INTERSTATE BARRIER EFFECTS OF THE USE TAX

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During the past decade many types of legislative barriers have been erected to obstruct the marketing processes. Some were directed to specific commodities such as oleomargarine, dairy products, and liquor, while others were intended to protect local trade channels and methods of distribution against the incursions of outside agencies such as chain stores, mail-order houses and itinerant merchants. Among the latter measures is the use tax. It is singled out for study in this article, first because of the many erroneous impressions that exist concerning it, and second because of the legal-economic problems which it raises.

Origins of the Use Tax

The use tax is a levy upon the privilege of using, storing or otherwise consuming tangible personal property within a given state. It appears to be an attempt by state legislatures, when operating under significant pressures, to complement the sales tax and so to eliminate an obstacle which, it is alleged, seriously interferes with the enforcement of the primary sales tax law. The proponents of use taxes may be divided into two distinct groups, one concerned with the protection of revenue and the other with the protection of business.

Protection of Revenue

The widespread adoption of sales tax laws was largely the result of shrinking revenues accompanied by expanding demands for expenditures on the part of the states for welfare, aid to municipalities, and relief from the pressure on the real property tax base. It then became possible, by making retail purchases outside the state, to avoid payment of the sales tax. Consequently many state tax administrators, whose first duty is the collection of state revenues and who are inevitably jealous of encroachments upon their revenue sources, align themselves with the proponents of use taxes on the ground that such a law will discourage purchasing outside the state as a means of avoiding the sales tax.

Just how extensive the alleged loss in sales tax revenues may be is difficult if not impossible to ascertain. Certainly a large volume of business went to out-of-state firms before states began to adopt sales taxes, and to say that all such business was "lost" to a state immediately upon adoption of its sales tax would be absurd. The

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only revenues which can be considered "lost" are the receipts which might have been obtained upon those purchases intentionally made elsewhere to avoid payment of sales tax. However, if the many utterances on this revenue aspect are taken as a guide, apparently tax officers usually estimate their lost revenue on the total purchases made outside the state.

Even if attention be focused upon those purchases made out of state for the primary purpose of avoiding sales tax, it is virtually impossible to ascertain their volume. The most palpable cases of wholesale tax avoidance would seem to arise whenever cities are situated on opposite sides of a state line and in close proximity to each other. Then a real incentive might develop for purchasing in that market which has no sales tax, the larger and more expensive commodities such as furniture, clothing, autos and machinery. Some attempts have been made to estimate quantitatively the volume of business which shifts as a result of a sales tax in one of two contiguous cities.[1] Isolated surveys, although by no means conclusive, suggest that the amount of diversion due to the sales tax is extremely small and the corresponding loss of revenue negligible. Information furnished the author by a leading mail-order concern confirms this fact; it reported "no noticeable increase in mail-order sales when a state passed a sales tax law."

Protection of Business

The second large group supporting the use tax as a supplement to the sales tax consists of retail merchants and those who must compete with firms located in other states. Most of the contentions advanced by use tax adherents fall into this category and much of the appeal for popular support has been based on protection to local business, with all of its variations. Space does not permit tracing the steps by which the argument, beginning on revenue grounds, is gradually shifted until finally it declares the necessity of protecting intrastate enterprise from unfair competition—a far cry from pure revenue considerations.[2] To some observers this emphasis represents a recrudescence of the old protectionist bias, which is now being extended to specific states and their subdivisions.[3] Behind almost every trade-barrier law, however, there is a mixture of motives: revenue, protection of industry, welfare consideration and others. Consequently, to dispose of all so-called trade barriers as a logical extension of the old protectionist dogma would greatly oversimplify the problem and ignore some of its far-reaching ramifications.

The protection argument has been advanced to make the sales tax more acceptable to the retailers who must undergo considerable expense and inconvenience in col-

[1] N. D. Tax Survey Comm., *Report No. 7* (1936).

[2] The final statement of this position is to be found in such passages as the following taken from the Mississippi Compensating Tax Law, Miss. Laws 1938, c. 114, §1: "The primary purpose of this Act is hereby declared to be to protect the merchants, dealers, and manufacturers of Mississippi who operate under the privilege tax laws, against the unfair competition of importations into Mississippi without payment of the Retail Sales Tax of goods, wares, or merchandise usually carried for sale in this state." Any reference to protection of revenues is conspicuously absent; the whole emphasis is now placed upon protection to local business from "unfair" competition.

