Vanderbilt Law Review

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

Article 8

2-1956

Analysis of Sales and Use Tax Exemptions -- With Comment as to More Uniform Applications

George D. Brabson

Follow this and additional works at: https://scholarship.law.vanderbilt.edu/vlr

Part of the Constitutional Law Commons, and the Tax Law Commons

Recommended Citation
George D. Brabson, Analysis of Sales and Use Tax Exemptions -- With Comment as to More Uniform Applications, 9 *Vanderbilt Law Review* 294 (1956)
Available at: https://scholarship.law.vanderbilt.edu/vlr/vol9/iss2/8

This Symposium is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

ANALYSIS OF SALES AND USE TAX EXEMPTIONS — WITH COMMENT AS TO MORE UNIFORM APPLICATIONS

GEORGE D. BRABSON*

There are, generally speaking, three broad areas of exemption under statutes imposing sales and use taxes in the United States. These are:

(a) Exemptions arising out of the immunities of governmental agencies and instrumentalities, or out of the exercise of governmental functions.

(b) Exemptions arising under the commerce clause of the federal constitution.

(c) Specific exemptions created out of governmental taxing policies or social economic considerations.

Each of these areas of exemption has grown up somewhat haphazardly over a substantial period of time, and very largely as the result of shifting judicial opinion, rather than as a matter of consistent legislative policy. As a consequence it may be said that the whole body of exemptions rests upon premises that have somewhat dubious legal foundation and somewhat incongruous legal concepts. For example, the concept of states rights from the extremist point of view, which prevailed during the first half century of our Republic, underwent a drastic and startling revision as the result of the Civil War and the revolutionary change in public sentiment which followed it. In that process a large body of judicial opinion dealing with the immunity of the federal government from any encroachment whatever by the several states and based largely on the bold opinions of Chief Justice Marshall, began to give way to the stronger demands of an economic system based upon the nineteenth century industrial revolution.

Even more drastic changes in our concepts of taxation were occasioned by later governmental emergencies. The demands placed upon the national economy as the results of two world conflicts have in effect changed our pattern of thinking as to sources of revenue, and given rise to an entirely different method of taxation. It was not until these critical demands had to be met that it became incumbent upon both federal and state governments to re-examine the grounds for exemption from all forms of taxation, including not only sales and use taxes and other excise taxes, but also income taxes. The depression years of the nineteen thirties accentuated these demands, and emphasized the need for a finer application of the principles of tax exemption.

* Tax Attorney, The Ohio Oil Company, Findlay, Ohio.

Exemptions Arising from Governmental Immunities and Functions

It is a little surprising to note that up until as late as 1939 the great preponderance of governmental activities, both federal and state, were deemed to be exempt from sales or use taxes.[1] Every acre of federal land or of occupation was looked upon as a sort of oasis in which no state taxes could be imposed upon the sales or other business activities carried on there. As late as 1940 it was held in the case of *Minnesota v. Ristine*[2] that a state had no authority to collect a use or privilege tax on gasoline sold in a federal reservation.

There can be no question but that this was the general rule up until passage of the Hayden-Cartwright Act[3] by Congress in 1936, and that the rule was applicable to sales, use, storage and other types of license taxes. The very breadth and extent of the exemption was in fact responsible in part for enactment of the Hayden-Cartwright Act. Senator Hayden, in his supporting argument on the bill before Congress, gave numerous situations and citations indicating that the states were being deprived of a vast amount of revenues, and were virtually helpless in their efforts to collect excise taxes in any form where the transaction took place in a federal territory or area.

A simple example of this type of governmental exemption should be sufficient to illustrate the inequitable consequences both as between the taxing state and the federal government, and between the taxing state and a neighboring state. In most of our western states federal land holdings are extensive, and in some cases exceed the areas privately owned. In certain cases federal reservations occupy up to the center line of a city street, with the result that traders federally licensed could sell free of any taxes on one side of the street, while private merchants across the street were subject to such sales, use and license taxes as the state chose to levy. A mile or so away, across a state line, no such taxes were imposed.[4] Thus the taxing jurisdiction found itself competing for revenue against both tax-free jurisdictions, and the merchants in the taxing state were competing against tax-free sales in the same situations.

The Hayden-Cartwright Act provided in substance that all taxes levied by any state upon sales of gasoline and other motor fuels could be levied in the same manner and to the same extent upon such fuels sold in any federal territory or area, except when sold to or for the

1. See the discussion in Commerce Clearing House, Tax Systems of the World 168 (7th ed. 1938).

2. 36 F. Supp. 3 (D. Minn. 1940), *rev'd sub. nom.* Minnesota v. Keeley, 126 F.2d 863 (8th Cir. 1942).

3. 49 Stat. 1521 (1936).

4. National Ass'n Tax Adm'rs, Reports (Annual Conf. 1939).

exclusive use of the federal government. The act was first construed to apply only to sales taxes on gasoline and motor fuels, and not to use or license taxes relative to such fuels.[5] Debate also arose as to the inherent limitations of the act, and as to the advisability of extending its provisions so as to cover not only gasoline and motor fuels but also to embrace taxes which might be imposed upon other business activities on government owned property.

As a result Congress passed in December 1940 what was in effect an amendment to the Hayden-Cartwright Act, and generally referred to as the Buck Act.[6] This new act provided in substance that all kinds and types of businesses carried on in whole or in part in federal territories or areas located within a state or states, would be subject to the same sales, use, license, income and other taxes of general application imposed by such state or states upon similar transactions in such state or states.

It was soon apparent, however, that the Hayden-Cartwright Act was not a panacea for all the conflicts arising from governmental immunities. As late as 1928 the Supreme Court had held in *Panhandle Oil Co. v. Mississippi*[7] that a state was without authority to levy any kind of tax on sales made to the federal government. In the *Indian Motorcycle Co.* case,[8] decided shortly thereafter, the Court held that a federal excise tax could not be levied on motorcycles purchased by a state or one of its political subdivisions, if done in the exercise of a governmental function of the state, and not in its proprietary capacity.

Notwithstanding these decisions certain of the states insisted upon the application of their sales and use taxes to transactions entered into within their boundaries by such federal agencies as national banks and other federal agencies. In 1934 the Supreme Court held, however, in *Standard Oil Co. v. California*[9] that retail sales taking place in a post exchange on the Presidio constituted sales by an agency of the federal government and were not subject to the California license tax. As a result of this decision, as well as the strong opposition from federal purchasing agencies to such levies, the State of California amended its act so as to exempt virtually all sales to the federal government from the California tax.

