Vanderbilt Law Review

Volume 9
Issue 2 *Issue 2 - Symposium on State Sales Tax*

Article 6

2-1956

The Measure of Sales Taxes

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THE MEASURE OF SALES TAXES

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The Scope of this Article

The measure of the tax is as significant a problem in sales taxation as is assessment in ad valorem property taxation or the determination of net income for income taxation. It is the base for taxation.

Sales taxes are creations of state statutes. The appendix presents a general summary of these statutes to show their provisions. Separate state excise taxes on cigarettes or spirits are not included within the scope of this paper, nor are taxes on selling, storing or distributing motor fuels or oils. These excises present special problems, as do separate taxes on extraction, oil drilling and mining. Only when these problems arise under a general sales tax will they be discussed here. Many sales taxes are inextricably tied to license or privilege taxes. If such a tax applies to broad areas of sales transactions, to several industries which are not confined to a specialized category, the tax will be considered herein. No attempt has been made in this paper to consider sales taxes imposed by the United States federal government, by any of its territories, by other nations or by their political subdivisions. Nor has attention been given to local taxes imposed by cities, counties, or townships except as these are an integral part of sales taxes which are uniform throughout the state.

No discussion of property taxes, ad valorem taxes on intangibles, or net income taxes can be presented within the limits of this paper, even for purposes of analogy. General privilege or license taxes which vary directly in amount according to the taxpayer's dollar volume of sales will, however, be considered as sales taxes for our purposes. So will gross receipts or gross income taxes to the extent that they are applied to sales.

Discussion of what constitutes a sale and what are transactions or occupations are presented elsewhere in this issue. The question here is: When a taxable sale is made, what is the amount upon which the tax rate is imposed?

Purpose of Appendix

Lawyers, because they are concerned with specific cases, are in the habit of viewing particular parts of the law through a microscope. The appendix is a surveyor's view of the measure of sales and use taxes in all forty-eight states in terms of what things are included and what are excluded.

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Significantly, all general sales and use taxes are on ad valorem basis. In many states, beer and other malt beverages are taxed at a set amount per barrel or six-ounce bottle, but these taxes are not under general sales or use tax statutes. Even then, the flat tax is sometimes only a minimum subject to ad valorem percentage increases if the price of liquor per barrel increases. Some of the general sales tax laws, however, notably Maryland, North Carolina, Ohio, South Carolina and to some extent Pennsylvania and Wyoming, exempt individual sales below certain prices, or set a maximum tax on individual sales or graduated maximum taxes on three price groups. This per unit influence on ad valorem taxes must greatly complicate collection and accounting.

The terminology used to describe the sales tax base is bewilderingly various: "sales," "gross income" (Indiana and West Virginia), and "gross proceeds." This should not disconcert us, for in many cases the meaning is further defined in and depends upon the particular statute. Uniformity of language might, therefore, be deceptive. Hence reference to such terms is eliminated in the appendix in most cases.

Classification of States

The appendix shows that there are twenty-eight states which have what may properly be called general sales and use taxes. In nearly all cases the use taxes are based upon "use, consumption and storage" of an article on which the sales tax has not been paid.

Next to the twenty-eight states having both sales and use taxes, the largest group of states are the sixteen which have neither sales nor use taxes. These are Delaware, Idaho, Kentucky, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oregon, Texas, Vermont, Virginia and Wisconsin. The variety of states in this list suggests that states abstain both because of adequate alternative sources of revenue and as a matter of policy because of the regressive nature of general sales taxes. Abstention does not prevent local option, however, for New York City and other sizeable cities in New York State have city sales taxes. New Jersey's franchise tax measured by gross receipts is undoubtedly passed on to the consumer insofar as economically feasible.

A third and last classification would include the four remaining states which have a tax operating substantially as a general sales tax, but without any compensating or complementary use tax. Illinois, Indiana, Mississippi and Missouri comprise this group. Two of the states without use taxes, Indiana and Mississippi, together with Florida and New Mexico, are the only states which clearly extend their sales taxes to wholesale sales.[1] This coincidence gives a hint of

1. It should be noted that Oklahoma taxes sales to itinerant peddlers. Other sales for resale are not taxed, presumably on the ground that the retail

the different philosophies of taxation. Most states seek to tax the article of goods as such only once and accordingly tax its retail sale or first consumer use within the state. Several use-tax states even carry this philosophy to the point (see appendix) of crediting against the use tax amounts paid as retail sales taxes in other states. Or they may exempt from use tax an article on which an equal or greater sales tax has been paid in the use-taxing state, or in any state, or in several states added together.

Each transaction appears to be the basis of taxation in states which tax both wholesale and retail sales. This means that identical articles of goods may be taxed many times. Turnover taxation encourages business consolidation or agency arrangements which may not be economically desirable. Moreover, it multiplies a problem common to all sales taxes, namely, whether the sales price which is used as the tax base should include other taxes on the sale of the article.

Other Taxes as Part of the Tax Base

As shown in the appendix, many states require the sales tax to be passed on to the consumer, sometimes as a separately stated amount in addition to the price. The economic problem of who bears the burden of sales tax is not so easily dismissed, for even a uniform-percentage, general, retail sales tax will produce various dollar amounts of increase in the prices of various goods. If the sales of a particular article of merchandise fall off sharply when the price increases as required by the tax (or, as an economist would say it, if the demand for the article is highly elastic), then the seller and not the consumer suffers most of the economic burden of the tax, regardless of the statutory requirement of passing on the tax. For this reason, the *requirement* of shifting is usually undesirable. Insofar as consumer demand is elastic, passing on the tax not only may be more harmful to the seller financially than absorbing a part of the tax, but also, since it greatly reduces the volume of sales, it may reduce tax revenues.

The variety of provisions permitting or requiring addition of the tax to the sales price and prescribing how the tax shall be billed raises the question whether, when two sales taxes are imposed on the same sale, the basis or measure of one sales tax is the price which includes the other sales tax. This problem is minimized in states which restrict the sales tax to retail sales, for most of the manufacturers' taxes or wholesalers' taxes have, at the point of sale to the consumer, lost their identity as tax money and clearly become an integral part of the price. However, the problem arises in connection with federal retail excise taxes and state motor fuel taxes even

sales tax can be collected. Kansas had a use tax before it enacted its sales tax and the use tax appears to cover wholesale sales. Arizona taxes manufacturing, but has no wholesale tax rate.

in these states. In states such as Indiana, Alabama, Florida, Mississippi, New Mexico, North Carolina and West Virginia on its privilege tax, the problem is not restricted to retail sales and becomes difficult in the absence of clear and constitutional statutory provisions. Such provisions are not easy to write, particularly in the face of changing relevant federal statutes.

A tax on a tax is not necessarily unconstitutional, but the invalidity of taxing federal tax funds is shown by the following argument which was recently successful in preventing Indiana gross income taxation of a producer of gasoline on amounts collected as federal excise tax:

I. The federal excise tax on gasoline sold by a producer is a tax upon the sale, not upon the manufacture.

II. The federal excise tax on gasoline sold by a producer is not a part of his sale price.

III. The federal excise tax on gasoline sold by a producer is intended to be, and is, a tax upon the purchaser and to be paid and borne by the purchaser.

IV. The producer is the collector of the federal excise tax on gasoline sold by a producer and is the agent of the United States for the purpose of such collection.

Based upon the foregoing analysis:

V. Amounts received and collected by the producer and accounted for and paid over by it to the United States as and for federal excise tax on gasoline sold are not subject to tax under the provisions of the Indiana Gross Income Tax Act.

VI. To subject such amounts to taxation by the State of Indiana would be to tax (a) monies collected and held as taxes and revenues of the United States and (b) the collection of such taxes and revenues by an agent and instrumentality of the United States for such collection, in violation of the constitutional immunity of such revenues and such agency from such taxation under the Constitution of the United States.

VII. To subject such amounts to taxation by the State of Indiana would be to tax gross receipts of the United States as, and as if they were, gross receipts of the producer and would, therefore, deprive the producer of its property without due process of law and deprive the producer of the equal protection of the laws, in contravention of the fourteenth amendment to the Constitution of the United States.

We proceed now to an elaboration of each of the steps in the argument.

I. In *Indian Motorcycle Co. v. United States*[2] the Court had before

2. 283 U.S. 570 (1931).

it the federal excise tax on motorcycles sold. This tax was levied by section 600 of the Revenue Act of 1924, which provided that:

> There shall be levied, assessed, collected and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased.[3]

Motorcycles were among the articles enumerated, and the applicable rate was five per cent of the price for which sold. It will be observed that the language of this section is almost exactly the same as the language of section 3412(2) of the Code, which is here in question.

The Supreme Court said:

> Both parties rightly regard the tax as an excise, and not a direct tax on the articles named. But they differ as to the transaction or act on which it is laid. Counsel for the Government regard it as laid on manufacture, production or importation, or, in the alternative, on any one of these *and* the sale. We think it is laid on the sale, and on that alone. It is levied as of the time of sale and is measured according to the price obtained by the sale. It is not laid on all sales, but only on first or initial sales—those by the manufacturer, producer or importer. Subsequent sales, as where purchasers at first sales resell, are not taxed. Counsel for the Government base their contention on the requirement that the tax be paid by 'the manufacturer, producer or importer'; but we think this requirement is intended to be no more than a comprehensive and convenient mode of reaching all first or initial sales, and that it does not reflect a purpose to base the tax in any way on manufacture, production or importation.[4]

The mere fact that the tax was in terms of the amount of the money proceeds of sale, instead of the amount or quality sold, could make no difference. In either case, the tax would be measured by the sale. Indeed, in *Panhandle Oil Co. v. Mississippi ex rel. Knox*,[5] where, as in the instant case, the tax was in terms of cents per gallon of gasoline sold, the Supreme Court expressly held that the tax was laid upon the sale. Also the Court said "to use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale."[6]

In the *Indian Motorcycle* case and the *Panhandle Oil* case, the Supreme Court held that the federal tax was invalid as applied to sales to a state municipal corporation and that the state tax was invalid as applied to sales to the United States. In the recent case of *Kern-Limerick, Inc. v. Scurlock*,[7] the Supreme Court reaffirmed this doctrine.

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3. Revenue Act of 1924, § 600, 43 STAT. 322.
4. 283 U.S. at 573.
5. 277 U.S. 218 (1928).
6. *Id.* at 222. See also Frick v. Pennsylvania, 268 U.S. 473, 494 (1925); Telegraph Co. v. Texas, 105 U.S. 460 (1881).
7. 347 U.S. 110 (1954).

We are not here concerned with the doctrine of constitutional immunity from taxation by one government of sales to the other. But we are concerned with the Supreme Court's holding, as a separate and distinct proposition, that taxes undistinguishable from the federal excise tax on gasoline sold were taxes upon the sale itself. Both cases are precisely in point upon the question presented here.

II. Since the federal excise tax on gasoline sold by a producer is levied upon the sale by the producer and attaches upon such sale, it does not come into existence until after the production has been determined—in short, until after the contract of sale has been made and consummated. Then, for the first time, the tax attaches and becomes a liability. The tax, therefore, is not a part of the producer's sale price, which has already been determined; it is an exaction in addition to and over and above the producer's sale price.

In the nature of the case, the sale price of an article cannot include a tax levied upon that very sale. There are always the two things—the sale price and the tax levied upon the sale. They are mutually exclusive and neither can include the other.

In *Standard Oil Co. v. State*,[8] the Michigan court said:

> In view of the fact that the federal excise tax and the State sales tax attach at the instant a sale is made, it follows that the federal tax has not become a part of the sale price, but is a fund, which when collected is payable by the manufacturer to the federal government. Such fund does not become a part of the 'gross proceeds' realized by the manufacturer from the sale, and is not subject to taxation within the meaning of Act No. 167, Pub. Acts 1933. . . .
>
> The conclusion is inevitable that the federal excise tax may not be considered as a part of the retail price, and the judgment of the trial court is affirmed.

In *Standard Oil Co. v. State Tax Commissioner*,[9] the North Dakota court said:

> The instant the sale is made, the Federal Government says, "This sale is subject to, and there is laid upon it, a tax of 1 cent (now 1½ cents) for each gallon sold"; and the State says, "This sale is subject to, and there is laid upon it, a tax of two percent on the total amount of the sales price 'valued in money whether received in money or otherwise.' " In these circumstances it seems entirely clear that the amount of the Federal excise tax, thus collected by the seller from the buyer for payment to the Federal Government of the tax laid by it upon the sale, does not become part of the "gross receipts" realized by the seller from the sale within the purview of the State Sales Tax Act.

Some of the manufacturers excise taxes imposed by chapter 32 of the Internal Revenue Code are stated in terms of a given per cent of the sale price. Section 4216, entitled "Definition of Price," provides as follows:

8. 283 Mich. 85, 276 N.W. 908, 912 (1937).
9. 71 N.D. 146, 299 N.W. 447, 450 (1941).

> (a) In determining, for the purposes of this chapter, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this chapter, whether or not stated as a separate charge.[10]

III. The proposition that the tax is a tax upon and to be paid and borne by the purchaser is entirely consistent with the fact that it is the seller who is required to report and pay over the tax to the Government. Thus in the *Panhandle Oil* case the Supreme Court said "it is immaterial that the seller and not the purchaser is required to report and make payment to the State."[11] And in the *Indian Motorcycle* case the Court said "but we think this requirement is intended to be no more than a comprehensive and convenient mode of reaching all first or initial sales. . . ."[12]

Every one of the exemptions turns upon some fact which is peculiar to the purchaser and is wholly unrelated to the producer or seller.

That the federal excise tax on gasoline sold is laid upon the purchaser, not upon the producer or seller, is further shown by the fact that the code permits the payment of credits and refunds of taxes paid upon tax-exempt or tax-free sales only to the purchaser or to the producer or seller upon proof that the purchaser has or will have the benefit of the credit or refund.

IV. The producer is the collector of the federal excise tax on gasoline sold by a producer and is the agent of the United States for the purpose of such collection for the following reasons:

(1) Failure to collect, account and pay over is a criminal offense.

(2) The tax money is a fund in trust.

(3) The registration and bond requirements of the producer are badges of agency.

(4) The federal excise tax on gasoline sold attaches at the time of the sale by the producer.[13] But the producer is required to file a return and pay over the tax to the United States on a quarterly basis.[14] In the ordinary course of business the producer receives payment in full from the purchaser before paying over the tax to the United States.