[3] See Walker, *State and Local Protectionism* (July 1940) 18 TAXES 407.

lecting and accounting for the tax. Thus retailers are induced to accept this burden if they can be convinced that the use tax eliminates unfair out-of-state competition. At the same time the argument has been used effectively to create some semblance of popular support for use taxes, without which the necessary legislation could not be enacted. It is alleged that the general public will "also commend the tax as an equitable adjunct to the sales tax."[4] Or as one enthusiast put it:[5]

> . . . the use tax is likely to become Michigan's first popular and universally approved tax because it was adopted primarily for the benefit and protection of Michigan merchants.

The major tenet of the protection-of-business group is the need for restoring the same competitive conditions that existed before sales taxes were adopted. If all tangible personal property be subject to a uniform tax regardless of where purchased, then "local merchants will be placed upon an equal competitive basis with those outside the state."[6] To this end the use tax is urged as an appropriate measure, for it "places the seller in the state on an equal footing with his out-of-state competitor, or competitor within the state who makes an interstate sale."[7] Yet judging by some utterances, the merchant group is less interested in neutralizing the local effect of a sales tax, than it is in adopting measures which would tend to equalize the competitive advantages from whatever source derived. Employed in this fashion, a tax originally intended to neutralize a specific disadvantage to local trade may well become a positive barrier to the flow of commodities into the state.

TRADE BARRIER ASPECTS OF THE USE TAX

Attempts to define the expression "trade barrier" are frequently couched in terms of advantages to local residents and industries.[8] However, an advantage to one group may be offset by a corresponding disadvantage to other groups in the same state, with the result that there is no "net" local gain. Thus a margarine law is advantageous to the dairy interests, but is at the same time a real burden to low income groups which are denied use of a tablespread and must turn to unsatisfactory substitutes. Whether the claimed advantage outweighs the alleged disadvantage in such a situation is a question of policy for each state legislature to decide. It remains for the economist to demonstrate that disadvantages can follow from the adoption of trade barrier laws, and that such laws are not, by any means, an unmixed blessing for the residents of the state. Moreover, a working economic definition ought not to be bound by the legal arguments on trade barriers. The *sine qua non* of a trade barrier is economic, not legal, and the approval of so-called barrier statutes by the Supreme Court does not close the record or write *finis* to any analysis of the problem. This point is important because some state administrators are asserting that a statute, which the Court declares to be within the plenary power of the state, is not a trade barrier. Such laws must also appear before the

[4] Jenner, *The Use Tax in Washington* (1939) 32 PROC. NAT. TAX ASS'N 262.
[5] Allen, *Discussion* (1937) 30 *id.* 50.
[6] *Id.* at 48.
[7] Rinisland, *Discussion, id.* at 45.
[8] See Truitt, *Interstate Trade Barriers in the United States, supra* this issue.

bar of economic analysis and be judged according to their effects on the structure of the national as well as the state economy.

Analysis of Judicial Criteria of Validity

It was not long before the first use-tax statutes were challenged in the courts, and a number of decisions have been handed down by the Supreme Court validating the tax itself as well as the methods used to collect it.[9] The development of the legal criteria which were to cut neatly between use taxes and unlawful burdens upon interstate commerce, evident in those decisions, has been traced in various publications and need not be considered.[10] It is the economic validity of those governing criteria which must be weighed in order to appraise the barrier effects of the use tax.

The rationale supporting constitutionality is well summarized in the following passage from Mr. Justice Cardozo's opinion in the progenitor case of *Henneford v. Silas Mason Co.*:[11]

> But a tax upon use, or what is equivalent for present purposes, a tax upon property after importation is over, is not a clog upon the process of importation at all, any more than a tax upon the income or profits of a business.

Inasmuch, then, as the property had come to rest the Court reasoned that taxation of its use could not be said to hamper commerce, whereas a tariff, either for protection or revenue, burdens the act of importation and so becomes unlawful for a state. Yet if it can be shown that in some cases the flow of specific commodities—the process of importation—is completely stopped or seriously disrupted, it would clearly be wrong to reason that the use tax is not a "clog." One of the major purposes of the tax was to protect business by discouraging the importation of commodities from other states. It was hoped that the interstate business would then return to local dealers whence it had been driven by the sales tax. To the extent of this motivation, then, the successful operation of a use tax depends upon increasing the volume of intrastate business by discouraging people from buying out-of-state goods. If there be no decrease in the flow, say, of consumer goods into the state, the tax has failed.

Nor is the situation improved economically by legalistic emphasis upon the fact that[12]

[9] Henneford v. Silas Mason Co., 300 U. S. 577 (1937); Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62 (1939); Southern Pacific Co. v. Gallagher, 306 U. S. 167 (1939); Pacific Telephone & Telegraph Co. v. Gallagher, 306 U. S. 182 (1939), have concerned the constitutionality of the use tax. Monomotor Oil Co. v. Johnson, 292 U. S. 86 (1934); Felt & Tarrant Mfg. Co. v. Gallagher, *supra;* Nelson v. Sears, Roebuck Co., 61 Sup. Ct. 586 (1941); Nelson v. Montgomery Ward & Co., 61 Sup. Ct. 593 (1941), have considered the validity of efforts to require out-of-state concerns to aid in use tax collection. Court decisions on gasoline taxes are relevant in any discussion of general use taxes, as the *Monomotor* case itself attests, for they constitute a backlog of judicial analysis which has for the most part been carried over into the more recent decisions on general use taxes.