Other states, such as Ohio, Michigan, Pennsylvania and Wisconsin, also took action either by act of the legislatures or through administrative regulations to exempt gasoline and motor fuels from sales tax

5. Minnesota v. Ristine, 36 F. Supp. 3 (D. Minn. 1940).
6. 54 STAT. 1060 (1940).
7. 277 U.S. 218 (1928).
8. Indian Motorcycle Co. v. United States, 283 U.S. 570 (1931).
9. 291 U.S. 242 (1934).

where they were sold to a federal agency or to a contractor working for the federal government. Up to 1940, in addition to these specific exemptions as to motor fuels, at least fifteen of the states had granted a general exemption from sales tax on all materials and supplies sold to federal government contractors, or used by them in carrying out government contracts.[10]

In the various decisions coming out of the courts, both state and federal, some very fine lines of distinction were drawn. In certain cases the courts stressed the fact that unless the agency involved were exercising a strictly governmental function no exemption from tax would be allowed.[11] In certain other cases the courts held that sales taxes might be imposed upon independent contractors performing services for the United States, but not upon cost-plus contractors, who were presumably acting as agencies of the federal government.[12] In other cases it was held that to grant such exemption from sales taxes imposed on contractors dealing with the federal government would cause unconscionable burdens upon the states, and hence should not be allowed.[13]

Some of the confusion arising from this line of cases was dispelled by the decision of the United States Supreme Court in the now ubiquitously cited *King & Boozer* case.[14] In that case the State of Alabama sought to impose its retail sales tax on King & Boozer, lumber merchants in Alabama supplying lumber on order of the contractor who was building, on a cost-plus basis, army camp buildings in that state. Two arguments were advanced by federal attorneys in opposing the tax: first, that the contractor was working under a cost-plus contract and hence was in legal effect an agency of the federal government; and second, that the economic burden of the tax was in effect imposed upon the government, which should not have its governmental operations curtailed by increases in costs.

The Supreme Court rejected both arguments. Regardless of the precise nature of the contract, the contractors were obligated to pay the tax as part of the total cost of the lumber. Hence, the contractors, not the government, were the actual purchasers. This obligation to pay the tax, said the court, was not relieved merely because they were acting in a loose sense on behalf of the government. Nor were they relieved of the obligation merely because the economic burden

10. The list included Arizona, Arkansas, Colorado, Illinois, Indiana, Iowa, Kansas, Michigan, Mississippi, New Mexico, North Carolina, Ohio, South Dakota, Utah and Washington.

11. Indian Motorcycle Co. v. United States, 283 U.S. 570 (1931), and cases cited therein.

12. Graves v. Texas Co., 298 U.S. 393 (1936) (sale of gasoline).

13. James v. Dravo Contracting Co., 302 U.S. 134 (1937) (state gross sales and income tax).

14. Alabama v. King & Boozer, 314 U.S. 1 (1941).

of the tax could be shifted by them to the government as the ultimate consumer. The contractors did not take on the character as agents of the federal government either to enter into contracts or pledge its credit. Thus the tax was not a levy on the federal government, and hence could invoke no governmental immunity.

The rationale of the *King & Boozer* case was as effective in the state legislatures and administrative agencies as it was in the courts. It was broad enough in its language virtually to eliminate the wide exemptions based on the theory of implied agency which had theretofore been accepted by the states. As a consequence, several state legislatures amended their sales tax acts eliminating the broad exemptions covering sales to contractors and other persons dealing with or on behalf of the federal government. Other states modified their administrative rules so as to eliminate the exemption except in special cases, as when the contractor is specifically authorized to act on behalf of a federal purchasing agency.[15]

As a result of its decision in the *King & Boozer* case the Supreme Court reviewed a number of later cases in which sales on government territory were involved. In *Query v. United States*[16] the State of South Carolina was attempting to impose its license tax on the privilege of selling certain articles upon sales made at army post exchanges located in that state. The precise question raised by the Supreme Court was whether the language in the Buck Act prohibited the imposition of the tax on the post exchange as "on or from the United States or any instrumentality thereof." The Court then held that a post exchange was an integral part of the War Department and partook of whatever immunities that Department had under the Constitution and federal statutes.

In the case of *Standard Oil Co. v. Johnson*,[17] the State of California sought to impose its license tax on vendors of gasoline and motor fuels, upon sales of such fuels made by regular distributors of Standard Oil Company to army post exchanges located in that state. The Supreme Court of California upheld the tax on the ground that a post exchange was not a federal agency but was related to it only in a contractual capacity. The United States Supreme Court held, however, that the establishment of post exchanges was a matter controlled by federal law; that under federal law and War Department regulations such exchanges have been made integral parts of the War Department and deemed by it to be essential for the performance of governmental functions, and share in fulfilling duties entrusted to that Department.

15. See the South Dakota Sales Tax Law, S.D. CODE § 57.3202 (Supp. 1952); New Mexico Gross Income Tax Act, N.M. STAT. § 72-16-5 (1953).

16. 316 U.S. 486 (1942).

17. 316 U.S. 481 (1942).

Hence the Court held that post exchanges are "arms of the government" and are not subject to state sales or license taxes on transactions arising from such operations.

A review of the more recent decisions of the federal courts dealing with the governmental immunities to sales taxes and similar license and excise taxes indicates that these courts are still somewhat uncertain as to the application of *James v. Dravo Contracting Co.*[18] and the *King & Boozer* case. On the one hand, the Supreme Court said in *Carson v. Roane-Anderson Co.*,[19] decided in 1952, that the State of Tennessee could not impose sales and use taxes on materials purchased and used by private contractors in performing contracts for the Atomic Energy Commission, since the Atomic Energy Act gives an express exemption from state and local taxation. Again, in *Federal Land Bank v. Bismarck Lumber Co.*[20] it was held that the broad exemption from taxation given by Congress to federal land banks would avoid the imposition of a North Dakota sales tax levied on sales of lumber for repair of its bank properties in that state. On the other hand, in *Black Hawk Consolidated Mines Co. v. Gallegos*,[21] the court held that a corporation engaged in selling gold and silver to the United States Government is not acting as an agency of the Government in making such sales and is subject to the New Mexico gross sales tax.