(5) The exemptions depend upon: (a) the identity or status of the purchaser; (b) what the purchaser is going to do with the product; (c) the identity or status of the ultimate purchaser to whom the

10. INT. REV. CODE OF 1954, § 4216.
11. 277 U.S. at 222.
12. 283 U.S. at 574.
13. INT. REV. CODE OF 1954, § 4081; U.S. Treas. Reg. 44, § 314.3(b) (1944).
14. INT. REV. CODE OF 1954, § 6071(a); U.S. Treas. Reg. Part 477, § 477.2 (1953).

purchaser sells the product; and (d) what the ultimate purchaser is going to do with the product.

When the producer makes a sale of gasoline he must determine whether or not the sale is subject to tax. In order to do this he must ascertain facts which constitute the exemption. These facts are not matters within his own knowledge. They have to do with the status and activities, present or future, of someone other than himself. In order to gather these facts, the producer may have to follow the product to the ultimate consumer. But he must determine these facts and determine them correctly at his peril.

V. Section 2 of the Indiana Act imposes a tax "upon the receipt of gross income."[15] Section 1(m) defines the term "gross income" to mean:

> [T]he gross receipts of the taxpayer received as compensation for personal services, including . . . and the gross receipts of the taxpayer received from trades, businesses, or commerce, including . . . and the gross receipts received from the sale, transfer, or exchange, of property, . . . all receipts received from the performance of contracts, all receipts received as prizes and premiums, all receipts received from insurance, all amounts received as alimony, damages, or judgments, and all receipts received by reason of the investment of capital, including . . . and all other receipts of any kind or character received from any source whatsoever. . . . [here follow certain provisos not material here][16]

"As applied to a taxpayer," section 1(h) defines the term receipts" to mean:

> [T]he gross income in cash, notes, credits and/or other property which is received by the taxpayer or is received by a third party for his benefit.[17]

Section 6 of the Act provides:

> There shall be excepted from the gross income taxable under this act . . . :
>
> (b) Taxes received or collected by the taxpayer as agent for the state of Indiana and/or the United States of America. No person shall be considered as an agent for the state of Indiana and/or the United States of America within the meaning of this subsection (b) unless he has been explicitly designated as a collecting agent in the statute under the terms of which the tax is imposed.[18]

The first sentence of section 6(b) was a part of this section from the very beginning. The second sentence was added in 1937.[19]

In *Standard Oil Co. v. Department of Treasury*,[20] the Indiana court rendered a declaratory judgment, as follows:

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15. IND. ANN. STAT. § 64-2602 (Burns 1951).
16. *Id.* § 64-2601(m).
17. *Id.* § 64-2601(h).
18. *Id.* § 64-2606.
19. Ind. Pub. Acts 1937, c. 117, § 6.
20. Docket No. A-73555, Ind., May 22, 1934.

> That plaintiff is not obligated or obliged to pay to the State of Indiana any tax on that portion of its receipts obtained or received by plaintiff as agent or otherwise for the various states, the Government of the United States, or any municipal or political subdivision, which taxes are measured by the sale or use of gasoline or lubricating oil and are generally known as gasoline or motor fuel taxes, or privilege taxes for the use of the highway or manufacturers' excise taxes, etc.

In *Socony Vacuum Oil Co. v. City of New York,*[21] the Supreme Court of New York rendered a declaratory judgment holding invalid a regulation of the Comptroller of New York City to the effect that the New York City sales tax was applicable to amounts received by sellers as and for state excise tax on gasoline sold. While the case did not directly involve the federal excise tax on gasoline sold, the court treated both taxes as presenting the same question. In his opinion at special term (unreported), Judge O'Brien said:

> Section 2 of the local law provides that there shall be paid ". . . a tax of two per centum upon the amount of the receipts from every sale in the city of New York. . . ." The comptroller, in construing this provision as indicated by the words "receipts from every sale," has by Regulation 88 included therein the tax imposed by the United States Government and the State of New York as a total of the "receipts from every sale" and has by such regulation imposed a tax not only upon the price of the gasoline but upon the taxes of the United States Government as well as the State of New York. I cannot agree to such a construction and believe that the local law intended only the initial cost of merchandise to the purchaser, exclusive of any lawful tax which may be included in the "receipts." The tax as levied by the local law was not intended to be a tax upon a tax, or double taxation, but merely to reach the sales of merchandise, exclusive of any tax imposed by law upon such merchandise.

VI. In *United States v. County of Allegheny,*[22] the county assessed a real property tax against Mesta Machine Company, which was the owner of certain real estate and a manufacturing plant located thereon. Installed in the plant was machinery, of which Mesta was the bailee, which was the property of the United States and which was used for the manufacture of field guns. The county made no assessment against the United States, but included the value of the machinery in the amount of the assessment against Mesta. The Pennsylvania courts sustained the assessment upon the ground that, under the state law, the machinery constituted a part of the mill for assessment purposes and was properly assessed as real estate.

The Supreme Court of the United States reversed, saying:

> The Tax Law of the Commonwealth of Pennsylvania as interpreted and applied in this case violates the Federal Constitution in so far as

21. 247 App. Div. 163, 287 N.Y. Supp. 288 (1st Dep't), *aff'd,* 272 N.Y. 668, 5 N.E.2d 385 (1936).
22. 322 U.S. 174 (1944).

> it purports to authorize taxation of the property interests of the United States in the machinery in Mesta's plant, or to use that interest to tax or to enhance the tax upon the Government's bailee.[23]

VII. To impose the Indiana gross income tax upon amounts so received by the producer would be to tax the producer upon gross receipts which are not the producer's gross receipts—to tax gross receipts of the United States as, and if they were, gross receipts of the producer. This would not only violate fundamental conceptions of right and justice, but it would be a taking of the producer's property without due process of law, in violation of the due process clause of the fourteenth amendment to the Constitution of the United States. Moreover, since producers as a class are singled out for such arbitrary taxation, which is not imposed upon other classes of taxpayers, it would deprive the plaintiff of the fourteenth amendment's guaranty of equal protection of the laws.

In *Hoeper v. Tax Commission*,[24] we have a precisely parallel case. The State of Wisconsin imposed a graduated net income tax, under which the separate income of Hoeper's wife was added to his separate income, so that Hoeper was taxed on the combined total of the two separate incomes. The necessary effect of this procedure was to collect tax upon the wife's income at a higher bracket rate than the rate which would have applied had her separate income been computed and taxed separately. So far as Hoeper was concerned, it compelled him to pay a tax upon his wife's income as if it were his own income.

The Supreme Court held the imposition invalid and said:

> Since, then, in law and in fact, the wife's income is in the fullest degree her separate property and in no sense that of her husband, the question presented is whether the state has power by an income-tax law to measure his tax, not by his own income but, in part, by that of another.[25]

Carpenter v. Carman Distributing Co.[26] held that the Colorado statute[27] was intended to exempt intermediate sales from taxation so that the tax would not be pyramided into the cost of the final product, but collected only on the final transaction.

Pacific Coast Engineering Co. v. State[28] held that the sales price as between retailers and consumers is not defined by a tax provision that if a retailer passed on the tax and did not absorb it, the full sales price is the amount exclusive of the tax and the purpose of the California provision[29] was to prevent taxing the amount which is

23. 322 U.S. at 192.
24. 284 U.S. 206 (1931).
25. 284 U.S. at 215.
26. 111 Colo. 566, 144 P.2d 770 (1943).
27. COLO. STAT. ANN. c. 144, § 2(n) (1935).
28. 111 Cal. App. 2d 31, 244 P.2d 21 (1952).
29. CAL. REV. & TAX. CODE ANN. § 6012 (Deering 1952).

collected from the consumer for tax on the sales.

To the same effect is *Spencer v. Mero*[30] which held that the Florida tax is against the consumer and not against the retail merchant. Hence, a merchant who collects the tax funds as required by law is an involuntary trustee. He is not liable for tax funds if he proves that his store was broken into and the tax funds stolen.

It should be noted that the logic of the foregoing argument provides no basis for exclusion of the federal excise tax on gasoline from the price and sales tax base of a sale by a retailer to the consumer. Thus, the double taxation of gross receipts of a liquor dealer under the Illinois Retailers Occupation Tax Act and the Liquor Control Act was held valid in *Bardon v. Nudelman.*[31] In Illinois the retailer's tax itself is part of the tax base. However, the tax is imposed at the rate of two per cent on ninety-eight per cent of the sale price. Thus, in effect, the two per cent tax is excluded from the tax base.

The sequence of Alabama cases culminating in *Ross Jewelers, Inc. v. State*[32] shows a tendency to include federal taxes in the state sale tax base if the retailer did so in collecting the tax from the customer. However, the most recent opinion on the *Ross* case indicates a policy on the part of some courts to exclude federal excise taxes from the state sales tax base. In Kansas, the ultimate consumer pays the tax; an article is taxed only once.[33] Maine has held that the sales tax is on the consumer. Consumers can, therefore, deduct it for income tax purposes.[34] Maine in the same case held that the sale of food to employees in a manufacturer's cafeteria is a retail sale.

The Arkansas gross receipts tax act is a sales tax act.[35] If a store collects the tax from customers, it cannot seek to recover the tax from the state, for such action would constitute unjust enrichment.

A motion picture theater which rents film is subject to both a sales tax on the rental and a general revenue tax on the gross receipts, even when the rental is a percentage of gross receipts.[36]

One reason why a tax on a tax is often the path of least resistance is seen in *Winter v. Barrett,*[37] which held unconstitutional as lacking in uniformity a definition of tangible personal property, the sale of which was taxed when it excluded motor fuel. The court regarded the existing motor fuel tax as on the consumer and not on the

30. 52 So. 2d 679 (Fla. 1951).
31. 369 Ill. 214, 15 N.E.2d 836 (1938).
32. 260 Ala. 682, 72 So. 2d 402 (1954).
33. Southwestern Bell Tel. Co. v. State Comm'n, 168 Kan. 227, 212 P.2d 363 (1949).
34. W. S. Libbey Co. v. Johnson, 148 Me. 410, 94 A.2d 907 (1953).
35. Cook v. Sears-Roebuck & Co., 212 Ark. 308, 206 S.W.2d 20 (1947).
36. Crescent Amusement Co. v. Carson, 187 Tenn. 112, 213 S.W.2d 27 (1948).
37. 352 Ill. 441, 186 N.E. 113, 89 A.L.R. 1398 (1933).

privilege of selling. Thus an exemption may cause invalidity, whereas double taxation by the same taxing unit may not.

New Mexico provides that the sales tax itself is included in the tax base unless segregated.[38] If more than the exact amount of the tax is collected from the buyer, the excess collected is part of the tax base. If a contractor pays the New Mexico sales tax on materials used in construction, the statute allows the cost of the materials to be deducted from his privilege tax base. In most cases, either rate is two per cent.

An attorney who paid the one dollar license fee for admission to the state bar, the gross income tax and the license fee under the state sales tax law was held not to have suffered double taxation under the New Mexico constitution.[39] The sales tax is a privilege tax, not an income tax. New Mexico was not estopped to collect the tax from a merchant because an agent of the New Mexico Department of Revenue erroneously advised that the sales were not taxable, thus depriving the merchant of an opportunity to collect from his customers.[40]

Use Tax Correlation

Nearly all of the states which have both sales taxes and use taxes provide in their statutes that the sales tax and the use tax are complementary. It follows that if the sales tax is paid on a transaction, the use tax is not. Some use-tax statutes, notably Maryland's, specifically allow credit for sales taxes paid in other states. This leaves two questions. Does the use tax apply in a situation not subject to sales taxation but not designed to evade sales taxation? Secondly, if the transaction is specifically exempt from sales taxation may it be subject to the use tax?

The use tax does not apply when property was purchased outside the state for use there and was subsequently brought to Iowa, since there was no intention to avoid Iowa sales or use taxes.[41]

Sales and use taxes are complementary and exemptions from the sales tax are to be treated as exemptions from the use tax.[42]

Subsidies

A situation in which subsidies are paid raises a question whether these subsidies, if they depend upon the volume of sales are part of the

38. N.M. STAT. ANN. § 72-16-2(d)-(e) (1953).
39. State *ex rel.* Attorney Gen. v. Tittmann, 42 N.M. 76, 75 P.2d 701 (1938).
40. Henderson v. Gill, 229 N.C. 313, 49 S.E.2d 754 (1948).
41. Morrison-Knudsen Co. v. State Tax Comm'n, 242 Iowa 33, 44 N.W.2d 449, 41 A.L.R.2d 523 (1950).
42. Union Portland Cement Co. v. State Tax Comm'n, 110 Utah 152, 176 P.2d 879 (1947).

gross proceeds of the sale which are subject to sales tax. This is analogous to the problem of a tax on a tax.

Subsidies paid to a mining company are not part of gross proceeds of sale and not part of the measure of tax.[43]

Computation on Fractional Amounts

As shown in the appendix, the sales tax as imposed upon the consumer is often stated in terms of one cent for each purchase totalling between certain stated amounts. The tax as required to be collected from the retailer, however, is typically stated as a percentage of total sales. This sometimes creates a hiatus between the amounts collected by the retailer and the amounts for which he is accountable. In addition, some states allow the retailer to retain a certain percentage of his collections as compensation for his collection and accounting expense in connection with the tax. Georgia and Florida allow three per cent of the tax to be deducted by a merchant for collection expense. Moreover, the constitutional decision holding that the system of using state minted mills (ten per cent of one cent) for the payment of sales tax is an unconstitutional invasion of the federal government's exclusive power to coin money has created an acute problem in connection with percentage sales taxes on small purchases.

In *W. F. Jensen Candy Co. v. State Tax Commission*,[44] the Utah Supreme Court rejected a contention that a provision of statute which prohibited collection from consumers of an amount in excess of the tax without regard to fractional parts of one cent, in effect, eliminated the tax on sales of less than fifty cents. The Utah Supreme Court held that since the Utah tax merely permitted the retailer to pass on the tax to the consumer, the retailer was expected to absorb the tax to the extent of any fractions of one cent. This case is particularly interesting in view of the frequent provisions of statutes that a retailer is required to collect the tax from consumers. In an earlier Utah case, *State Tax Commission v. City of Logan*,[45] a utility had been permitted to total fractions of a cent from prior month's billings in order to add a full cent to the sales tax added to a consumer's bill in a later month.

The Utah results are not necessary if the state otherwise construes its statutes. In *De Aryan v. Akers*,[46] the rights of a customer who made a fifteen cent purchase were held not to be infringed when a retailer added a one cent charge to cover the three per cent sales tax, although the retailer would be required to pay the state only four and one half mills.

43. State Tax Comm'n v. Sam Knight Mining Lease, Inc., 74 Ariz. 244, 246 P.2d 877 (1952); State Tax Comm'n v. Miami Copper Co., 74 Ariz. 234, 246 P.2d 871 (1952).
44. 90 Utah 359, 61 P.2d 629 (1936).
45. 88 Utah 406, 54 P.2d 1197 (1936).
46. 12 Cal. 2d 781, 87 P.2d 695, *cert. denied*, 308 U.S. 581 (1939).

