by expressly repealing the "transformation" or "new and different product" test in Section 2(c) of the Selective Sales and Use Tax Act and substituting therefore a broad industrial exemption. This, the Legislature has not done.

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[116] This provision reads as follows:

"Sec. 5739.01 . . . (E) 'Retail sale' and 'sales at retail' include all sales except those in which the purpose of the consumer is: . . . (2) To incorporate the thing transferred as a material or a part into tangible personal property to be produced for sale by manufacturing, assembling, processing, . . . or to use or consume the thing transferred directly in the production of tangible personal property for sale by manufacturing processing, . . ." 2 CCH Ohio Tax Rep. Par. 60-209.

[117] PA. STAT. ANN. tit. 72, § 3403-2(c) (1959), Pa. Sales and Use Tax Rep. Par. 95-507.