Taxing officials in most of the states which impose sales and license taxes are obviously uncertain as to the application of these rulings to federal transactions. In South Dakota the Attorney General has ruled that sales of tangible property to the Production Credit Corporations organized under the federal enabling act, are not to governmental agencies, but are to entities distinct from the federal government, and hence subject to sales taxes in that state.[22] On the other hand, the same office had ruled earlier that a soil conservation district was a governmental subdivision, and hence sales of materials and gasoline used by the district officials were not subject to sales taxes.[23]

One of the most interesting manifestations of this uncertainty on the part of state taxing officials is found in a case recently decided in Indiana. In that case the State of Indiana sought to impose its gross income tax (sales tax) on that portion of the receipts of a gasoline distributor which represented the federal gasoline tax. The taxpayer argued successfully that it was simply a collection agency for the federal government so far as the federal tax was concerned; that the amount collected could never become the property of the taxpayer,

18. 302 U.S. 134 (1937).
19. 342 U.S. 232 (1952).
20. 314 U.S. 95 (1941).
21. 52 N.M. 74, 191 P.2d 996 (1948).
22. Opinions Att'y Gen., South Dakota (Sept. 10, 1952).
23. Opinions Att'y Gen., South Dakota (Dec. 19, 1939).

and was, therefore, not includible in gross income subject to the Indiana tax. While that case was decided in favor of the taxpayer,[24] the State of Indiana refuses to acquiesce in the decision, and is now preparing a new case for presentation to the courts.

From the foregoing analysis of the leading cases on the subject of governmental immunities, it becomes apparent that there has been at least a modicum of homogeneity in the decisions of the various courts, both state and federal, involving this type of exemptions. There are perhaps two reasons for this. In the first place, the decided cases in the majority of instances have arisen in regard to a narrow and confined area of law, to-wit, the power of one sovereign state to lay a tax upon the sovereign functions of another state. In the second place, the legislatures in the various states have over the years and from time to time expressly recognized the principle of governmental immunity by the enactment of specific provisions granting the exemption in more or less uniform statutory language. This is particularly true of the sales and use tax statutes which have been enacted by the various states in the last twenty-five years.

As a result we find that the courts have not differed radically in their construction of the almost uniform wording found in the statutes. We find likewise that while there have been many divergences among the decisions dealing with particular items, this can be attributed largely to the factual situations, rather than to wide differences in the legal concepts of immunity and exemption from tax. In short, there has been very little variation in the decisions in the various states as to the meaning of the statutory language itself or as to the principles of law involved.

EXEMPTIONS ARISING UNDER THE COMMERCE CLAUSE

It goes without saying that the most prolific source of exemptions from sales and use taxes lies in the field of interstate commerce. It is natural that this should be so. The constitutional limitations against burdening or interfering with the flow of commerce between the states have been with us since the beginning, and have always occasioned controversy. This type of controversy began as early as the case of *Gibbons v. Ogden*,[25] and even in the earliest cases a distinction was made between taxes which imposed a direct burden on interstate commerce or which discriminated against interstate commerce, and those which could be said to merely affect such commerce.

It is a matter of constitutional history to observe that up until the

24. Associated Serv. Corp. v. Gross Income Tax Div., Superior Ct., Marion County, Ind., March, 1955.
25. 22 U.S. (9 Wheat.) 1 (1824).

depression of the nineteen thirties the provisions of the commerce clause had always been strictly construed, and almost invariably favored the preservation of the strongly federalist doctrines established by Justice Marshall. It was not until the courts began to feel the economic and social pressures of the depression-conscious state legislatures that a more liberal construction of the commerce clause appeared.

It is, of course, elementary and the courts have always recognized that not all forms of taxation constitute control or regulation over interstate commerce. The courts had said that "even interstate commerce must pay its way," and the bare fact that a person is engaged in such commerce does not relieve him of all taxes simply because they add to the cost of doing business.[26]

Nevertheless the first important departure from the strict rules of the John Marshall school did not occur until the early nineteen thirties. In two cases arising in South Carolina[27] and in Iowa,[28] each involving state taxes imposed upon the sale and storage of gasoline, the Supreme Court held that gasoline imported from other states for use in supplying interstate carriers was subject to a sales tax or license tax which applied equally to all users of gasoline, and did not discriminate against interstate commerce. In the *Monomotor Oil* case,[29] the Court said that it would no longer treat as a burden on commerce a license fee imposed on all motor fuel sold or disposed of in Iowa, regardless of where the shipments originated, or whether interstate shipments by a local distributor were made direct to local consumers from outside that state. The Iowa license fee was in its effects, of course, no less than a sales tax on the commodities sold.

The next step in the development of this new doctrine was to hold that after property transported in interstate commerce has become part of the common mass of property within a state it may be subjected to a tax by that state imposed upon the use or consumption of such property. The Supreme Court made that decision in *Henneford v. Silas Mason Co.*[30] in 1937 and sustained the right of the State of Washington to impose a compensating use tax on all articles imported into that state which would have been subject to sales tax if purchased within the state.

Shortly thereafter the Supreme Court of Alabama broadened the doctrine again in the case of *Graybar Electric Co. v. Curry.*[31] In that case the State of Alabama imposed a license tax on local retail dealers measured by gross receipts of the dealer from sales.

26. Western Live Stock v. Bureau, 303 U.S. 250 (1938).
27. Eastern Air Transp. v. South Carolina Tax Comm'n, 285 U.S. 147 (1932).
28. Monomotor Oil Co. v. Johnson, 292 U.S. 86 (1934).
29. *Ibid.*
30. 300 U.S. 577 (1937).
31. 238 Ala. 116, 189 So. 186, *aff'd,* 308 U.S. 513 (1939).