Are Shipping and Storage Costs Included?

Analogous to the question whether other taxes should be included in the price of the goods which is the measure or base of the sales tax is the question whether shipping costs and storage costs should be included in the tax base price. The argument in the foregoing section would apply directly on this point, except for the matters which arise from the statutory construction of the statutes imposing the other taxes and for the problems of governmental immunity. The problem of whether the shipping and storage costs arise before, at the moment of or after the sales tax is, with these exceptions, exactly the same as the problem of double taxation.

Accordingly, it has been uniformly held that when the shipping or storage occurs prior to sale and is a necessary cost of delivering the goods to the purchaser, in accordance with the terms of the sale at a given time and place, such shipping and storage charges are included in the purchase price and in the measure of the sales tax.[47] A separate billing of the customer will not change the general rule if no other facts are changed.[48]

In *Bloxom v. Henneford*,[49] the court held that the cost of transportation to the purchaser's place of business, including freight, drayage or other costs, paid by the purchaser after he bought the goods cannot be part of the measure of a sales tax imposed upon "the purchase price." Clearly, the argument of the *Bloxom* case would apply with equal force to storage incurred after the sale upon which the tax is imposed.

When the goods are sold f.o.b. by the purchaser who accepts delivery subject only to inspection upon delivery to the carrier or warehouse, the base of the tax would be the sale price exclusive of storage costs or shipping charges separately billed to the customer. The reasoning here would be the same as under the double tax situation. It should be noted, however, that whenever the shipment is intended to go outside the state the advantage to the seller is in providing for acceptance of delivery by the purchaser after shipment so that the entire transaction would be subject to an interstate commerce exemption and not fall within the rule of *Department of Treasury v. Wood Preserving Corp.*[50]

Freight charges for bringing goods into the state for use *after* their

47. For a discussion of the older cases on deductibility of freight charges in determining gross receipts see Annot., 102 A.L.R. 768 (1936).

48. Gee Coal Co. v. Department of Finance, 361 Ill. 293, 197 N.E. 871 (1935); State v. Menefee Motor Co., 18 La. App. 694, 139 So. 61 (1932); State *ex rel.* Snidow v. State Bd. of Equalization, 93 Mont. 19, 17 P.2d 68 (1933); Hope Natural Gas Co. v. Hall, 102 W. Va. 272, 135 S.E. 582 (1926).

49. 193 Wash. 540, 76 P.2d 586 (1938).

50. 313 U.S. 62 (1941); see Morrison-Knudsen Co. v. State Bd. of Equalization, 58 Wyo. 500, 135 P.2d 927 (1943).

purchase outside the state cannot be included in computing use tax thereon.[51]

Under the Wyoming Selective Sales Act of 1937 transportation charges for freight and passengers are taxable retail sales; hence a shipper cannot recover money paid to cover the tax.[52] This is true although property shipped is later sold at a price which includes shipping costs. A taxpayer may be subjected to penalties for nonpayment although he questioned liability.[53] The court's decision was based on the idea that transportation was a service under the 1937 act as amended in 1941 since the word "service" had been held to include transportation in *State Board of Equalization v. Stanolind Oil & Gas Co.*[54] and *State v. Capitol Coal Co.*[55] In both of those cases the tax was held not to apply because of wholesalers or manufacturers exemptions, but in the *Holly*[56] case the Wyoming Supreme Court felt it had no choice in applying the tax although it expressly stated that the result was harsh and unwise. *Morrison-Knudson Co. v. State Board of Equalization*[57] has now overruled the *Holly* case in refusing penalties when taxability was, in good faith, doubtful.

How are Containers Taxed?

The appendix shows a variety of statutory provisions for the taxation of containers. Perhaps the most thorough is the relatively recent statute of Rhode Island.[58]

Four situations can be distinguished: the taxation or exemption of empty containers when they are (1) non-returnable and (2) returnable, and the taxation of filled containers along with the contents when they are (3) returnable and (4) non-returnable.

In most instances when the matter has been largely left to judicial interpretation a sale of a non-returnable empty container has been held to be a taxable retail sale.

Alabama regards the sale of barrels and kegs by manufacturers to users not for resale as taxable retail sales. The use of containers by manufacturers is consumption, so the container manufacturer must pay the tax, although the container cost is passed to the consumers.[59]

In spite of a Utah statute which exempts "or the container . . . thereof" from taxation,[60] *E. C. Olsen Co. v. State Tax Commission*,[61]

51. Dain Mfg. Co. v. Iowa State Tax Comm'n, 237 Iowa 531, 22 N.W.2d 786 (1946).
52. Woodson v. State, 57 Wyo. 305, 116 P.2d 852 (1941).
53. State v. Holly Sugar Corp., 57 Wyo. 272, 116 P.2d 847 (1941).
54. 51 Wyo. 237, 65 P.2d 1095 (1937).
55. 54 Wyo. 176, 88 P.2d 481 (1939).
56. State v. Holly Sugar Corp., 57 Wyo. 272, 116 P.2d 847 (1941).
57. 58 Wyo. 500, 135 P.2d 927 (1943).
58. R. I. Acts and Resolves 1948, c. 2004.
59. Birmingham Paper Co. v. Curry, 238 Ala. 138, 190 So. 86 (1939).
60. UTAH CODE ANN. §59-15-2(f) (1953).
61. 109 Utah 563, 168 P.2d 324 (1946).

taxed corregated cases sold to canneries and a railroad, and car strips, packing boxes, pea canning trays, because they are not containers of the finished product.

A sale of wrapping materials by wholesale grocers to retail grocers is a retail sale.[62] This case also taxed sales of electricity and ice to preserve cool beverages.

When a brewer bought bottles, kegs and cartons outside the state and later sold beer in them, retaining no title to the bottles, kegs and cartons, they were not in the second instance the subject of a retail sale.[63]

In Ohio a rule adopted by the tax commissioner pursuant to statutory authority had excluded from taxation sales of packing or wrapping materials and containers to be used in packing, wrapping or crating tangible property sold in an established business. Approving this rule, *Kroger Grocery & Baking Co. v. Glander*[64] held that sales of cartons, containers and wrapping materials to a grocery company for use in connection with the sale of its products were exempt from the retail sales act.

It is somewhat difficult to justify the above cases which are contrary to the *Kroger* rule in view of the fact that the price of the container is undoubtedly reflected in the price of the product when it is sold at retail in the container, particularly in states which have stated as one of the goals of their taxation that the product will be taxed only once at its ultimate sale. Consequently, the better view would seem to be that non-returnable containers when sold empty are not taxable.

Non-returnable or expendible containers are purchased for resale; hence are not subject to retail sales taxes when sold empty to the manufacturer of products to be sold in such containers at a price affected by their cost.[65]

Now suppose new bottles and cases are purchased by a ginger ale manufacturer for sale, filled, to the ultimate consumer. Title to the bottles and cases passes upon this ultimate sale of the ginger ale. Nevertheless, the bottles and cases may be returned for a refund which the ginger ale manufacturer is obligated to pay. So the ultimate sale of ginger ale is not treated as an ultimate sale of the bottles. It is

62. Warren v. Fink, 146 Kan. 716, 72 P.2d 968 (1937).

63. Zoller Brewing Co. v. State Tax Comm'n, 232 Iowa 1104, 5 N.W.2d 643 (1942), *modified on other grounds*, 6 N.W.2d 843 (Iowa 1942).

64. 149 Ohio St. 120, 77 N.E.2d 921 (1948).

65. Moore v. Arizona Box Co., 59 Ariz. 262, 126 P.2d 305 (1942) (vegetable crates); McCarroll v. Scott Paper Box Co., 195 Ark. 1105, 115 S.W.2d 839 (1938) (pasteboard cartons for packing bakery products); Lee v. Hector Supply Co., 133 Fla. 849, 183 So. 489 (1938) (vegetable crates); American Molasses Co. v. McGoldrick, 256 App. Div. 649, 11 N.Y.S.2d 289 (1st Dep't. 1939) (pails, barrels and drums); Sterling Bag Co. v. City of New York, 256 App. Div. 645, 11 N.Y.S.2d 297 (1st Dep't. 1939) (sugar bags).

disregarded for tax purposes and the first sale of the bottles to the ginger ale manufacturer is taxed as a retail sale. From the point of view of collecting the tax at least once, the result is sound. The tax is not collected a second time because the amount posted by the ultimate consumer of the ginger ale is treated as a deposit to assure return of the container and the sales tax does not apply to the deposit. The difference, as noted in the *Gay*[65a] case, is that the state now derives revenue from bottles returned by the consumer and discarded by the ginger ale manufacturer as unfit for use. Presumably, the deposit is not taxable even though the bottles are never returned by the consumer, or their return is refused (because "unfit" or for no reason), since the tax has been paid on the bottles. In such an event, the deposit could cover the cost of the bottles and cases, including the tax.

The *Gay* case in Florida is squarely opposed by decisions in Maine and Indiana. In Indiana, both wholesale and retail sales are taxed but the wholesale rate is less (one-fourth of one per cent as against one-half of one per cent). In *Department of Treasury v. Fairmount Glass Works*[66] the sale of a beer bottle on a return basis was held to be a resale so the wholesale rate applies. The Florida court had great difficulty in dodging this conclusion as shown by its opinion on rehearing.

A soft drink bottle, returnable, is a container and its purchase by retailer from manufacturer is not a retail sale and not taxable.[67] Maine statutes exempt sales of filled returnable containers by retailer to consumer.

Sales of milk bottles to retail distributors of milk when bottles are returnable by consumers to distributors are not retail sales subject to tax, under the containers exemption.[68]

Oil drums returnable to a seller by the consumer do not come within the exemption of sales of containers to manufacturers.[69] This is a special statutory problem.

Rhode Island taxes sales (not resales) of empty, returnable containers or filled non-returnable containers. Thus the sale of the container is taxed only once.

In *Inchausti & Co. v. Cromwell*,[70] where the parties admitted that it was customary to sell hemp in the market baled and not loose, the cost of baling should be included as part of the purchase price in

65a. Gay v. Supreme Distributors, Inc., 54 So. 2d 805 (Fla. 1951).
66. 113 Ind. App. 684, 49 N.E.2d 1 (1943).
67. Coco-Cola Bottling Plants v. Johnson, 147 Me. 327, 87 A.2d 667 (1952).
68. Evans v. Memphis Dairy Exchange, 194 Tenn. 317, 250 S.W.2d 547 (1952).
69. Consumers Cooperative Ass'n v. State Comm'n, 174 Kan. 461, 256 P.2d 850 (1953).
70. 20 Phil. 345 (1911).

computation of the sales tax. *Secretary of State v. Potter*[71] held that a tax of five cents to be paid on containers of malt syrup or malt extract should be computed by weighing the entire contents of the containers filled with liquid ingredients.

When gasoline was sold from a tank containing thirty per cent taxable and seventy per cent nontaxable gasoline, each sale should be taxed at thirty per cent of the whole amount sold rather than wholly exempting sales which accounted for seventy per cent of the tank's contents.[72]

Returns, Discounts and Allowances

Provisions for returns, discounts and allowances are almost entirely statutory. In many cases, however, clear provisions in the statutes are lacking. Only in North Carolina and West Virginia does the statute clearly prohibit the deduction of cash discounts allowed at the time of sale and later taken. Many statutes put time limitations on the provision for returns. Rhode Island requires the return within one hundred and twenty days, and California within ninety days, for example. Nearly all statutes permit the exemption of sales when the item is returned regardless of whether repayment of the purchase price is made in cash or credit.

The statutory provision exempting sales when the goods were returned for credit or refund does not apply to repossession of merchandise sold under a conditional sales contract.[73]

Provisions for Credit Sales and Bad Debts

The appendix discloses an amazing variety of statutory provisions in connection with credit sales. Some statutes distinguish between conditional sales contracts which provide for installment sales and ordinary credit. When such a distinction is made there are usually statutory provisions for obtaining the approval of the office administering the tax for paying the tax on conditional sales as the amounts are received. Some states permit all credit sales to be treated in this manner, either at the taxpayer's option or subject to the prior approval of the office administering the tax. If the credit sale is treated as completely taxable at the time it is entered into three additional problems arise: (1) if the debt turns out to be bad, may a tax credit based on an unpaid balance be allowed? (2) if the sale was subject to a mortgage or otherwise involves a mortgage, does the tax base include the full amount of the mortgage and (3) are interest and service charges included in the sale price for purposes of tax computation?

71. 252 Mich. 460, 233 N.W. 380 (1930).
72. Charleston Oil Co. v. Carter, 131 S.C. 468, 128 S.E. 8 (1925).
73. Montgomery Ward & Co. v. Fry, 277 Mich. 260, 269 N.W. 166 (1936).

The North Carolina statute permits merchants to obtain an extension of the time of payment of tax on credit sales. They may then include in each monthly tax report the installments collected during the previous month and pay the tax only on amounts actually collected. Otherwise, the merchant may pay the tax when the sale takes place and take credit for the amount of the tax when the bad debt is charged off for income tax purposes.

In the absence of specific statutory provision for credit sales, *Gardner-White Co. v. Dunckel*[74] held that the tax became due when the sales contract was accepted by both the buyer and the seller. The taxpayer was not permitted to compute the tax as and when each installment payment was actually made, nor to take any deduction for bad debts or credit losses.

Similarly, and in accordance with cases cited under the heading of "Returns, Discounts and Allowances," *Rudolph Wurlitzer Co. v. State Board of Tax Administration*[75] held that there was no right to refund or credit on the tax upon repossession of property sold on conditional sales contract for nonpayment of installments. The court held inapplicable the statutory provisions permitting deductions of credits or refunds for returned goods. A leading federal case which permits no tax credit for bad debts is *Carter v. Slavick Jewelry Co.*,[76] which applied the five per cent jewelry tax on the gross contract sales price even though an unpaid balance had been charged off and the account closed.

The statutory provisions in Alabama, that in all events there is no tax until collection, or in Georgia, that the taxpayer may elect to pay the tax on an accrual basis, seem much more equitable. So do the provisions of the North Carolina statute which make the tax the debt of the purchaser, payable as the price is collected, or which permit a credit to be taken for the tax when the debt is charged off. Similarly, the North Dakota statute allows a credit for the tax paid at the time the account is charged off with a specific statutory provision that any subsequent collections on the account are taxed.