[10] Warren and Schlesinger, *Sales and Use Taxes: Interstate Commerce Pays Its Way* (1938) 38 COL. L. REV. 49; Lockhart, *The Sales Tax in Interstate Commerce* (1939) 52 HARV. L. REV. 617; WATERS, USE TAXES AND THEIR LEGAL AND ECONOMIC BACKGROUND (Kans. Bus. Studies, 1940).

[11] 300 U. S. 577, 586 (1937).

[12] *Ibid.*

. . . the goods when used in Washington after the transit is completed will share an equal burden with goods that have been purchased there.

Because the effect of a duty upon the subsequent use of a commodity is virtually the same as one levied upon its introduction, this notion of equal burden is palpably unsound from an economic viewpoint. In each instance the result is likely to be a reduced volume of interstate trade either because the tax is added to the price to discourage buyers or because it is absorbed by the seller, making less profitable the continuance of business with that state. "Burden" thus means one thing to the jurist and quite another to the economist. The legal conception of burden appears to be an abstraction deduced without probing backwards into the motives of the lawmakers or forward into the incidence and effects of the tax law.

A related economic paradox is the facility with which the Supreme Court interprets the taxable transactions of storage, use or consumption. Judicial treatment of the selective gasoline tax is illustrative. These cases reveal a concept of "use" much broader than that ordinarily associated with consumption, one that encompasses a whole series of events finally culminating in consumption. Under such a view the mere handling of gasoline could be construed as a use and so taxable. As one economist has put it, the microscopic isolation of separate uses by fine-spun differentiation is but sheer casuistry. Were a state to levy a tax upon each of the uses subject to its jurisdiction, the most elementary knowledge of tax incidence would recognize the extraordinary cumulative burden falling upon the consumption of gasoline in interstate commerce. In contrast with this legal metaphysics, the economist analyses use taxes in terms of consumption. This means a final use which exhausts the commodity either instantaneously, *e.g.*, the consumption of gasoline, or over a long period of time, *e.g.*, the use of a machine. Thus had the Court employed consumption instead of "use" as the criterion of the gasoline use tax, its decisions might well have turned the other way.

A similar sacrifice of economic logic to legal rhetoric is apparent in the recent Supreme Court decisions decreeing the enforced cooperation of the two leading mail-order houses as collection agents for the Iowa use tax.[13] The Sears Roebuck Co. had been authorized to do business in Iowa since 1928 and had, in the course of time, established a number of retail stores which produced annually over $5,000,000 in sales. On this retail business the usual sales tax was paid; on orders placed through these retail outlets and delivered from out of the state, use tax was collected. The issue was joined in the matter of use tax on mail-order sales when the orders went directly to the out-of-state office and shipment was made directly to the consumer. The volume of such business derived entirely from catalogs was also over $5,000,000 and roughly equaled the retail sales. Essentially the same were the facts in the companion case involving Montgomery Ward and Co.

Argued in terms of the Commerce Clause and the Fourteenth Amendment, the real point at issue in both cases was the use of the company as a collection agent.

[13] Nelson v. Sears, Roebuck Co., Nelson v. Montgomery Ward & Co., both *supra* note 9.

Earlier cases raising the question had involved local activity by a foreign corporation, whereas the mail-order business, it was contended, was wholly interstate. This view was rejected by the Court which declared the entire Iowa business of each concern to be a unit. In the words of the majority opinion in the *Sears Roebuck* case:[14]

> . . . whatever may be the inspiration for those mail orders, however they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa. They are nonetheless a part of that business though none of respondent's agents in Iowa actually solicited or placed them. Hence to include them in the global amount of benefits which respondent is receiving from Iowa business is to conform to business facts.

Thus it was held the state could require collection of the use tax as the price of all the benefits flowing from Iowa business.

The company argued, and quite correctly, that it was in competition with other mail-order houses which, since they had no local business connections, could not be forced to collect the use tax. To this the Court replied:[15]

> But those other concerns are not doing business in the state as foreign corporations. Hence unlike respondent, they are not receiving benefits from Iowa for which it has the power to exact a price.