An Alabama dealer took an order from a local customer for certain articles to be shipped f.o.b. from the manufacturer in Ohio directly to the Alabama customer. The Court held that the amount of such sales was includible in the gross receipts of the dealer and hence subject to the tax, even though the effects of the tax were to increase the cost of doing business. The case was appealed to the United States Supreme Court, and was affirmed without opinion.[32]

Meanwhile the Supreme Court had rendered another decision which, although it dealt with a privilege tax, opened the door to a further extension of the new doctrine. In the case of *Western Livestock v. Bureau of Revenue*,[33] the State of New Mexico imposed a license tax on publishers of magazines in that state measured by the gross sales of advertising space. The Court held the tax was valid even though the magazines were mailed and distributed in interstate commerce, under the theory that the preparation, printing and publishing constituted a local business activity, distinct from its circulation in commerce, and that the burden on such commerce was too remote to call for a rigid application of the rule prohibiting the use of gross receipts from interstate commerce as the measure of a tax.

The Supreme Court had now laid the groundwork for an even further extension of the doctrine permitting the taxation by the states of property actually flowing in the channels of interstate commerce. The opportunity to make such a decision appeared in the well-known case of *McGoldrick v. Berwind-White Coal Mining Co.*[34] In that case the City of New York imposed its sales tax on coal mined in Pennsylvania, sold by the mining company through its offices in New York City through salesmen and telephone contacts working in such offices. The Supreme Court held *inter alia:*

(1) That a sales tax levied on every purchaser of merchandise in a state regardless of the source of the merchandise does not violate the commerce clause merely because it has moved in interstate commerce immediately before transfer of possession to the purchaser.

(2) That a sales tax conditioned on delivery of possession to a purchaser within a state is based upon a local business activity which, apart from its effect on interstate commerce, is subject to the taxing power of a state, and hence such a tax does not discriminate against interstate commerce.

(3) That such a tax has no different effect upon interstate commerce than a tax on the *use* of property which has just been moved in the channels of commerce. Citing *Monomotor Oil Co. v. Johnson*.[35]

32. 308 U.S. 513 (1939).
33. 303 U.S. 250 (1938).
34. 309 U.S. 33 (1940).
35. 309 U.S. at 49, 55, 58.

In the companion case of *McGoldrick v. Felt & Tarrant Mfg. Co.*[36] a somewhat different situation was presented. There an Illinois manufacturer of business machines sold them to customers in New York City through offices located there. The orders were sent to Illinois for acceptance, and the machines shipped directly to the purchasers, who remitted by check to the Illinois office. The Court held that such sales were subject to the New York City sales tax for the same reasons cited in the *Berwind-White* case, and that such a tax did not "lay an undue burden on interstate commerce."

There can be no doubt whatever but that the transactions in the *Berwind-White, Felt & Tarrant* and *Du Grenier*[37] cases, all involved sales which would have been considered as interstate commerce a decade or so previously. In contemporary cases the Court even went so far as to treat a sale of merchandise ordered by telephone from New York City to a coal company in New Jersey as subject to the New York City sales tax.[38] It is difficult to fathom the nature of the business activity to which the tax could attach in such cases.

The utilization of a compensating use or consumption tax to protect local vendors against competition from other states received recognition first by the courts in the State of Washington. In *Vancouver Oil Co. v. Henneford*[39] the court sustained a use tax broadly imposed on all forms of personal property, holding that the tax was not a property tax, but an excise tax and hence free from constitutional limitations on property taxes. The court also held that the tax was not a burden on interstate commerce since it was imposed only after the flow of interstate commerce had ceased. In *Southern Pacific Co. v. Gallagher*[40] the United States Supreme Court upheld a similar tax in California, holding that there was no discrimination against interstate commerce so long as the use tax was imposed on the same basis as the sales tax which was imposed upon California vendors. To the same effect was the California case of *Pacific Telephone & Telegraph Co. v. Gallagher*.[41]

From the foregoing analysis of the cases up to 1940, it will be seen that the courts had developed two distinct lines of reasoning; one in support of the imposition of sales and license taxes, and the other in support of the imposition of use taxes. In general, as to sales taxes and license taxes related to sales, the Supreme Court of the United States had adhered to the following principles:

36. 309 U.S. 70 (1940).

37. McGoldrick v. A. H. Du Grenier, Inc., 309 U.S. 70 (1940) (companion to the *Felt & Tarrant* case).

38. Jagels v. Taylor, 309 U.S. 619 (1940).

39. 183 Wash. 317, 49 P.2d 14 (1935).

40. 306 U.S. 167 (1939).

41. 306 U.S. 182 (1939).

1. The mere movement of property in interstate commerce is not enough in itself to command exemption from taxation.
2. A state sales or license tax which is imposed upon some local business activity or event and is applicable to all such transactions on the same basis, does not discriminate against interstate commerce.
3. A state sales tax laid generally on all sales in the state regardless of the source of the property does not unduly burden interstate commerce, where its only relation to interstate commerce arises from its transportation therein immediately prior to delivery to the customer.

In general as to use and consumption taxes, the Court had made the following determinations:

1. The movement of property in interstate commerce terminates when it comes to rest within a state and becomes part of the common mass of property therein.
2. A tax on the use, consumption or storage of such property after termination of an interstate movement is not imposed upon that commerce, and hence is not a burden upon it.
3. Such a tax imposed upon the same basis and same rates as a sales tax upon the same kind of property within the state is a compensating tax which does not discriminate against interstate commerce.

Since 1940 a somewhat different trend has appeared in the decisions of the courts dealing with both sales and use taxes. In the area of sales (and license) taxes the cases fall into two categories, *i.e.,* (1) those in which the property sought to be taxed moves from the taxing state to purchasers outside the state, and (2) those in which the property moves from vendors outside the taxing state to purchasers inside that state.

In the case of property moving from the taxing state to purchasers outside, the trend of decisions seems to be toward exempting all such transactions from tax.[42] In such cases, as foreshadowed in prior decisions, the courts have insisted that there must be a legal obligation assumed by the vendor to deliver or cause delivery of the property to the vendee outside the taxing jurisdiction. In such cases it is immaterial whether the property is shipped f.o.b. point of origin, or freight prepaid to destination. It is likewise immaterial where legal title to the property can be said to have passed in such cases.