An equally significant question is whether the interest or service charge on a credit sale is part of the taxable sales price. A few statutes specifically exclude service charges and a few specifically include them. Most statutes are not clear on this point. In *Bachrach Motor Co. v. Posadas*,[77] an installment sale of an automobile, when title passed at the time of the sale, was held to be taxable only on the sales price "or value of the things in question at the time they are

74. 296 Mich. 225, 295 N.W. 624 (1941).
75. 281 Mich. 558, 275 N.W. 248 (1937).
76. 26 F.2d 571 (9th Cir. 1928).
77. 53 Phil. 999 (1929).

disposed of" without including interest on installments, even though predetermined.

In most situations paying a mortgage for a debtor results in taxable income to the debtor.[78] In connection with a sales or gross receipts tax, the long Indiana history of uncertainty in regulations concerning mortgages on real estate is significant.

The sales tax on the sale of real estate does not include in the tax base the unpaid balance on sellers' (mortgagors') mortgage either when the seller is released from the mortgage and the buyer assumes the mortgage or later as the buyer pays off the mortgage.[79] Whether the buyer of mortgaged real estate assumes and agrees to pay the mortgage, effects a novation releasing the seller-mortgagor, or merely pays the seller his equity and continues to make the mortgage payments, the seller is taxed only on the sale price of the land exclusive of the amount covered by the unpaid balance on the mortgage.[80]

Taxation of Rental Receipts

Most states provide in broad terms for the taxation of rents under which the lessee retains possession of personal property. However, this is usually intended to cover lease arrangements which are in fact disguised conditional sales contracts. Thus, Regulation 60 under the Nevada sales tax act provides that a sale disguised as a lease is taxable as a sale, for example, when the property is substantially consumed during the life of the lease. Again the variety of statutes is significant, particularly the tendency to distinguish between taxable hotel facilities and short term leases and nontaxable long term leases. Most statutes, of course, are confined to tangible personal property. Thus, the rental of ice skates at a skating rink was held taxable in *Pla Mor, Inc. v. Glander*.[81] Many statutes provide that the rental of an article is taxable if the sale of the article would be. Other statutes such as that of North Carolina, Rhode Island and Pennsylvania do not tax rents unless the transaction is actually a sale.

Gay v. Supreme Distributors, Inc.[82] held that income from juke boxes and coin devices is rental in the amount received by the box owner, not joint income on total receipts by the location operator and the machine owner. In Florida rents are taxed; music might be an amusement for purposes of taxation.

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78. Annot., 162 A.L.R. 907 (1946).
79. Indiana Dep't of State Revenue v. Colpaert Realty Corp., 231 Ind. 463, 109 N.E.2d 415 (1952).
80. Department of State Revenue v. Crown Development Co., 231 Ind. 449, 109 N.E.2d 426 (1952).
81. 149 Ohio St. 295, 78 N.E.2d 725 (1948).
82. 54 So. 2d 805 (Fla., 1951).

Under the Colorado statute providing for taxation if the right to continuous possession or use is granted under a lease of an article which would be taxable if sold, the renting of driverless automobiles to the public for temporary use upon the basis of charges for time, mileage, service, oil and gas, and damages has been held not taxable.[83] The same case held that sales of automobiles to one in the business of renting them out were not wholesale sales even though wholesale prices were paid. To like effect, on the exemption of automobile rentals from sales tax, is *U-Drive-'Em Service Co. v. State*.[84]

Likewise, when a photographer furnished photographic prints and manual illustrations to customers for reproduction by them for advertising purposes and the photographer or illustrator retained title, the New York City sales tax did not apply.[85]

On the other hand, a transaction under which a typesetter produced finished work for a printing house, billing an extra charge as a deposit to insure the return of the type, was held subject to sales tax.[86] Similarly, use of motion picture films to an exhibitor was held to be a taxable sale in *United Artists Corp. v. Taylor*.[87]

Other film-lease cases and printing cases are considered in this article under the heading of "Do Retail Sales Include Services?" In *Dun & Bradstreet v. New York*,[88] a credit reference agency charged for its services and permitted subscribers to remove credit reference books to its own offices. The transaction was held to be a nontaxable service.

Taxation of Exchanges

There are a variety of statutory provisions. Many statutes provide that the taxes be imposed upon receipts in money or goods valued in money and stop there. This is approximately what the Indiana statute does which creates a problem peculiar to the Indiana income tax law, since the purchaser of goods at retail could, under the strict language of the statute, be regarded as having received a thing of value for his money and, therefore, be subject to gross income taxation on all his purchases throughout the year. The possibility of this absurd result under the language of the statute, has been ignored. This possibility, of course, is avoided in most statutes since occasional sales are exempt and the taxes are imposed only upon sales by certain defined groups of persons. The obvious difficulty with the ordinary provision for taxing exchanges at the full value allowed by the retailer is that

83. Herbertson v. Cruse, 115 Colo. 274, 170 P.2d 531, 172 A.L.R. 1312 (1946).
84. 205 Ark. 501, 169 S.W.2d 584 (1943).
85. Howitt v. Street & Smith Publications, 276 N.Y. 345, 12 N.E.2d 435 (1938); Andersen v. New York, 172 Misc. 370, 15 N.Y.S.2d 155 (Sup. Ct. 1939).
86. Typekrafters, Inc. v. Philadelphia, 34 Pa. D. & C. 82 (1938).
87. 273 N.Y. 334, 7 N.E.2d 254 (1937).
88. 276 N.Y. 198, 11 N.E.2d 728 (1937).

the retailer, when he sells the goods traded in, will be subject to a second sales tax unless the statute specifically exempts sales of merchandise which was traded in, as many statutes do.

Bedford v. Hartman Bros.[89] held that an automobile dealer could be taxed on the full retail price, without allowance for trade-ins and taxed again when the automobile traded in on the first sale was sold. The undesirability of this 1939 decision had a salutary effect, for the 1941 amendments to the Colorado act provide fair alternatives to the retailer in handling goods received in exchange and resold which might well be copied in other states.

In some cases where the transaction is not at all for cash the tax has been held inapplicable; thus, food served free to employees was not taxable in *Cook v. Southwest Hotels.*[90]

A commissioner may inquire into the facts of the transaction to determine fair and reasonable value of exchanged property.[91] This is certainly a sound general rule, but it does not avoid the necessity of clear and detailed statutes. An excellent annotation[92] on the computation of sales tax where the property is turned in by the purchaser shows that the general rule for taxation of all exchange transactions is to tax the cash received plus the agreed evaluation or value allowed for property traded in. The *Pore*[93] case itself, of course, permits the determination of the actual value of the property traded in. To like effect is, *State ex rel. Sioux Falls Motor Co. v. Welsh.*[94]

Many statutes provide for deduction from the price base of the original sale of the full amount allowed for the trade-in. Others in the alternative provide for nontaxability at the time of resale.

In the absence of statutory provisions, *Philadelphia v. Heinel Motors*[95] held that no deduction from full sales price could be made on the basis of the allowance made for personal property taken in trade.

In *General Tire Co. v. Oklahoma Tax Commission,*[96] the tax was imposed on the full retail price of more expensive tires sold by a tire dealer to the purchaser of a new automobile, although the tires that came with the automobile were accepted as partial payment. The court observed that there is no limit to the number of times that an article may be subject to sales tax in the regular channels of trade.

Ohio allows no deduction for the credit allowed for exchanged prop-

89. 104 Colo. 190, 89 P.2d 584 (1939).
90. 213 Ark. 140, 209 S.W.2d 469 (1948).
91. Howard Pore, Inc. v. Nims, 322 Mich. 49, 33 N.W.2d 657, 4 A.L.R.2d 1041 (1948).
92. Annot., 4 A.L.R.2d 1059 (1949).
93. Howard Pore, Inc. v. Nims, *supra* note 91.
94. 65 S.D. 68, 270 N.W. 852 (1936).
95. 142 Pa. Super. 493, 16 A.2d 761 (1940).
96. 188 Okla. 607, 112 P.2d 407 (1941).

erty. Thus, when an automobile dealer exchanged tires that were supplied by the manufacturer of a new automobile with other new tires preferred by the customer, even though the exchange was even, the transaction was taxable.[97]

When the goods taken in trade are resold no exemption is allowed in the absence of statutory provisions.[98] Similarly, systematic sales of exchanged property by a retailer would not appear to be exempt in Ohio, for *State ex rel. City Loan & Savings Co. v. Zellner*,[99] held one engaged in the chattel loan business liable for tax when he systematically sold repossessed property.

In *State Tax Commission v. Burns*,[100] meals served to a restaurant's employees were not taxable sales. The employees were permitted to eat while on duty free of charge in accordance with a local custom of the business. No allowance was made for meals not eaten. *Walgreen Co. v. Gross Income Tax Division*[101] is distinguishable from the Alabama and Arkansas cases[102] in that the value of articles obtained by employees was deducted from the employees' wages by a retail drug store company. The fact that the transaction involved a short period of credit did not place the case within the debt repayment deduction allowed under the Indiana statute since, as the court observed, only ordinary commercial credit to customers was involved.

This would seem to be an area in which more statutory clarification is needed. It also should be provided that a trade-in received by one in the business of selling the article is not, to that extent, a retail sale or a realization of value at the full retail rate.

Do Retail Sales Include Services?

Local services do not confer jurisdiction to tax. Thus, advertising in Maryland, delivery of goods to common carriers consigned to Maryland users, and delivery in its own trucks in Maryland was not a basis for imposing a duty of collecting Maryland use taxes on a Delaware corporation through seizing its delivery truck. The Maryland statute violated the due process clause of the fourteenth amendment, since no mail or telephone orders were accepted and no personal solicitation was done in Maryland.[103] Nor, said the Supreme Court, could a sales tax apply to a Delaware vendor.[104]

State Tax Commission v. Hopkins[105] held that even though the

97. Dayton Rubber Mfg. Co. v. Glander, 149 Ohio St. 83, 77 N.E.2d 615 (1948).
98. Olympic Motors v. McCroskey, 15 Wash. 2d 665, 132 P.2d 355, 150 A.L.R. 1306 (1942).
99. 133 Ohio St. 263, 13 N.E.2d 235 (1938).
100. 236 Ala. 307, 182 So. 1 (1938).
101. 225 Ind. 418, 75 N.E.2d 784, 1 A.L.R.2d 1014 (1947).
102. Cook v. Southwest Hotels, 213 Ark. 140, 209 S.W.2d 469 (1948).
103. Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954), *reversing* 201 Md. 535, 95 A.2d 286 (1953).
104. 347 U.S. at 346.
105. 234 Ala. 556, 176 So. 210 (1937).

value of tangible materials employed in the manufacture of eyeglasses is only twenty per cent of the total price charged the consumer, the sales tax on tangible personal property applies to the whole amount.

Serving food and drink is a sale, though common law said it was a service.[106] Similarly, restaurants are taxed as making retail sales under the Ohio act.

Some of the cases involving printing were discussed under "Taxation of Rental Receipts." In Alabama, printing, lithographing, engraving and steel die embossing were held subject to sales tax.[107]

Feed purchased in connection with shipments by a common carrier was not exempt as a wholesale sale, or as a service connected with transportation, or as interstate commerce.[108] Sale of leather products and shoe findings to repairmen for use in repairing shoes is a taxable retail sale and not a sale for resale.[109]

Because of the characteristics noted in the *Hopkins* case, sales of eyeglasses by optometrists, oculists and ophthalmogists have been a fertile field for sales tax litigation. Most courts follow the *Hopkins* decision, even though the glasses are supplied by an oculist or optometrist pursuant to a prescription which he made himself after examining the eyes.[110]

In Illinois, *Babcock v. Nudelman*[111] held that the profession of optometry was not subject to the retailers occupation tax even though incidental sales of tangible personal property were made in connection therewith. As will be shown in the following section, this is consistent with the Illinois approach favoring taxation according to occupation rather than by segregated aspects of each transaction. In *American Optical Co. v. Nudelman,*[112] it was held that sales of glasses by an optical manufacturer to optometrists and oculists were sales for resale, since the *Babcock* decision did not involve a determination that the glasses were not sold, but merely that the sale was not taxable because it was incidental to the practice of a profession. Thus, the glasses are not taxable at all. The oculist case was later followed in Illinois by *Huston Bros. Co. v. McKibbin,*[113] which held that the sale of drugs, medicines, pharmaceutical and surgical supplies to physicians

106. Pappanastos v. State Tax Comm'n, 235 Ala. 50, 177 So. 158 (1937).
107. But see the dissent of Justice Gardner in Long v. Roberts & Sons, 234 Ala. 570, 176 So. 213 (1937).
108. Utah Concrete Products Corp. v. State Tax Comm'n, 101 Utah 513, 125 P.2d 408 (1942).
109. W. J. Sandberg Co. v. Iowa, 225 Iowa 103, 278 N.W. 643, *modified on rehearing*, 281 N.W. 197 (1938); Craig-Tourial Leather Co. v. Reynolds, 87 Ga. App. 360, 73 S.E.2d 749 (1952).
110. Kamp v. Johnson, 15 Cal. 2d 187, 99 P.2d 274 (1940); Rice v. Evatt, 144 Ohio St. 483, 59 N.E.2d 927 (1945); Pennsylvania v. Miller, 337 Pa. 246, 11 A.2d 141 (1940).
111. 367 Ill. 626, 12 N.E.2d 635 (1937).
112. 370 Ill. 627, 19 N.E.2d 582 (1939).
113. 386 Ill. 479, 54 N.E.2d 564 (1944).

and hospitals was not subject to the tax on the ground that it was not a retail sale. *P. H. Mallen Co. v. Department of Finance*[114] is to the same effect. In *Revzan v. Nudelman*[115] sellers of rubber heels and leather to repairmen were held not subject to the retail sales act. In the *Revzan* case, the Illinois court justly observed that "to hold that one party is liable to a tax because another party is not liable would be an anomaly in the law."

On the contrary, it has been held that sales of leather to shoe repairers is a wholesale sale. A sale by a repairman is taxable in the full amount if service is not segregated.[116] *Western Leather*[117] may be impliedly overruled by *Utah Concrete Products Corp. v. State Tax Commission.*[118] *Merriwether v. State*[119] held that sales of automobile parts and supplies to a retail automobile dealer for use in reconditioning used automobiles for sale was subject to the retail sales tax, since the used car dealer is not a manufacturer. This was in accordance with *Cody v. State Tax Commission,*[120] wherein sales made to automobile repair shops were held taxable. *Doby v. State Tax Commission*[121] shows that Alabama's position is consistent, since an automobile repair shop was held not liable for sales tax on the gross proceeds of sales of parts and accessories used in reconditioning second hand automobiles. The Alabama statute exempts the sale of used automobiles and the court refused to require segregation of parts.