In the case of property moving from vendors outside the taxing state to vendees within the taxing state, the trend toward unlimited application of such taxes has apparently wavered. In the case of *McLeod v. J. E. Dilworth Co.,*[43] decided in 1944, the United States Supreme Court affirmed the Supreme Court of Arkansas in holding invalid a sales tax imposed upon merchandise manufactured in Tennessee and shipped to purchasers in Arkansas, pursuant to orders taken by telephone or by travelling salesmen. The Court distinguished

42. Crew Levick Co. v. Pennsylvania, 245 U.S. 292 (1917).
43. 322 U.S. 327 (1944).

the *Berwind-White* case on the ground that the Berwind-White Company maintained sales offices in New York City and made physical delivery of the coal there, while in the present case the vendor's offices were in Tennessee, the sale was consummated in Tennessee and delivery was made in Tennessee in interstate commerce yet to flow. Thus the Court based its decision ultimately upon the fact that the "transfer of ownership" took place outside the taxing state.

A more noticeable trend away from the unlimited application of sales taxes came a few years later in the decision of the Supreme Court in the case of *Norton Co. v. Department of Revenue.*[44] In that case the Norton Company, a Massachusetts corporation, having a branch office in Chicago, made sales to its Illinois customers directly and also took orders for merchandise to be manufactured and shipped from Massachusetts to Illinois customers. In certain instances orders were taken and shipment made from the Chicago warehouse. The State of Illinois sought to apply its retailers' occupation sales tax to all sales made by Norton Company in that state. The Supreme Court denied the right to tax any part of the taxpayer's sales which were not consummated in Illinois. Said the Court, in a significant withdrawal from its previous language:

> Where a corporation choses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling and delivery back to the buyer, it is obvious that the state of the buyer had no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable.[45]

Thus the Court has now returned to the much earlier doctrine that where the taxpayer "could have approached the Illinois market through solicitors only . . . it would have been entitled to the immunity of interstate commerce" as to all its sales.[46]

The Supreme Court has shown a still more definite trend away from the unlimited application of state sales taxes in a series of cases beginning with *Spector Motor Service v. O'Connor,* decided in 1951, followed by *Memphis Steam Laundry v. Stone* in 1952, *Michigan-Wisconsin Pipe Line Co. v. Calvert* in 1954 and *Railway Express Agency v. Virginia* in 1954.[47] In each of these cases a license or privilege tax was involved, based, however, upon gross sales or receipts from doing business in the state. In each case the Supreme Court denied the right to tax in language *somewhat* as follows:

44. 340 U.S. 534 (1951).
45. *Id.* at 537.
46. *Id.* at 538.
47. Spector Motor Serv. v. O'Connor, 340 U.S. 602 (1951); Memphis Steam Laundry v. Stone, 342 U.S. 389 (1952); Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954); Railway Express Agency v. Virginia, 347 U.S. 359 (1954).

> It is enough to say that we have recently ruled that local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state license, privilege or occupation tax.

In the area of use taxes a somewhat more drastic change in the trend of judicial opinion has occurred. This change of trend has come about largely by reason of the imposition of obligations to collect and remit taxes levied on foreign corporations. Up until a few years ago it was assumed that a state could impose virtually any type of condition upon a foreign corporation entering to do business in that state.[48] For a good many years the various states took advantage of this and imposed upon foreign corporations the obligation to collect and remit use taxes.

In several cases prior to 1941 the Supreme Court had sustained the right of the state to require such compliance with its use tax statutes. That was precisely the holding of the Court in the *Monomotor Oil Co.* case; the case of *Henneford v. Silas Mason Co.* reemphasized the rule.

In the case of *Nelson v. Sears Roebuck & Co.*[49] the Supreme Court had held clearly that a mail order house licensed to do business in Iowa may be required to collect and remit an Iowa use tax on mail orders sent in to the Chicago warehouses of the taxpayer, even though such orders were in no way solicited or obtained through local business activities in Iowa. The Court said that the unsolicited mail orders were part of the "full benefits" derived by the taxpayer from its aggregate of business activities in the state and hence subject to the use tax. To the same effect was the decision in *Nelson v. Montgomery Ward.*[50]

As already pointed out in reference to sales taxes, *supra,* the early decisions of the United States Supreme Court exempted from taxation the bare solicitation of orders in a taxing state, whether by mail, telephone or traveling salesmen.[51] As a result of depression-years psychology the Court changed its approach and held that where a foreign corporation maintains offices in a taxing state from which its representatives solicit orders, make adjustments, etc., the state may impose a use tax on such orders and require the corporation to collect and remit such taxes.[52] In *General Trading Co. v. Tax Commission*[53] the United States Supreme Court held that even where the corporation had no offices in Iowa and merely sent traveling representatives

48. Southern Pac. Co. v. Gallagher, 306 U.S. 167 (1939) (tax).
49. 312 U.S. 359 (1941).
50. 312 U.S. 373 (1941).
51. International Harvester v. Kentucky, 234 U.S. 579 (1914).
52. West Publishing Co. v. Superior Court, 20 Cal. 2d 720, 128 P.2d 777 (1942), *cert. denied,* 317 U.S. 700 (1943).
53. 322 U.S. 335 (1944).

into the state, the use tax could be imposed since it was "a familiar and sanctioned device."

It is quite apparent now that this trend in applying use taxes has reached its high water mark and is receding. In the very recent case of *Miller Bros. Co. v. Maryland*,[54] taxpayer, a Delaware manufacturer, sent its delivery trucks into Maryland to deliver merchandise, ordered personally or by mail orders sent to the vendor's offices in Delaware. No offices or warehouses were maintained in Delaware and no salesmen were sent in. The Supreme Court reversed the Supreme Court of Maryland which had followed the *General Trading* case, and had sustained the tax. The Supreme Court held in a surprise decision that no state has a right under the fourteenth amendment to require a foreign corporation to pay or collect a use tax where it was not engaged in direct selling in that state.

The effect of the Supreme Court's decision in the *Miller Bros. Co.* case is problematical. That decision may easily be given several different interpretations, thus: (1) It may well reflect a growing realization of the Court that a further broadening of the principle of taxation embraced in the *General Trading* Co. case might lead to profound and undesirable economic dislocations. (2) It may be construed as the first effort of the Court to differentiate between the methods of merchandising which subject one to taxation in a state from methods which do not. (3) It may reflect only a change in the complexion of the Court, since Justice Jackson, who wrote the dissenting opinion in the *General Trading Co.* case, wrote the majority opinion in the *Miller Bros. Co.* case.