Warshawsky & Co. v. Department of Finance[122] likewise refused to permit segregation of new and used automobile parts, but in this case the entire sale price of the reconditioned motor was held to be subject to the tax. This is consistent with the usual Illinois view that the tax either applies to the gross receipts of the occupation from sales or it does not. Accordingly, Illinois does not allow transactions to be segregated for tax purposes.

Recapping or retreading of tires has been another field of litigation on whether services or retail sales are involved.

Hawley v. Johnson[123] held that even though the sales price of exchanges should be "valued in money,"[124] the agreed trade-in price governs the amount of the gross receipts from sale rather than the

114. 372 Ill. 598, 25 N.E.2d 43 (1939).
115. 370 Ill. 180, 18 N.E.2d 219 (1938).
116. Western Leather & Finding Co. v. State Tax Comm'n, 87 Utah 227, 48 P.2d 526 (1935).
117. *Ibid.*
118. See note 109 *supra.*
119. 252 Ala. 590, 42 So. 2d 465, 11 A.L.R.2d 918 (1949).
120. 235 Ala. 47, 177 So. 146 (1937).
121. 234 Ala. 150, 174 So. 233 (1937).
122. 377 Ill. 165, 36 N.E.2d 233 (1941).
123. 58 Cal. App. 2d 638 (1943).
124. See Eisenberg's White House, Inc. v. State Bd., 72 Cal. App. 2d 8, 164 P.2d 57 (1947).

full value of the merchandise accepted in trade, because the California statute excludes cash discounts from gross receipts.

Singing River Tire Shop v. Stone[125] held that the vulcanizing and recapping of automobile tires were not taxable sales. *Zook v. Perkins*[126] also held that sales of retreading materials to the repairman were not wholesale sales to a manufacturer, but were retail sales. As noted in the discussion of cases requiring segregation, the Ohio rule is contrary to the Mississippi and Colorado decisions.

Consistent with the Illinois occupational approach described heretofore, *Mahon v. Nudelman*[127] held that restyling and repairing fur garments for customers is a repair business and the incidental transfer of title to added furs and linings was not a retail sale. However, in *C. & E. Marshall Co. v. Ames*,[128] the court held that sales of crystals, clock glasses, pinions, springs and other jeweler's supplies to retailers who assembled and repaired watches were not retail sales since, with minor alterations the parts entered the customer's watch in the same form in which they were purchased and ultimate consumers were billed separately for the retail labor and services.

On the contrary, *Mendozo Fur Dying Works v. Taylor*[129] held that the sale of dyestuffs to a dyer was a taxable retail sale, since the dyer was not primarily in the business of reselling dyestuffs but in the business of rendering skilled services in performing the labor of dyeing. To like effect, is *In re H. D. Kampf, Inc.*,[130] although this case was based on the ground that a sale of dyes and chemicals was a retail sale because it was a sale for consumption.

Several cases hold that transactions involving services are rentals and not sales, or sales of real estate or otherwise distinguishable from retail sales of personal property.

When small parts were sold on oral contracts in connection with elevator repairs, the elevator company was not liable for tax since the parts became a part of the realty.[131] Rejecting a similar contention, *Commonwealth v. Pennsylvania Heat & Power Co.*[132] imposed the tax on the sale of installed oil burners and their parts and accessories.

The construction cases are somewhat analogous to the installation situations. *Material Service Corp. v. McKibbin*[133] holds that neither the materialman who sells to the contractor nor the contractor who installs materials into a building which is sold are making taxable re-

125. 21 So. 2d 580 (Miss. 1945).
126. 118 Colo. 464, 195 P.2d 962 (1948).
127. 377 Ill. 331, 36 N.E.2d 550 (1941).
128. 373 Ill. 381, 26 N.E.2d 483 (1940).
129. 272 N.Y. 275, 5 N.E.2d 818 (1936).
130. 38 F. Supp. 319 (S.D.N.Y. 1951).
131. State *ex rel.* Otis Elevator Co. v. Smith, 357 Mo. 1055, 212 S.W.2d 580 (1948).
132. 333 Pa. 46, 3 A.2d 412 (1939).
133. 380 Ill. 226, 43 N.E.2d 939 (1942).

tail sales of the materials. The same result would seem to be reached by the combination of *Crane Co. v. Arizona State Tax Commission*,[134] which held that a materialman was not liable for the tax and *Duhame v. State Tax Commission*[135] which held that a contractor was not selling materials at retail and, therefore, is not subject to the tax. However, in the *Duhame* case, the *Crane* case is "specifically overruled." In connection with the situation thus created, *Arizona in re State Tax Commission v. Harmonson Co. Metal Products*[136] held that where a contractor had relied on existing rulings of the state tax commissioner and had not passed on the tax to his contracting party, the United States, Arizona was not estopped from collecting the tax from the contractor.

In *People v. Imperial County*,[137] sales of crushed rock and gravel at cost by a county to a city for road work were held to be taxable in spite of the county's contention that it was not engaged in the business of making sales at retail. Sales of railroad ties to a railroad company were treated as retail sales in *Department of Revenue v. Jennison-Wright Corp.*[138]

A materialman's sales to contractors are taxable retail sales.[139] A retail sales tax has been imposed upon the transaction between the contractor and the landowner or subcontractor.[140]

Although a laundry performed a service exempt from the Tennessee sales tax, the tax applied to the full rental on laundered diapers.[141]

In some states services are taxable as such, whether or not sales are involved. A contract under which a tire company furnishes a transit company with tires and repairs of tires and charges on a mileage basis is a taxable service.[142]

When services are excluded, what price is used as a sales price, wholesale or retail? A manufacturer who sells cement blocks at retail and who also constructs cement block foundations is liable, when he does construction, only for a tax based on the cost to him of

134. 63 Ariz. 426, 163 P.2d 656, 163 A.L.R. 261 (1945).
135. 65 Ariz. 268, 179 P.2d 252, 171 A.L.R. 684 (1947).
136. 63 Ariz. 452, 163 P.2d 667 (1945).
137. 76 Cal. App. 2d 572, 173 P.2d 352 (1946).
138. 393 Ill. 401, 66 N.E.2d 395 (1946).
139. Craftsman Painters & Decorators v. Carpenter, 111 Colo. 1, 137 P.2d 414 (1942); State v. Christhilf, 170 Md. 586, 185 Atl. 456 (1936); Woodrich v. St. Catherine Gravel Co., 188 Miss. 417, 195 So. 307, 127 A.L.R. 1179 (1940); St. Louis v. Smith, 342 Mo. 317, 114 S.W.2d 1017 (1937); Albuquerque Lumber Co. v. Bureau of Revenue, 42 N.M. 58, 75 P.2d 334 (1937); Atlas Supply Co. v. Maxwell, 212 N.C. 624, 194 S.E. 117 (1937).
140. Wiseman v. Gillioz, 192 Ark. 950, 96 S.W.2d 459 (1936); Metzen v. Department of Revenue, 310 Mich. 622, 17 N.W.2d 860 (1945); R. C. Mahon Co. v. Department of Revenue, 306 Mich. 660, 11 N.W.2d 280 (1943), *overruling* Metzen v. Brown, 301 Mich. 532, 3 N.W.2d 870 (1942); Kohn v. Philadelphia, 151 Pa. Super. 635, 30 A.2d 672 (1943).
141. Saverio v. Carson, 186 Tenn. 166, 208 S.W.2d 1018 (1948).
142. Charleston Transit Co. v. James, 121 W. Va. 412, 4 S.E.2d 297 (1939).

the materials or articles consumed by him in manufacturing the blocks. He is not liable for the tax on the full retail sale price of his own blocks used by himself in construction.[143]

On the other hand, funeral directors are reasonably taxed twice on the cost of the casket to them unless they segregate the fair selling price of the casket from the total cost of the funeral.[144]

If services are not segregated, the entire sales price of an optometrist for eyeglasses is taxable.[145]

If the price of monuments erected at a grave includes the price of labor to erect the monument, the owner of the monument must pay the tax on the total sales price, without deducting the cost of labor.[146]

Upholstery repair is wholly subject to the Ohio sales tax, unless the services are segregated. But segregation on vendor's books is enough if the correct amount of the tax is collected. The consumer's sales slip need not show the segregation.[147] When neither the transfer nor the use and consumption of tangible personal property is involved, the sales tax is inapplicable. However, if replacement parts are installed in connection with cleaning or repairing watches or jewelry, segregation is required and the tax applies to parts or to whole price if unsegregated[148]—likewise, on application of tire recapping material.[149]

In connection with the cases on segregation of taxable amounts, it should be noted that in general the burden of proof as to the amount for which the taxpayer is liable under a sales tax is upon the taxpayer.[150]

Does Occupation or Transaction Control?

The cases requiring segregation of retail sales from services to avoid taxation of the whole charge are an interesting contrast to the Illinois principle that the occupation is either wholly taxable or not taxable at all. This problem arises particularly in connection

143. 1941 Ohio B.T.A. 954.
144. Kistner v. Iowa State Bd. of Assessment and Review, 225 Iowa 404, 280 N.W. 587 (1938).
145. Rice v. Evatt, 144 Ohio St. 483, 59 N.E.2d 927 (1945).
146. Ferguson v. Cook, 215 Ark. 373, 220 S.W.2d 808 (1949).
147. Roberts v. Glander, 156 Ohio St. 247 (1951); Rose v. Glander, 153 Ohio St. 363, 91 N.E.2d 685 (1950).
148. Cogen v. Glander, 156 Ohio St. 263 (1951); Muench v. Glander, 57 Ohio L. Abs. 371 (1949).
149. Wilson v. Glander, 151 Ohio St. 479, 86 N.E.2d 761 (1949).
150. Pierce Oil Corp. v. Hopkins, 264 U.S. 137 (1924); Carrol v. Tuskaloosa, 12 Ala. 173 (1847); Standard Oil Co. v. Brodie, 153 Ark. 114, 239 S.W. 753 (1922); Miller v. People, 76 Colo. 157, 230 Pac. 603 (1924); Board of Administrators v. Girardey, 36 La. Ann. 605 (1884); State v. Girardey, 34 La. Ann. 620 (1882); Commonwealth v. Thorne, Neale & Co., 264 Pa. 408, 107 Atl. 814 (1919); *In re* Mercantile License Tax, 77 Pa. Super. 93 (1921); Commonwealth v. Atlantic Ref. Co. 69 Pa. Super. 32 (1918); Commonwealth v. Banker Bros. Co., 38 Pa. Super. 101 (1909), *aff'd*, 222 U.S. 210 (1911); Annot., 39 A.L.R. 273 (1925).

with retail sales mixed with services but also arises in connection with distinctions between retail sales and wholesale sales. For example, *Herbertson v. Cruse*[151] held that since a public automobile-renting business did not involve a sale of the automobile, the purchase of automobiles for use in such a business was a taxable retail sale, even though wholesale prices were paid. To the same effect, *Department of Treasury v. J. P. Michael Co.*[152] held that sales to hospitals and other institutions by a wholesale grocer at wholesale prices were sales to the ultimate consumer and not sales for resale. This case applied the tax at retail rates.

An evolution in the philosophy of taxation is visible in the Indiana cases. The *Michael* decision is consistent with all the early Indiana cases and with the language of the Indiana gross income tax act that the individual transaction, and not the occupation of the seller, determines whether wholesale, retail, or general income rates of tax are applied. Accordingly, all of the early Indiana cases involving the sale and service problem required segregation, with taxation of all unsegregated proceeds at the highest rate applicable to any of them. Then the department of revenue succeeded in *Samper v. Indiana Department of State Revenue*[153] in obtaining a decision that the general income rate of one per cent applied to the receipts of a radio and television repair shop, even though the taxpayer had segregated and reported at the one-half of one per cent retail rate his receipts from parts installed in cabinets owned by customers and other repair parts. The *Samper* case allowed the retail rate only upon sale of complete radio and television sets and over-the-counter sale of parts. The *Samper* case cited as its authority a construction case, *Gross Income Tax Division v. Fort Pitt Bridge Works*,[154] which taxed all the receipts from the performance of a construction contract at the one per cent rate, even though materials were installed in connection with the construction, on the basis that the contract was indivisible.

Retailers were not long in seeing the significance of the *Samper* decision in its holding that an indivisible contract must be taxed entirely at the rate which depended upon the predominant nature of the transaction. If, for example, delivery and installation were incidental to a retail sale, that should be taxed at the retail sales rate of one-half of one per cent and not segregated at one per cent as services. The Indiana Supreme Court so held in *Gross Income Tax Division v. L. S. Ayres & Co.*[155]

Indiana has thus moved very far away from its rule requiring

151. 115 Colo. 274, 170 P.2d 531, 172 A.L.R. 1312 (1946).
152. 105 Ind. App. 255, 11 N.E.2d 512 (1937).
153. 231 Ind. 26, 106 N.E.2d 797 (1952).
154. 227 Ind. 538, 86 N.E.2d 685 (1949).
155. 233 Ind. 194, 118 N.E.2d 480 (1954).

segregation and is approaching the position of the Illinois Retailers Occupation Act. In Illinois, sales which are incidental to other business activity are not taxable.[156] The Illinois cases hold that the tax is on the seller's occupation and not upon the sale or the consumer.

Sales incidental to the practice of a profession are not subject to the Retailers Occupation Tax Act.[157] Construction contracting, including sale of gravel and steel is taxable if the building is of commercial value, but not if it is for a sanitary district. The tax does not apply to sale of blueprints nor to commercial photography, since they are services.[158] Printing or sale of stereotypes are not taxable, though paper is sold.[159] A sale of shrubs is taxable even in connection with a landscaping contract.[160] Serving food is taxable in hotels[161] or in restaurants.[162]

An opinion of the state attorney general held that a resale of mules received as the purchase price of a tractor does not subject a tractor dealer to the mule dealers tax imposed on "purchasing mules for resale" in North Carolina.[163]

But in Alabama, sales to manufacturers which are consumed by them and do not become a component part are retail sales. Thus, a sale to a manufacturer was not exempt.[164] The transaction, not the occupation, controlled.

Florists sold flowers grown on their own land and also flowers bought from wholesalers. Although the court found that the flowers grown were farm products, the sales were not exempt, because they were made by plaintiffs as florists and not as farmers or producers.[165]

The Effect of Sales Methods

It is not the purpose of this paper to discuss the definition of sales for tax purposes. However, it should be noted in general that the legal form or commercial device involved in a sale usually has no effect upon the computation of sales tax liability.

It seems to make no difference whether the retailer owns the goods

156. Svithiod Singing Club v. McKibbin, 381 Ill. 194, 44 N.E.2d 904 (1942); Mahon v. Nudelman, 377 Ill. 331, 36 N.E.2d 550 (1941); Herlihy Mid-Continent Co. v. Nudelman, 367 Ill. 600, 12 N.E.2d 638, 115 A.L.R. 485 (1937).