In all likelihood the decision actually reflects a point of view embracing all three of the foregoing postulates. Justice Jackson was frank enough to say in the *Miller Bros. Co.* opinion that:

> Our decisions are not always clear as to the grounds on which a tax is supported, . . . nor are all of our pronouncements during the experimental period of this type of taxation consistent or reconcilable.[55]

Such language is quite an admission from that Court. On the other hand, Justice Jackson also said:

> [T]here is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising. Here there was no invasion or exploitation of the consumer market in Maryland.[56]

If the *Miller Bros. Co.* decision means what it says, the principal import of the case to the public is apparently that in order for a taxing

54. 347 U.S. 340 (1954).
55. *Id.* at 344.
56. *Id.* at 347.

state to acquire jurisdiction to compel a foreign corporation to collect and remit use taxes there must be active and continuous solicitation made directly in the state by salesmen or agents of the corporation. If such solicitation results in actual sales, the other activities or events usually concomitant in consummating the transaction are more or less immaterial. Even that, however, would constitute a departure from the much earlier doctrine that the mere solicitation of business in a taxing state, without more, is not sufficient to subject a foreign corporation to use tax, or even to a service of process in that state. Such was the holding of the Supreme Court in the relatively obscure case of *Peoples Tobacco Co. v. American Tobacco Co.*,[57] decided in 1918.

All of the many controversies in the field of interstate commerce which have plagued both state and federal courts have arisen out of administrative or judicial interpretation of a single provision in the Federal Constitution—the commerce clause, which is a single sentence of article I, section 8. It can be said, therefore, that we have had uniformity from the beginning so far as basic legislation is concerned. The very fact that this is so gives rise to a serious question as to whether mere statutory uniformity between the several states as to other types of exemptions could be relied upon to produce satisfactory results.

The least that can be said in respect of the myriad interpretations of the commerce clause is that they represent a growing concept of enlarged governmental responsibility in the regulation and control over all forms of commerce. The growth has not been a consistent or steady one and it has been influenced by as many political considerations as economic ones. Which again causes us to pause and wonder if the mechanics of administration of tax exemptions will ever be able to counter-balance the many other factors which must also be weighed.

EXEMPTIONS ARISING FROM TAXING POLICIES AND SOCIAL AND ECONOMIC CONSIDERATIONS

As already suggested above, the very fact that sales and use tax exemptions based on governmental immunity and on the commerce clause have arisen out of the same relationship to the federal government in the case of each of the states—this fact alone has been responsible for a considerable amount of uniformity in the statutes of the various states granting such exemptions. There is also the further fact that the doctrine of exemption by reason of governmental immunity or by reason of the provisions contained in the commerce clause of the United States Constitution has been in process of formu-

57. 246 U.S. 79 (1918).

lation ever since the Constitution became effective. As a result the process of formulation has of itself become a process of clarification likewise, to a very considerable extent.

Quite the contrary is true of the statutes in the various states which have created exemptions arising from political policies and the socio-economic policies that have prevailed in those states. In this situation there has been present very little of the leveling influences which might have tended toward a uniform treatment of such exemptions. In addition to that, the sales and use tax statutes creating this type of exemptions are of much more recent vintage, and have not had the time to develop a period of mellowing and adjustment to each other.

As a consequence we find that it is in this area of political and social exemptions that the greatest divergencies appear. It should be noted that the earliest sales tax law still in effect among the states was not enacted until 1929,[58] and that it was not until the mid-nineteen thirties that the majority of the present sales and use tax statutes were enacted.[59] A number of these acts were enacted in the early nineteen forties, which also saw the sales tax movement spread to the municipalities in certain states. A few more have appeared even more recently, such as the Florida and Georgia sales and use tax acts which became effective November 1, 1949, and April 1, 1951, respectively.

At a time when general sales taxes have developed into the most stable form of taxation upon which the post-war economic recovery of Western Europe has been based, and when those taxes promise to become the principal sources of revenue in countries having such great diversities in their social and economic policies as Sweden and Spain, for example—it seems expedient to re-examine the divergencies in these social and economic policies among our own states. A recent study of the problem as it applies to the Western European countries appeared in recent issues of the *National Tax Journal*.[60] The author seems justified in his conclusion that multiple-stage sales taxes at a very low rate and applied on what is virtually an exemptionless basis, have afforded a very satisfactory medium for the reconstruction of Western Europe from two world wars, and an intervening period of world-wide depression.

While the economic and political conditions in Western European countries do not seem to warrant a direct comparison, the fact remains that sales and use taxes in virtually the same form now furnish more than half the annual revenues in a number of our own states,

58. West Virginia. An earlier act (1921) was repealed.

59. For example: Arizona, 1933; California, 1933; Colorado, 1935; Illinois, 1933; Iowa, 1933; Indiana, 1933; Michigan, 1933; Ohio, 1933.

60. Due, *Sales Taxation in Western Europe,* 8 NAT'L TAX J. 171, 300 (1955).

and have done so consistently over a substantial number of years. These taxes also provide a large part of the revenues in all of the other states which impose them.[61]

On the face of a simple comparison, it seems doubtful if these diversities as expressed in the exemptions in the Western European countries could rival those that appear in the lists of exemptions granted in our various states. For example, the State of Alabama, which enacted both a sales and use tax law in 1940, grants some nine broad areas of exemption, including farm products, farming tools, implements and fertilizer, newsprint, textbooks, tobacco products, motor fuels, and foodstuffs; while the State of Arkansas, its near neighbor, in its first sales tax law enacted in 1941, exempted only agricultural products from the above list. The present Arkansas law, which was enacted in 1947, broadens the list of exemptions to some extent.[62] In the State of Ohio the area of exemptions is again a broad one, covering some twenty categories, while in the adjoining State of Indiana virtually all types of sales are subject to the gross income tax.