157. Herlihy Mid-Continent Co. v. Nudelman, 367 Ill. 600, 12 N.E.2d 638, 115 A.L.R. 485 (1937).

158. J. A. Burgess Co. v. Ames, 359 Ill. 427, 194 N.E. 565 (1935).

159. A.B.C. Electrotype Co. v. Ames, 364 Ill. 360, 4 N.E.2d 476 (1936); Adair Printing Co. v. Ames, 364 Ill. 342, 4 N.E.2d 481 (1936).

160. Swain Nelson & Sons Co. v. Department of Finance, 365 Ill. 401, 6 N.E.2d 232 (1937).

161. Brevoort Hotel Co. v. Ames, 360 Ill. 485, 196 N.E. 461 (1935).

162. O'Neil v. Department of Finance, 360 Ill. 484, 196 N.E. 463 (1935).

163. Opinion of the Attorney General of North Carolina, July 15, 1955.

164. Lone Star Cement Corp. v. State Tax Comm'n, 234 Ala. 465, 175 So. 399 (1937).

165. Henderson v. Gill, 229 N.C. 313, 49 S.E.2d 754 (1948). *Contra*, Youngquist v. Chicago, 405 Ill. 21, 90 N.E.2d 205 (1950).

or services sold. Alabama taxes sales by a retailer, although the property was held on consignment.[166]

Connecticut has ruled that tire recappers are retailers whether the customer furnishes the tire casing or not. They are taxable on the charges made.[167]

Tips received by waitresses are taxable gross receipts of the employer if agreed that they belonged to employer and could be credited against minimum wages.[168]

Some difficulty has been encountered in states which require the collection of the retail sales tax from the customer where the sale is by vending machine.

Until the 1951 amendments, sales by coin operated vending machines were not included in taxable retail sales.[169] The problem involved is that the tax is on the customer and there is no one to collect it. Maryland permits sellers to pay tax on vending machine sales.

It should be noted, however, that such sales may not fit the statutory definition of retail sales. Thus, *Castleberry v. Evatt*[170] held that sales of packaged fluid milk by a dairy through vending machines located in an industrial plant over which the vendor exercised no control except the right of ingress and egress to service machines were sales off the "premises where sold," and were not taxable.[171]

Conclusion

Double taxation can result from a tax which includes the amounts of other taxes, from two or more taxes on the same occupation or transaction, from taxing the retail sale of component parts such as shipping, storage containers as well as the final sale, from taxing sales of the same article twice when goods which have been returned or exchanged are resold, and from taxing repairs (including replacement parts) as well as the sale of parts to repairmen. Much of the difficulty arises in the definition of a retail sale, but attempts to tax only the final transaction and frankly to recognize that the tax is on the consumer at least give a guide to courts. More diverse taxes typically encounter the same problems in connection with rate distinctions and lack this guide.

While some states have made careful efforts in their sales and use taxes to fit a pattern left by their other taxes and the taxes of other states and the United States, most states impose a sales tax without sufficient regard for existing excises on motor fuels, liquors, cig-

166. Lash's Products Co. v. United States, 278 U.S. 175 (1929).
167. Letter from Connecticut Tax Commissioner, October 26, 1955.
168. Anders v. State Bd. of Equalization, 82 Cal. App. 2d 88, 185 P.2d 883 (1947).
169. Rooney v. Horn, 174 Kan. 11, 254 P.2d 322 (1953).
170. 147 Ohio St. 30, 67 N.E.2d 861, 167 A.L.R. 193 (1946).
171. Article 12, section 12 of the Ohio Constitution was cited in the opinion.

arettes and other special areas and without regard to license fees on certain businesses which may also be measured by gross receipts.

Another area of weakness in most state sales taxes is in the treatment of credit sales. Most statutes do not indicate whether or not service charges or interest are part of the measure or base of the tax. Many provide for obtaining approval of the administrative agency for paying the tax on credit sales as collections are made. The measure or base of a sales tax is as significant as the assessed valuation in property taxation or the cost base in capital gains taxation or the definition of net income in income taxation. To clarify the measure of sales taxes, courts and administrative officers have filled some of the many gaps left by statutes.

In defining the measure of the tax as in other areas of sales taxation, most of our state sales tax laws bear the stamp of the nineteen thirties. That age was far too willing to write statutes as broadly as possible, leaving such limitations as were necessary in practice to be determined by administrative discretion. The more recent statutes show the benefit of experience as well as an increased desire for precision and thoroughness for the sake of uniformity, clarity and equity in administration.

APPENDIX

ALABAMA*

ALA. CODE ANN. tit. 51, §§ 752-786 (1940) as amended by 1955 Cum. Supp. *1. Nature of tax:* privilege or sales tax and use tax. *2. Rates:* 3% on retail sales and amusements; 1% on autos, trucks and trailers, etc. *3. Wholesale or retail:* retail, unless unsegregated. *4. Intangibles:* not included. *5. Real estate:* not included. *6. Shipping costs:* included. *7. Storage costs:* included. *8. Container cost:* included.[1] *9. Sales taxes included in price:* federal oil tax,[2] but not federal excise tax on jewelry.[3] *10. Discounts and allowances:* deductible. *11. Refunds if goods returned:* yes. *12. Rent received:* not included. *13. Services incident to sale:* included. *14. Occupational variations:* applies only to persons in business of selling at retail. *15. Evaluation of exchanges:* resale of exchange autos exempt. *16. Bad debts:* no tax until collection. *17. Use tax:* on all transactions not subject to or exempted from sales tax.

ARIZONA

ARIZ. CODE ANN. §§ 73-1303; 73-1309 (Supp 1954). *1. Nature of tax:* occupation license tax on gross proceeds or gross income and use tax. *2. Rates:* ¼ of 1% on meat or poultry or feed, etc.; 1% on transportation, mining, communications, printing, restaurants, building, etc.; 2% on amusements, hotels, collection agencies, storage, and sales at retail, etc. *3. Wholesale or retail:* only retail at 2% rate; no wholesale rate. *4. Intangibles:* not included. *5. Real estate:* not included. *6. Shipping costs:* not included. *7. Storage costs:* probably included, if in sales price. *8. Container cost:* included. *9. Sales taxes included in price:* not if added to sales price and unabsorbed. *10. Discounts and allowances:* deductible. *11. Refunds if goods returned:* yes. *12. Rent received:* included only in storage businesses, if rental is genuine. *13. Services incident to sale:* not included; sales incidental to services also not included. *14. Occupational variations:* only occupations named in statute are taxed. *17. Use tax:* on storage, use or consumption of tangible personal property bought after July 1, 1956.

ARKANSAS

ARK. STAT. ANN. §§ 84-1901 through 84-1919 (1947); *Ark. Stat. Ann.* §§ 84-1920 through 84-1923 and §§ 84-3101 through 84-3128 (Cum. Supp. 1953). *1. Nature of tax:* gross receipts and use taxes. *2. Rates:* 2% for either tax. *3. Wholesale or retail:* sales to licensed re-sellers exempt; also sales of parts to manufacturers. *4. Intangibles:* not included. *5. Real estate:* not included. *6. Shipping costs:* included. *7. Storage costs:* included. *8. Container costs:* probably included. *9. Sales taxes included in price:* not manufacturers excise taxes nor liquor, cigarettes and gasoline on which Arkansas tax is paid. ". . . the Department has long adopted the policy and followed the procedure of allowing deductibility of Manufacturers' Excise Taxes where same are separately stated or billed consumer users."[4] *13. Services incident to sale:* included, by decision.[5] *14. Occupational variations:* casual sales exempt.

1. But see State v. Reynolds Metals, 83 So. 2d 709 (Ala. 1955) (exempting returnable spools and reels).
2. Pure Oil Co. v. State, 244 Ala. 258, 12 So. 2d 861 (1943).
3. See Ross Jewelers, Inc. v. State, 260 Ala. 682, 72 So. 2d 402, 43 A.L.R.2d 851 (1955).
4. CCH ALL STATE SALES TAX REP. ¶ 4-075.08 (hereinafter cited CCH).
5. Ferguson v. Cook, 215 Ark. 373, 220 S.W.2d 808 (1949).

15. Evaluation of exchanges: resales of exchanged property exempt. *16. Bad debts:* option of cash basis returns if some sales are on credit. *17. Use tax:* on privilege of storing, using or consuming; exemption of property on which gross receipts tax paid.

CALIFORNIA

CAL. REV. & TAX CODE §§ 6051, 6201 and 6401 (Deering 1952). *1. Nature of tax:* sales and use taxes. *2. Rates:* 3% for either. *3. Wholesale or retail:* retail only. *4. Intangibles:* not included. *5. Real estate:* not included. *6. Shipping costs:* not included, if transported *after* sale (§§ 6011(q), 6012(c)). *7. Storage costs:* included if prior to sale. *9. Sales taxes included in price:* not federal taxes, except manufacturer's or import excises, or California or local percentage retail taxes. *10. Discounts and allowances:* deductible. *11. Refunds if goods returned:* no tax if goods returned within 90 days of purchase and price refunded in cash or credit. *12. Rent received:* included, if item taxable (§ 6012). *13. Services incident to sale:* included (§ 6011). *14. Occupational variations:* yes;[6] occasional sales exempt. *15. Evaluation of exchanges:* sales price "valued in money."[7] *17. Use tax:* similar to Colorado below.

COLORADO

COLO. REV. STAT. ANN. §§ 138-6-1 through 138-6-42 (1953). *1. Nature of tax:* sales and use taxes. *2. Rates:* 2% for either. *3. Wholesale or retail:* retail only.[8] *4. Intangibles:* not included. *5. Real estate:* not included. *8. Container cost:* included; sales of containers and labels by manufacturers exempt.[9] *9. Sales taxes included in price:* any direct federal tax excluded. *10. Discounts and allowances:* deductible. *11. Refunds if goods returned:* yes. *12. Rent received:* included, if item taxable on sale. *13. Services incident to sale:* included, but not services plus materials.[10] *14. Occupational variations:* yes. *15. Evaluation of exchanges:* retail sale price of property not included if property sold thereafter; or sale of exchanged article exempt if first sale reported at full retail. *16. Bad debts:* debts charged off are basis for tax credit on future taxes, but later collections taxed; if credit extended over 60 days, taxed as collected. *17. Use tax:* on storage, use or consumption of any article bought at retail; does not apply to property subject to sales tax.

CONNECTICUT

CONN. GEN. STAT. §§ 941c, 943c (Supp. 1953). *1. Nature of tax:* sales and use taxes. *2. Rates:* 3% for either. *3. Wholesale or retail:* retail only. *4. Intangibles:* not included. *5. Real estate:* not included. *8 Container cost:* sales of returnable containers filled or returned exempted, also sale of empty non-returnable containers; feed bags exempt. *14. Occupational variations:* casual sales of autos not taxed, but use tax applies to purchaser. *15. Evaluation of exchanges:* on autos and tractors, trade-in allowance is deducted; resale of used auto or tractor is taxed.

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6. National Ice & Cold Storage Co. v. Pacific Fruit Exp. Co., 11 Cal. 2d 283, 79 P.2d 380 (1938).

7. Hawley v. Johnson, 58 Cal. App. 2d 638 (1943); Eisenberg's White House v. State Bd. of Equalization, 72 Cal. App. 2d 8, 164 P.2d 57 (1945).

8. The purchase of an entire business is a retail sale. Palmer v. Perkins, 119 Colo. 533, 205 P.2d 785 (1949).

9. The sale of packages containing laundry is not exempt. Carpenter v. Carmen Distributing, 111 Colo. 566, 144 P.2d 770 (1943).

10. The sale of tire recapping materials to a recapper is taxable; the service of recapping is exempt. Zook v. Perkins, 118 Colo. 464, 195 P.2d 962 (1948). The sale of mining equipment is taxable. Bedford v. Colorado Fuel & Iron Corp., 102 Colo. 538, 81 P.2d 752 (1938).

DELAWARE

None.

FLORIDA

FLA. STAT. §§ 212.01-.23 (1953). 1. *Nature of tax:* sales, use, and leases and amusement admissions. *2. Rates:* 3%. *3. Wholesale or retail:* retail and other transactions. *4. Intangibles:* not included. *5. Real estate:* included. *6. Shipping costs:* included. *7. Storage costs:* included. *8. Container cost:* under rule 75, not included if container returnable; but sale of container is taxed;[11] sales of empty non-returnable containers exempted. *10. Discounts and allowances:* deductible. *11. Refunds if goods returned:* yes. *12. Rent received:* included if less than 6 months lease. *13. Services incident to sale:* included, except installing, applying, repairing or remodeling property sold. *14. Occupational variations:* yes. *15. Evaluation of exchanges:* valued in money, amount for which credit is given to purchaser by seller. *17. Use tax:* yes.

GEORGIA

GA. CODE ANN. § 92-3402g (Supp. 1955). *1. Nature of tax:* sales or rental and use taxes and admissions. *2. Rates:* 3% on either. *3. Wholesale or retail:* retail only. *4. Intangibles:* not included. *5. Real estate:* not included. *8. Container cost:* sales of containers exempted. *9. Sales tax included in price:* not federal retailers' excise taxes billed to consumer separately. "There shall be excluded from the purchase price of any article or service Federal or State Excise Taxes before the calculation of the sales or use tax but such Federal or State Excise Taxes shall be excluded if and only if (1) the Federal or State Excise Tax is levied on the product as sold (but shall not be excluded if it is a tax on the component parts in the series of assembly) and (2) the Federal or State Excise Tax is separately stated."[12] *12. Rent received:* included on personal property and hotel facilities under 90 days. *13. Services incident to sale:* repairs or sales incidental to services not included; otherwise, included except for installing, applying, remodeling or repairing property sold. *14. Occupational variations:* yes. *15. Evaluation of exchanges:* amount for which credit is given; but if used goods taken, tax only on net. *16. Bad debts:* yes, if on accrual basis; tax does not include interest or charges on credit. *17. Use tax:* on goods brought into state for use; reduced by any sales tax paid.

IDAHO

None.