The legal basis for the various types of exemptions is such that it would be difficult to challenge them. It is clear that the right of the several states to levy sales or use taxes on certain types of transactions may be seriously curtailed by constitutional limitations.[63] On the other hand, the right of a state to exempt specific items of property or specific transactions from such taxes appears to have few constitutional or legal restrictions.[64] It seems to be within the legislative power to determine what transactions shall be subject to tax, and by corollary what transactions shall not be the subject of taxation.[65] Thus, notwithstanding a prior provision in the general statute conferring a broad exemption on casual sales, the legislature may by appropriate amendment narrow the exemption so as to subject specific transactions to the tax, or may authorize the tax commissioner so to do.[66]

It is, of course, a truism that the acts which have conferred the broadest areas of exemption from sales and use taxes have created the most difficult problems of enforcement and collection. The Ohio act is an outstanding example of this. The Ohio law now contains some fourteen categories of sales which are specifically exempt from the tax. In addition to that, however, the actual area of exemption is considerably broadened by certain exceptions to the definition of a

61. See the tabulation in THE ECONOMIC ALMANAC 595-96 (1952).
62. Such as limited sales to charitable organizations, sales of food in schools, sale of newspapers, tobacco products and farm products.
63. Haefner v. Youngstown, 147 Ohio St. 58, 68 N.E.2d 64 (1946); Andrews v. Tax Comm'n, 135 Ohio St. 374, 21 N.E.2d 106 (1939).
64. State *ex rel.* Foster v. Evatt, 144 Ohio St. 65, 56 N.E.2d 265 (1944); Fox v. Frank, 52 Ohio App. 483, 198 N.E. 873 (1935).
65. King's Grill v. Evatt, Ohio B.T.A. No. 954 (1941).
66. OHIO DEP'T TAXATION, CIRCULAR No. 1 (May 10, 1955).

retail sale. Among these exceptions are those where the purpose of the consumer is (a) to resell; (b) to incorporate into other tangible property, or to use or consume in the production of other tangible property which is to be sold; (c) to use as security for the performance of an obligation of the vendor; (d) to use or consume in certain personal services; (e) to use or consume as evidence of a contract of insurance; and (f) to use or consume in commercial fishing.[67]

It is in this area of exceptions and exemptions covering industrial use and consumption that the courts in all the states have had the greatest difficulty. Whether or not the item in question is to be used or consumed directly in the production of tangible personal property for sale by manufacturing, processing, refining, mining or in the production of crude oil and natural gas, farming, agriculture, horticulture or floriculture becomes a distressing and involved question of fact in practically every situation that is at all controversial. The courts of Ohio, for example, have been dealing with this sort of statutory language for some twenty years with a singular lack of success in settling the issue. The reader who is interested in following the development of this administrative problem in Ohio will find an analysis of the leading cases in the footnote below.[68]

---

67. OHIO CODE ANN. § 5546-1 (Throckmorton 1940).

68. As originally enacted by the Ohio General Assembly, the language read as follows: "to use or consume the thing transferred directly in the production of tangible personal property for sale by manufacturing, processing, refining, mining . . . production of crude oil and natural gas, farming, agriculture, horticulture, or floriculture."

In *Saunders Mills v. Evatt,* 139 Ohio St. 227, 39 N.E.2d 526 (1942), the Supreme Court of Ohio held that a purchase of motor trucks to haul alfalfa from fields to a processing plant, was subject to sales tax because the trucks were engaged solely in transporting prior to the actual process of dehydration.

In *Bailey v. Evatt,* 142 Ohio St. 616, 53 N.E.2d 812 (1944), the court receded somewhat and held that motor equipment, shovels, etc., used in stripping soil from gravel deposits to be mined later by a different method was excepted from taxation because it was used directly in the mining process.

In *France Co. v. Evatt,* 143 Ohio St. 455, 55 N.E.2d 652 (1944), the court held that dump cars used in hauling crushed stone from a screening plant to adjacent yards where it was washed and mixed were exempt from tax under the theory that the washing and mixing were part of one continuous process of manufacture.

In *Dye Coal Co. v. Evatt,* 144 Ohio St. 233, 58 N.E.2d 653 (1944), the court held that trucks used by a mining company to haul coal from pits to tipples where the coal was cleaned and graded was exempt from tax as "used or consumed directly in mining."

In *Kroger Grocery & Baking Co. v. Glander,* 149 Ohio St. 120, 77 N.E.2d 921 (1948), the court held that the wrappers and containers used in producing and selling bread were excepted from the tax because such items rendered the product more suitable for marketing.

In *Fyr-Fyter Co. v. Glander,* 150 Ohio St. 118, 80 N.E.2d 776 (1948), the court held that a sale of fire extinguishers to a coal company was a taxable sale because such equipment was not used directly in the production of the taxpayer's products for sale by mining. The court, for the first time, said that the word "directly" was intended to narrow the exemption to a point where only an item which was indispensable to and usually employed in the business could be deemed to come within the exception.

In *Terteling Bros., Inc. v. Glander,* 151 Ohio St. 236, 85 N.E.2d 379 (1949), the court held that machinery and equipment used by a company under a strip

The courts have had equal difficulty in their attempts to determine when an item is "used directly in making retail sales," or is "used directly in the rendition of a public utility service." These are areas which are free of sales taxation in many states, either by exceptions to the definition of what constitutes a sale, or by specific exemption. Again, the State of Ohio may be cited as an example in which courts have been entangled for years in an effort to apply a statute, which seems more vague and indefinite with each interpretation. A short analysis of the leading cases in Ohio is contained in the footnote below.[69]

---

mining contract on the land of a public utility company which took the coal at the contract price, was not subject to sales tax, the latter being engaged in rendering a public utility service.

In *Tri-State Asphalt Corp. v. Glander,* 152 Ohio St. 497, 90 N.E.2d 366 (1950), the court went to the other extreme and held that cranes and like machinery used to move the materials of taxpayer to a central location where the mixing process began, were not used directly in the production of the asphalt because they were not part of the actual process, and hence were subject to the tax.

In *Mead Corp. v. Glander,* 153 Ohio St. 539, 93 N.E.2d 19 (1950), the court apparently realizing its departure from the normal, held that cranes and equipment used primarily in moving woodpulp from storage to the processing mill, but also used for other purposes, were exempt from sales tax regardless of the incidental or secondary uses, and even though the transportation took place prior to the actual processing.

69. One of the earliest decisions dealing with this problem was a ruling of the Ohio Department of Taxation, issued in 1935 (Tax Commissioner's Rulings, 1935), holding that table linens sold to a restaurant were exempt as "used directly in making retail sales."

On the other hand, in *Sales Tax Bulletin No.* 73 (1936), the Department ruled that none of the equipment used by a retail store in its rest rooms was used to "consummate retail sales," but merely as a convenience to customers, and therefore not exempt.

In a similar ruling, No. 80 (March, 1937), it was held that printed matter such as advertisements or sales bulletins were not "used directly in making retail sales," unless the final use is such as to assist in *consummating* retail sales and not merely to *promote* sales; but that such items used in the sales rooms would be presumptively exempt of tax.