ILLINOIS

ILL. ANN. STAT. c. 120 § 441 (Smith-Hurd Supp. 1955). *1. Nature of tax:* sales tax. *2. Rates:* 2% of 98% of gross receipts. *3. Wholesale or retail:* retail only. *4. Intangibles:* not included. *5. Real estate:* not included. *6. Shipping costs:* included. *9. Sales taxes included in price:* motor fuel tax deductible;[13] tax itself is part of selling price.[14] "Furthermore, in computing retailers' occupation tax liability, a person making such computation may deduct an amount equivalent to excise taxes which he pays directly to the Federal Government if such Federal tax is an excise tax imposed upon the sale of

11. Gay v. Canada Dry Bottling Co. of Florida, 59 So. 2d 788 (Fla. 1952); Wray's Pharmacy v. Lee, 145 Fla. 435, 199 So. 767 (1941).
12. CCH ¶ 31-506.
13. People v. Werner, 364 Ill. 594, 5 N.E.2d 238 (1936).
14. Vanse & Striegel v. McKibbin, 379 Ill. 169, 39 N.E.2d 1006 (1942).

tangible personal property which such person sells at retail. . . . The same rule applies to manufacturers who sell tangible personal property at retail and who are required to pay directly to the Federal Government an excise tax upon their sale (as distinguished from their manufacture or other production) of such tangible personal property."[15] *12. Rent received:* not included, but conditional sales covered. *13. Services incident to sale:* services are incident to sale and are included,[16] but if sales are incidental part of other activity, tax does not apply; service businesses are not taxed. *14. Occupational variations:* applies only to persons engaged in business of selling at retail. *15. Evaluation of exchanges:* included at value allowed on trade-in. *16. Bad debts:* tax applies only as and when payments are received; no tax at time of credit sale. *17. Use tax:* no use tax except on motor vehicles and cigarettes.

INDIANA

IND. STAT. ANN. § 64-2601 *et seq.* (Burns 1951) as amended by 1955 Cum. Supp. *1. Nature of tax:* gross income tax. *2. Rates:* ¼ of 1% wholesale, ½ of 1% retail, 1% on other income and unsegregated transactions. *3. Wholesale or retail:* both. *4. Intangibles:* included. *5. Real estate:* included. *6. Shipping costs:* included. *7. Storage costs:* included. *8. Container cost:* included.[17] *9. Sales taxes included in price:* only if seller is not the taxpayer but only a collection agent.[18] *10. Discounts and allowances:* deductible. *11. Refunds if goods returned:* yes. *12. Rent received:* included. *13. Services incident to sale:* included; segregation formerly required but rate now occupational so that sales go with service[19] or service goes at retail sales rate.[20] *14. Occupational variations:* yes; rates vary with occupation as well as with transaction. *15. Evaluation of exchanges:* market value of property exchanged. *17. Use tax:* none.

IOWA

IOWA CODE §§ 422.42 *et seq.;* use tax §§ 423.1 *et. seq.* (1954) as amended by c. 45, Acts, 56th Gen. Assembly. *1. Nature of tax:* sales and amusements and use taxes. *2. Rates:* 2% on either. *3. Wholesale or retail:* retail. *4. Intangibles:* not included. *5. Real estate:* not included. *9. Sales taxes included in price:* credit for Iowa license, stamp and other taxes. "Federal Manufacturers' Excise Taxes are to be included in the gross sales on which tax is computed, unless the manufacturer acts as retailer and sells directly to the consumer, in which case, the excise tax is deducted in computing gross sales."[21] *10. Discounts and allowances:* deductible. *11. Refunds if goods returned:* yes. *12. Rent received:* not included under sales or use tax, except admissions, greens fees, etc. *13. Services incident to sale:* not included; segregation permitted. *14. Occupational variations:* tax depends upon buyer's disposition of goods, not occupation of seller.[22] *15. Evaluation of exchanges:* exchanges included at fair

15. CCH ¶ 34-505.
16. Bradley Supply Co. v. Ames, 359 Ill. 162, 194 N.E. 272 (1934); Department v. Jennison-Wright Corp., 393 Ill. 401, 66 N.E.2d 395 (1946).
17. The sale of a beer bottle on a return basis is a resale, so the wholesale rate applies. Department of Treasury v. Fairmount Glass Works, 113 Ind. App. 684, 49 N.E.2d 1 (1943).
18. Gross Income Tax Division v. Indianapolis B. Co., 108 Ind. App. 259, 25 N.E.2d 653 (1940); Assoc. Serv. Corp. v. Division, Marion County Superior Court (1954).
19. Samper v. Indiana Dep't of State Revenue, 231 Ind. 26, 106 N.E.2d 797 (1952).
20. Gross Income Tax Division v. L. S. Ayres & Co., 233 Ind. 194, 118 N.E.2d 480 (1954).
21. CCH ¶¶ 36-583, 36-584.
22. W. J. Sandberg Co. v. Iowa State Board of A. and R., 225 Iowa 103, 278 N.W. 643, modified in 281 N.W. 197 (1938).

price. *16. Bad debts:* if credit over 60 days, taxed as cash received; if tax paid, credit when sale charged off as bad debt. *17. Use tax:* yes.

KANSAS

KAN. GEN. STAT. ANN. §§ 79-3601 through 79-3623, as amended by 1955 Supp. *1. Nature of tax:* sales and use taxes. *2. Rates:* 2% on either. *3. Wholesale or retail:* retail only on sales, both on use tax. *4. Intangibles:* not included. *5. Real estate:* not included. *6. Shipping costs:* intrastate freight to consumer exempt. *8. Container cost:* sales of containers, labels, etc., to manufacturers exempt. *9. Sales taxes included in price:* tax itself must be added to sale price and not absorbed; Kansas and federal excise taxes excluded. *11. Refunds if goods returned:* yes if price, including tax, is refunded in cash or credit. *12. Rent received:* included. *13. Services incident to sale:* installation exempt. *14. Occupational variations:* applies to specified occupations, including retail sales; occasional sales exempt. *15. Evaluation of exchanges:* exchanges included except when resold and resale taxable. *17. Use tax:* yes.

KENTUCKY

KY. REV. STAT. ANN. §§ 138.460, 138.480 (Baldwin 1955). *1. Nature of tax:* no general sales tax. *2. Rates:* 3% on motor vehicle sales or use; 3% on utilities and communications; scheduled tax on admissions. *4. Intangibles:* not included. *5. Real estate:* not included.

LOUISIANA

LA. REV. STAT. §§ 47:301-47:318 (1950) as amended by 1954 Supp. *1. Nature of tax:* sales and use. *2. Rates:* 2%. *3. Wholesale or retail:* retail only. *4. Intangibles:* not included. *5. Real estate:* not included. *6. Shipping costs:* included if prior to sale.[23] *7. Storage costs:* included. *10. Discounts and allowances:* deductible. *11. Refunds if goods returned:* yes. *12. Rent received:* included on business property. *13. Services incident to sale:* tax covers services, but charges for installing, repairing, or remodeling are excluded from property sold. *15. Evaluation of exchanges:* sales of articles taken in trade exempt, but full tax on original sale. *17. Use tax:* yes.

MAINE

ME. REV. STAT. ANN. c. 17, §§ 1-37 (1954) as amended by 1955 Supp. *1. Nature of tax:* sales and use. *2. Rates:* 2%. *3. Wholesale or retail:* retail only. *4. Intangibles:* not included. *5. Real estate:* not included. *6. Shipping costs:* not included if separately stated and *after* purchase. *8. Container cost:* sales of containers for use or sale by retailers exempt; also sales to consumers by retailers of returnable, filled containers exempt. *9. Sales taxes included in price:* not federal taxes on retail sales, except manufacturers or importers excises. *10. Discounts and allowances:* deductible. *11. Refunds if goods returned:* yes. *12. Rent received:* included if deemed in lieu of sale. *13. Services incident to sale:* not included if separately stated. *14. Occupational variations:* isolated transactions by owner not in course of business exempt. *15. Evaluation of exchanges:* tax only on net sale price of motor vehicle when trade-in occurs. *17. Use tax:* yes; persons having possession liable for tax unless sales tax paid.

23. State v. Menefee Motor Co., 18 La. App. 694, 139 So. 61 (1932).

MARYLAND

MD. ANN. CODE Art. 81, §§ 320-367, §§ 368-395 (1951) as amended by 1955 Cum. Supp. *1. Nature of tax:* sales and use; also gross receipts tax on banks, travel and communications. *2. Rates:* 2¢ on sales from 51¢ to $1; 1¢ on each 50¢ or fraction thereof over $1. *3. Wholesale or retail:* retail only. *4. Intangibles:* not included. *5. Real estate:* not included. *6. Shipping costs:* not included if separately stated. *9. Sales taxes included in price:* not this tax. "The Tax is to be imposed upon the sales price before the addition of any State, City or Federal Excise Taxes, provided such taxes are separately stated from the price of the tangible personal property or service subject to the sales tax."[24] *11. Refunds if goods returned:* yes. *12. Rent received:* only hotel facilities included. *13. Services incident to sale:* not included on installing, applying, remodeling, or repairing if separately stated; professional services and finance charges not included if separately stated. *14. Occupational variations:* occupational exemptions; gross receipts tax is occupational; casual sales exempt. *15. Evaluation of exchanges:* value in money. *17. Use tax:* collector may permit installment sales to be taxed as paid; otherwise credit sales taxed in full.

MASSACHUSETTS

MASS. GEN. LAWS c. 64B, §§ 1-10 (1953) as amended by 1955 Supp. *1. Nature of tax:* no general sales or use tax. *2. Rates:* 5% on meals costing $1 or more.

MICHIGAN

MICH. STAT. ANN. §§ 7.521 *et seq.* (1950) as amended by 1955 Cum. Supp. *1. Nature of tax:* sales and use. *2. Rates:* 3%. *3. Wholesale or retail:* retail only. *4. Intangibles:* not included. *5. Real estate:* included. *8. Container cost:* included.[25] *9. Sales taxes included in price:* cigarette tax included in base;[26] federal gasoline tax excluded;[27] seller may add tax to price if charged separately. "No deductions or exemptions on account of federal taxes paid are allowable in computing taxable sales, except a federal excise tax which attaches at the instant a retail sale is made, and which is paid by the retailer directly to the Federal Government. A federal manufacturer's excise tax may be deducted only by the manufacturer, upon his retail sales directly to the consumer."[28] *10. Discounts and allowances:* deductible, by case law.[29] *11. Refunds if goods returned:* credits allowed when returned, but not when repossessed under conditional sales contract.[30] *14. Occupational variations:* license required for retailers subject to tax; isolated sales exempt. *15. Evaluation of exchanges:* no deduction from retail price for trade-ins received.[31] *16. Bad debts:* no deduction.[32] *17. Use tax:* exemption of goods on which Michigan sales tax is paid or exempted, and goods on which tax is paid in another state which exempts Michigan sales.

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24. CCH ¶ 42-521.
25. Cunningham Drug Stores v. Nims, 319 Mich. 467, 29 N.W.2d 915 (1947).
26. *Ibid.*
27. Standard Oil Co. v. State, 283 Mich. 85, 276 N.W. 908 (1937).
28. CCH ¶ 44-678.
29. Standard Oil Co. v. State, 283 Mich. 85, 276 N.W. 908 (1937).
30. *Ibid.*
31. *Ibid.*
32. Gardner-White Co. v. Dunckel, 296 Mich. 225, 295 N.W. 624 (1941).

MINNESOTA

MINN. STATS. §§ 60.63, 289.02, 295.02, 295.21, 295.24, 295.29, 295.32, 295.34, 295.37 (1953) as amended by Laws of Minnesota (1955). *1. Nature of tax:* no general sales or use tax; gross earnings tax in lieu of personal property tax in certain businesses.

MISSISSIPPI

MISS. CODE ANN. §§ 10103 *et seq.* (1942) as amended by 1955 Supp. *1. Nature of tax:* privilege taxes and sales tax. *2. Rates:* 2% of sales; ⅛ of 1% on wholesalers and jobbers except 1% on milk. *3. Wholesale or retail:* both. *4. Intangibles:* exempted. *5. Real estate:* not included if incidental; included if in course of regular business.[33] *6. Shipping costs:* included. *7. Storage costs:* included. *8. Container cost:* included. *9. Sales taxes included in price:* federal retailers' tax and state excises on cigarettes, gasoline, and oil are deducted; other state taxes are basis for total exemption. *10. Discounts and allowances:* deductible. *11. Refunds if goods returned:* yes, if price refunded in cash or credit. *12. Rent received:* not included. *14. Occupational variations:* privilege tax by occupations; retail sellers licensed; no tax on casual sales. *15. Evaluation of exchanges:* no deduction from retail for trade-ins; no tax on sale of trade-ins.

MISSOURI

MO. REV. STAT. §§ 144.010 *et seq.* (1949). *1. Nature of tax:* sales. *2. Rates:* 2%. *4. Intangibles:* not included. *5. Real estate:* not included. *9. Sales taxes included in price:* sales subject to motor fuel tax or fuel and power taxes in any state exempt; purchaser must pay tax. "Furthermore, in computing sales tax liability, a person making such computation may deduct an amount equivalent to excise taxes which he pays directly to the Federal Government if such Federal tax is an excise tax imposed upon the sale of tangible personal property which such person sells at retail. . . . The same rule applies to manufacturers who sell tangible personal property at retail and who are required to pay directly to the Federal Government an excise tax upon their sale (as distinguished from their manufacture or other production) of such tangible personal property."[34] *10. Discounts and allowances:* deductible. *11. Refunds if goods returned:* yes. *12. Rent received:* included if on tangible personalty. *13. Services incident to sale:* included. *14. Occupational variations:* retail sales, admissions, utilities, hotels and travel tickets. *15. Evaluation of exchanges:* at fair market value.[35] *16. Bad debts:* sale price is amount received. *17. Use tax:* none except 2% on motor vehicles.

MONTANA

None.

NEBRASKA

None.

NEVADA

None.

NEW HAMPSHIRE

None.

33. M. L. Virden Lumber Co. v. Stone, 203 Miss. 251, 33 So. 2d 841 (1948); Holcomb & Longino v. Stone, 34 So. 2d 491, suggestion of error overruled, 35 So. 2d 82 (1948).
34. CCH ¶ 47-605.
35. State v. Hallenberg-Wagner Motor Co., 341 Mo. 771, 108 S.W.2d 398 (1937).

NEW JERSEY

N.J. STAT. ANN. §§ 54:31-15.15, 15.16, 15.18, 15.22 (1940) as amended by 1955 Cum. Supp. *1. Nature of tax:* no sales or use tax; gross receipts excise for use of streets by franchise. *2. Rates:* 2% on firms having receipts not over $50,000 a year; 5% on portion of gross receipts which length of mains in public way bears to total length of firm's mains or lines. *3. Wholesale or retail:* any firm using lines or mains in streets under franchise. *4. Intangibles:* included. *5. Real estate:* included. *17. Use tax:* none.

NEW MEXICO

N.M. STAT. ANN. §§ 72-16-4, 72-17-3 (1953) as amended by 1955 Supp. *1. Nature of tax:* sales or privilege tax and use tax. *2. Rates:* varies with occupation; mining and mfg.: ¼ or ½ of 1% of gross receipts; wholesale, ⅛ of 1%; retail and services, 2%; autos, 1%. *3. Wholesale or retail:* both. *4. Intangibles:* not included. *5. Real estate:* included. *9. Sales taxes included in price:* wholesalers rate differs if tax passed on to retailer; retailer must pass on to consumer and must segregate. *10. Discounts and allowances:* deductible. *11. Refunds if goods returned:* yes. *12. Rent received:* not included; but income of hotels, boarding houses, etc., included. *13. Services incident to sale:* 2% rate applies to services but if salesman never has possession of goods sold, commission in lieu of salary is exempt; wholesale services exempt. *14. Occupational variations:* rates and exemptions. *15. Evaluation of exchanges:* motor vehicle trade-ins deductible. *17. Use tax:* exemptions of goods on which equal sales tax has been paid in any state.

NEW YORK

No state sales tax. New York City and other cities have sales and use taxes.

NORTH CAROLINA

N.C. GEN. STAT. §§ 105-164 *et seq.*; 105-218 *et seq.* (1950) as amended by 1955 Cum. Supp. *1. Nature of tax:* sales and use. *2. Rates:* 3% of total sales, maximum tax $15 per item on retail; $10 fee on wholesalers, plus 1/20 of 1% of total gross sales. *3. Wholesale or retail:* both as to sales tax; use tax only on retail. *4. Intangibles:* not included. *5. Real estate:* not included. *9. Sales taxes included in price:* merchant must add tax itself to price. *10. Discounts and allowances:* not deductible. *12. Rent received:* not included unless transaction actually a sale. *13. Services incident to sale:* sales at price shown on books. *14. Occupational variations:* wholesalers and retailers; casual sales exempt. *15. Evaluation of exchanges:* first sale at book price; resale of trade-in exempt. *16. Bad debts:* purchaser owes merchant amount of tax; tax due as price collected, or credit may be taken for tax when debt charged off. *17. Use tax:* sales tax credited against use tax.

NORTH DAKOTA

N.D. REV. CODE §§ 57-3901 *et seq.*; 57-4001 *et seq.* (1943) as amended by Laws of North Dakota (1953 and 1955). *1. Nature of tax:* sales and use. *2. Rates:* 2%. *3. Wholesale or retail:* retail only. *5. Real estate:* not included. *9. Sales taxes included in price:* tax collectible by seller from buyer; all articles subject to special North Dakota taxes exempt. "In cases where manufacturers sell directly to consumers and the Manufacturer's Excise Tax is billed separately,

such excise tax need not be included in the sales tax base."[36] *10. Discounts and allowances:* deductible. *11. Refunds if goods returned:* yes. *12. Rent received:* not included. *14. Occupational variations:* includes admissions, utilities, communications, and retail sales. *16. Bad debts:* when account charged off, credit for tax paid; subsequent collections taxed. *17. Use tax:* goods on which sales tax paid exempt.

OHIO

OHIO REV. CODE ANN. §§ 5739.02, .03, .10; 5741.02, .04 (1953). *1. Nature of tax:* sales and use. *2. Rates:* no tax on sales less than 41¢; 41-70¢, 2¢; 71¢-$1.07, 3¢; 3¢ a dollar above $1, with 1¢ on fractions; 8-40¢, 2¢ on 41-70¢; 3¢ above 70¢; use tax same. *3. Wholesale or retail:* retail only. *4. Intangibles:* not included. *5. Real estate:* not included. *8. Container cost:* by regulation, sales of containers and wrapping paper to retailers exempt.[37] *9. Sales taxes included in price:* seller must collect tax from buyer; "price" does not include tax; federal excises excluded. *10. Discounts and allowances:* not deductible unless taken at time sale is consummated. *11. Refunds if goods returned:* yes. *12. Rent received:* included on tangible personalty. *13. Services incident to sale:* free meals to employees as part of wages exempt; installation exempt if segregated. *14. Occupational variations:* casual or isolated sales exempt, but liquidations not exempt. *15. Evaluation of exchanges:* full retail, without deduction for exchange.[38] *16. Bad debts:* tax due when price paid or goods delivered, whichever is *earlier. 17. Use tax:* goods on which Ohio sales tax paid are exempt.

OKLAHOMA

OKLA. STAT. tit. 68, §§ 1251-1251n; 1310-1310i (1951) as amended by 1955 Supp. *1. Nature of tax:* sales and use. *2. Rates:* 2% on either. *3. Wholesale or retail:* retail only, but sales to peddlers included. *4. Intangibles:* not included. *5. Real estate:* not included. *8. Container cost:* sales of containers for resale filled or empty, unless returnable, exempt. *9. Sales taxes included in price:* sales taxed under certain other Oklahoma acts exempt. "In cases where manufacturers sell directly to consumers and the Manufacturer's Excise Tax is billed separately, such excise tax need not be included in the sale tax base."[39] *11. Refunds if goods returned:* sales of containers for resale filled or empty, unless returnable, exempt. *12. Rent received:* only parking and hotels included. *14. Occupational variations:* retailing, utilities, communications, hotels, parking, foods, admissions, dues, included. *15. Evaluation of exchanges:* full retail tax applied. *17. Use tax:* credit for any sales or excise tax; if over 2%, exempt.

OREGON

None.

PENNSYLVANIA

PA. STAT. ANN. tit. 72, §§ 3406, 3407 (1949). *1. Nature of tax:* sales and use. *2. Rates:* 1% one either; sales below 10¢ exempt; 1¢ on each dollar or fraction. *3. Wholesale or retail:* retail only. *4. Intangibles:* not included. *5. Real estate:* not included. *9. Sales taxes included in price:* tax on buyer; seller liable for collection. *10. Discounts and allowances:* deductible. *12. Rent received:* in-

36. CCH ¶ 59-535.
37. Kroger Grocery & Baking Co. v. Glander, 149 Ohio St. 120, 77 N.E.2d 921 (1948).
38. Dayton Rubber Mfg. Co. v. Glander, 149 Ohio St. 83, 77 N.E.2d 615 (1948).
39. CCH ¶ 61-514.

cluded only if title will ultimately pass. *13. Services incident to sale:* included; improvements of real estate, including services, are sales if real estate is for sale. *14. Occupational variations:* isolated sales not in line of business exempt, unless motor vehicles; certain industries exempt. *15. Evaluation of exchanges:* exchanges deducted. *17. Use tax:* sales, use or occupation tax paid anywhere credited.

RHODE ISLAND

R.I. Public Acts, Art. II, c. 2004 (1948). *1. Nature of tax:* sales and use. *2. Rates:* 1% on either. *3. Wholesale or retail:* retail only. *4. Intangibles:* not included. *5. Real estate:* not included. *6. Shipping costs:* not included if after sale and separately stated. *8. Container cost:* sales of empty, non-returnable containers exempt; containers exempt if contents exempt; returnable containers exempt when filled or resold. *9. Sales taxes included in price:* tax must be added to sale price; tobacco and gasoline exempted because especially taxed. *10. Discounts and allowances:* deductible. *11. Refunds if goods returned:* yes, if within 120 days. *12. Rent received:* included if found to be in lieu of sale. *13. Services incident to sale:* included except installing or applying, if segregated. *14. Occupational variations:* permit required for sales at retail. *15. Evaluation of exchanges:* valued in money. *17. Use tax:* goods on which Rhode Island sales tax is paid are exempt.

SOUTH CAROLINA

S.C. CODE §§ 65-1401 through 65-1433 (1952) as amended by 1955 Supp. *1. Nature of tax:* sales and use. *2. Rates:* 3%, but not over $25 on any article under $1,500; $40 on any article $1,500-$3,000; $75 maximum on any article; use tax same. *3. Wholesale or retail:* retail only. *4. Intangibles:* not included. *5. Real estate:* not included. *6. Shipping costs:* included. *7. Storage costs:* included. *8. Container cost:* included. *9. Sales taxes included in price:* gross proceeds do not include federal retail excises except manufacturers or importers excises. *10. Discounts and allowances:* deductible. *11. Refunds if goods returned:* yes. *12. Rent received:* not included. *13. Services incident to sale:* included in gross proceeds subject to tax. *14. Occupational variations:* retailer or seller is one engaged in the business. *15. Evaluation of exchanges:* gross proceeds do not include value of second hand trade-ins. *16. Bad debts:* not deductible. *17. Use tax:* exemption of goods exempt under sales tax or on which sales tax is paid.

SOUTH DAKOTA

S.D. CODE §§ 57.3301 *et seq.* (1939) as amended by 1952 Supp. and S.D. Acts of 1953, c. 467. *1. Nature of tax:* sales and use. *2. Rates:* 2% on either. *3. Wholesale or retail:* retail only. *4. Intangibles:* not included. *5. Real estate:* not included. *6. Shipping costs:* service or furnishing of transportation exempt. *9. Sales taxes included in price:* articles taxed under other South Dakota laws exempt. "As both the federal excise tax and South Dakota retail sales tax come due at the same time when such merchandise is sold, the retail sales tax will be computed only on the regular selling price of such articles exclusive of the federal tax collected and such federal tax is not to be considered as part of the gross receipts from such sale."[40] *10. Discounts and allowances:*

40. CCH ¶ 68-632.

deductible. *11. Refunds if goods returned:* yes. *14. Occupational variations:* retail sales, utilities, admissions, and communications included; retailers permit required; occasional sales exempt. *16. Bad debts:* sales tax due only as payment received. *17. Use tax:* exemption of property on which sales tax is paid.

TENNESSEE

TENN. CODE ANN. §§ 67-3003; 67-4203 (1955) as amended by 1955 Supp. *1. Nature of tax:* sales and use, also local privilege taxes. *2. Rates:* 3% on either; 2% of tax deductible by dealer as expense of accounting and return. *3. Wholesale or retail:* retail only. *4. Intangibles:* not included. *5. Real estate:* not included. *6. Shipping costs:* transportation charges included. *8. Container cost:* containers for farm products exempt. *9. Sales taxes included in price:* provision applicable to use tax applies; certain articles subject to other Tennessee taxes exempt. *10. Discounts and allowances:* deductible. *12. Rent received:* included. *13. Services incident to sale:* services are subject to tax whether sales connected or not. *14. Occupational variations:* tax collected from "dealers." *15. Evaluation of exchanges:* allowance for trade-ins deducted from tax base. *16. Bad debts:* price does not include interest or carrying charges. *17. Use tax:* credit given for payment of other states' sales taxes; distinguishable from sales tax under same statute.

TEXAS

Vernon's Texas Stats. 1948, S.7047 K1 and 2; S.70471. *1. Nature of tax:* no general sales or use taxes. *2. Rates:* 1.1% sales or use on autos; 2.1% on radio, TV, and cosmetics; 6¢ a pack on cards; also alcoholic beverage taxes.

UTAH

UTAH CODE ANN. §§ 59-15-1 through 59-15-22; §§ 59-16-1 through 59-16-25 (1953) as amended by 1955 Supp. *1. Nature of tax:* sales and use. *2. Rates:* 2% on either. *3. Wholesale or retail:* retail only. *4. Intangibles:* not included. *5. Real estate:* not included. *8. Container cost:* sales of containers, labels, and cases to manufacturers exempt. *9. Sales taxes included in price:* seller must collect tax from buyer; federal taxes excluded.[41] *13. Services incident to sale:* not included if segregated in charge to customer. *14. Occupational variations:* retailers and wholesalers must register; isolated sales exempt, except for motor vehicles; utilities, communications, entertainment, and meals included. *15. Evaluation of exchanges:* at fair market value. *16. Bad debts:* tax on amounts "charged." *17. Use tax:* exemption of goods on which sales tax of any state is paid.

VERMONT

No general sales tax. Utilities and communications are subject to a gross receipts tax, as are musical copyrights.

VIRGINIA

None.

WASHINGTON

WASH. REV. CODE §§ 82.08.020, 82.08.050, 82.12.020 *et seq.* (1955). *1. Nature of tax:* sales and use. *2. Rates:* 3% on either. *3. Wholesale or retail:* retail only. *4. Intangibles:* not included. *5. Real estate:* not included. *6 Shipping costs:*

41. Dupler's Art Furs Inc. v. State Tax Comm'n, 108 Utah 513, 161 P.2d 788 (1945).

delivery costs included. *9. Sales taxes included in price:* seller must collect from buyer; public utilities, motor fuel exempt. *10. Discounts and allowances:* deductible. *13. Services incident to sale:* charges for construction, repair or improvement of structures on real property are taxed. *14. Occupational variations:* casual sales exempt only from this tax. *16. Bad debts:* deductible if books on accrual basis; tax may be paid as price collected. *17. Use tax:* exemption of goods on which sales tax is paid.

WEST VIRGINIA

W. VA. CODE ANN. §§ 999(1) through 999(50) (1955). *1. Nature of tax:* sales and use. *2. Rates:* 2% on either use or sales; privilege tax varies from 15/100 of 1% on gross receipts from wholesaling to 6% on natural gas. *3. Wholesale or retail:* retail only. *4. Intangibles:* not included, although 1% privilege tax may apply. *5. Real estate:* not included; ½ of 1% privilege tax applies. *6. Shipping costs:* included.[42] *9. Sales taxes included in price:* seller must collect from buyer and not absorb sales or use tax; privilege tax not deductible in computing sales tax; producers using own product subject to producers' privilege tax; producers selling to non-commercial consumers subject to two privilege taxes. *10. Discounts and allowances:* not deductible. *11. Refunds if goods returned:* yes. *13. Services incident to sale:* sales tax applies to services not subject to privilege tax. *14. Occupational variations:* privilege tax strictly occupational. *16. Bad debts:* no deduction or credit; vendor must require purchaser to pay tax in 30 days. *17. Use tax:* applies only to goods bought outside state on which West Virginia sales tax is not paid.

WISCONSIN

None.

WYOMING

WYO. COMP. STAT. ANN. §§ 32-2501 through 32-2523; 32-2601 through 32-2628 (1945) as amended by 1955 Supp. *1. Nature of tax:* sales and use. *2. Rates:* 2% except 1% on sales under 25¢. *3. Wholesale or retail:* retail only. *4. Intangibles:* not included. *5. Real estate:* not included. *6. Shipping costs:* included, except farm raw products. *9. Sales taxes included in price:* exemption of goods on which federal excise exceeds 20% or on which other Wyoming taxes exceed 5%; price excludes any federal tax and this tax. *14. Occupational variations:* use tax requires retailer registration; sales tax applies to retailers, carriers, communications, utilities, meals, and admissions. *15. Evaluation of exchanges:* at fair market value. *17. Use tax:* exemption of property subject to Wyoming sales tax.

42. Natural Hope Gas Co. v. Hall, 102 W. Va. 272, 135 S.E. 582 (1926).