In a later ruling, No. 43 (revised in October, 1947), this presumption was eliminated, and taxpayers were required to offer evidence as to the final use.

In *Tax Bulletin* (1937), at 21, the Tax Commissioner ruled that cash registers and accounting machines were not taxable when actually used on "retail premises."

In *Cincinnati Hotel Co. v. Evatt,* Ohio B.T.A. (Sept. 20, 1940), it was held that forms used to inventory and check food supplies in a restaurant were taxable because not used directly in the sale of the meals.

In *John Mark, Inc. v. Evatt,* Ohio B.T.A. (Feb. 1945), the Board held that the equipment in a dining car moved on wheels to a leased location and used to prepare meals for sale to the public, was exempt from tax as property used directly in making retail sales of meals.

In *International Harvester Co. v. Glander,* Ohio B.T.A. (Nov. 1945), it was held that a fleet of trucks purchased for use to make retail sales and deliveries of ice to the public was exempt, even though part of the sales of ice were to commercial users (a non-exempt use).

In *Kroger Grocery & Baking Co. v. Glander,* 149 Ohio St. 120, 77 N.E.2d 921 (1948), the Supreme Court of Ohio held that a carton and a bag used to place around ice cream and like products to protect against thawing on the way to customers' salesrooms were used directly in the making of such sales, and hence were exempt.

In *Crowell-Collier Publishing Co. v. Glander,* 155 Ohio St. 511, 99 N.E.2d

A brief examination of these cases provokes two interesting observations. In the first place, it is of interest to note that the Ohio statute was designed to cover several situations, each differing from the others as to their character and as to purpose. A sale made to a purchaser whose purpose is to use the article in the production of property for sale by manufacturing, processing, etc., obviously differs in kind and character from a sale of the article to a purchaser whose purpose is to use the article in making retail sales. Nevertheless the statute fails to take these factual differences into account in prescribing what amounts to a blanket type of exemption.

In the second place it should be noted that the decisions of the courts in Ohio have failed to take these differences into account in applying tests of taxability in the various types of cases that have been presented. In the decisions dealing with sales of an article to be used in industrial processing or manufacturing, for example, will be found citations and tests of taxability dealing with sales where the article is to be used in making retail sales. It seems too obvious for comment that the tests of taxability of a sale for use in industrial processing would have no bearing whatever on a sale where the purpose was to use the thing sold for making retail sales, or rendering a public utility service, or to incorporate it into other property, or to use it in industrial cleaning or like services, or to resell it as such. The irrelevance of cases dealing with any one of these purposes to cases dealing with the other purposes seems apparent to the tax practitioner.

One point is, of course, that it is difficult if not impossible to cover the exemptions from taxation in a wide range of activities with one definition for all the types of activities which are involved. The making of a sale at retail is a completely different sort of activity from rendering a public utility service. It is difficult to understand how a legislature could apply the same definition of taxability in both situations.

A second point is that by applying the same tests of taxability to widely different types of activities the courts have become confused as to the areas in which the particular test of exemption should be applied. As a result the cases which were a precedent for one type of

649 1951), the Ohio Supreme Court held that self-addressed envelopes and container envelopes are exempt as used directly in making retail sales of magazines.

On the other hand, in *Elder & Johnson v. Glander,* 156 Ohio St. 445, 103 N.E.2d 392 (1952), the same court held that advertising mats and engravings used in newspaper advertising of similar products were taxable.

To refine the rule still further, the Ohio Department of Taxation held in *Circular* 21 (Aug. 31, 1954), that advertising matter sold to a mortician was exempt if it advertised only sales of coffins, but taxable if it advertised funeral services also.

activity have been erroneously cited in support of an entirely different kind of activity.

This statutory vagueness in defining what shall constitute a retail sale and what is excepted or exempted from taxation is true of the language found in the majority of the states imposing sales and use taxes. In Oklahoma, for example, the statute lists a series of about twenty exemptions, somewhat comparable to the exemptions and exceptions under the Ohio statute, but with even more summary treatment so far as the statutory language is concerned.[70] In Colorado the statute, while purporting to tax all retail sales other than that sold for resale, then proceeds to list some twenty odd areas of exempt sales in a series of sections analogous to the Oklahoma statute.[71] Needless to say, the administrative agencies and the courts in these states have had endless difficulty in attempting to apply the exemptions.

In California the statute contains numerous sections excluding certain persons, occupations and professions from the definition, plus a list of specific types of transactions as exempt from the tax.[72] The general theory of exclusions is that the occupation or profession is a consumer of the materials sold, and is not a retailer, hence is not subject to the tax. The list of exemptions includes agricultural products, commercial fishing, newspapers, publications, occasional sales, meals served in businesses and institutions, and a host of miscellaneous food products. The statutory language granting the exemptions was conceived over a substantial period of time, and is based upon such incongruous premises that the courts of California have been plagued with more cases asking for clarification of the exemption than any other state.

The statutes of Wyoming and Alabama appear to qualify those states as having the most numerous exemptions from both sales and use taxes.[73] It is of interest to note that the per capita sales tax collections in both states have ranked consistently low in comparison with states having fewer exemptions, and the general efficiency of this form of taxation as a revenue producer has ranked likewise.

In conclusion it should be observed that in those states where sales and use taxes have become substantial sources of revenue the primary concern of the administrative officials has been with regard to exemptions. This has become increasingly so in the post-war years since 1945, when virtually all those states have been forced into greatly expanded governmental functions with no corresponding ex-

70. 68 OHIO STAT. § 1251d (1941).
71. Carpenter v. Carman Distributing Co., 111 Colo. 566, 144 P.2d 770 (1943).
72. CAL. REV. & TAX. CODE §§ 635-685 (Deering 1952).
73. Wyoming has a combined total of at least twenty-two kinds of exemptions. Alabama has a total of twenty-one, plus various exceptions.

pansion of the sources of revenue. Definite efforts are being made by the tax administrators in many states either to reduce greatly the areas of exemption or to eliminate them altogether, in favor of a reduction in the rate of taxation. It would appear, therefore, that unless the imponderable arguments of political consideration take over, the virtual elimination of exemptions in this area may win out in the race with uniformity.