Although the "impotence of state power" prevents a state from reaching any mail-order houses not doing local business in that state, the economic fact still remains that Sears Roebuck is in competition with such firms. This competition is, of course, limited to the sphere of mail-order sales; in the retail field Sears Roebuck receives benefits from the state for which it must pay a price. So long as it continues the local trade it must be presumed that that business is profitable. But, in considering the mail-order sphere alone, the company must meet competition quite apart from any benefits received or profits earned on the retail stores. All are engaged in interstate commerce. The association with retail stores is wholly incidental to the mail-order sales; nevertheless the Court allows it to be used as a lever to force conditions upon the company which place it at a competitive disadvantage in the mail-order line. To condition the operations of one company and not others is to substitute expediency for equity. The interstate business of one concern is burdened while others escape simply because a state enacts tax laws which cannot adequately be enforced either for administrative reasons or because the state lacks sufficient power to force collection at the source.

These decisions set for the present the high-water mark of the Supreme Court's efforts to compromise effectively between the right of the state to obtain revenue and the obligation of the state to leave interstate commerce unburdened and unregulated. The distinction between intrastate and interstate business is blurred, and indeed completely obliterated whenever both types of trade are carried on by the same company. As yet the state cannot enforce its will upon such companies

[14] Nelson v. Sears, Roebuck Co., *supra* note 9, at 589. [15] *Ibid.*

unless they are licensed to do local business or maintain offices and local agents to solicit orders. However, the majority opinions in the mail-order cases open the way for making the use tax in effect a tax upon sales. What started out as a tax upon the privilege of use has in fact metamorphosed into a tax upon the privilege of selling in interstate commerce.

Multiple Tax Burden

The extent to which the use tax may operate as a barrier to interstate trade is primarily an economic question of tax incidence, and the corollary effects and burdens which result therefrom. But before turning to this analysis, some brief mention may be made of the circumstances under which multiple taxation occurs. The question of discriminating or double taxation resulting from the use tax has been covered by several writers but the possibilities have not been fully explored. While several instances will be set out below, limitations of space require the most cursory treatment.

In the first place ten states include an offset provision in their laws, with the result that a commodity consumed in the state is not liable for a use tax if it has already paid an equivalent amount in sales tax to the state of origin. This ostensibly prevents a double taxation. The fact that seven states do not have this provision supports the earlier assertion that advocates of use taxes in these states were not interested in re-establishing the relative competitive position that existed before the sales taxes were adopted; it is clear that they were concerned there with protection to business even at the cost of burdening out-of-state competitors.

Secondly, double taxation may be avoided to some extent by allowing a monthly exemption quota for purchases made out of the state. Six states make such allowances in amounts varying from $50 per quarter year to $100 per month. While these exemptions represent a practical compromise with the difficulties of enforcement, the retail merchants in such states are receiving virtually none of the protection they anticipated from the tax.

Thirdly, the usual discussion of double taxation turns on the matter of two taxes levied upon a single commodity, a sales tax in the state of purchase and a use tax in the state of consumption. In this situation the use tax may become a "positive barrier." The extent of this type of barrier is probably limited to the occasional purchases made by individuals or companies in one state and transported by them into another state for consumption. Where the out-of-state purchases are handled as interstate transactions, only the use tax is paid so that no double taxation can be said to exist. To gain the tax immunity which has always been accorded interstate commerce, the commodity must actually be shipped from the seller to the buyer across state lines. While no quantitative evidence is available, it is a reasonable presumption that the bulk of the dollar volume of goods imported into a state is handled in this manner. For other transactions, which cannot qualify as interstate, double taxation is a reality unless the state provides that a sales tax paid elsewhere may be offset against the use tax liability. The Supreme Court has not yet declared itself specifically on this type of double taxation, though the nature and breadth of its decisions on the use tax make unlikely any provision for relief.

Fourthly, failure to exempt products which cannot be procured in the buyer's state, or which are not produced there, is sometimes cited as a "positive barrier" on the ground that no protection is accorded home industry.[16] But whether a home industry is or is not protected is immaterial; the tax may still operate as a barrier. As the Supreme Court has indicated, the use tax is a valid exercise of state taxing power, not because it gives protection to local industry but in spite of it.

Use taxes assume significance as trade barriers because of the effect they may have upon the competitive advantages between two states or two regions of the country. The tax is levied upon any and all commodities (barring specific exemptions) that come into a state. The conditions which surround the production and sale of commodities vary widely. Some goods are sold with a small mark-up over cost in the expectation that the volume of sales will be sufficient to produce the desired profits. A use tax which cannot be shifted to the customer may wipe out the small margin and make such business unprofitable. Moreover, when goods are shipped great distances across the country and incur high freight charges, the use tax is levied on the price *including* freight. This clearly is a burden upon firms seeking to sell in a distant market in competition with other firms located close to that market. Whenever the trade barrier effects of the use tax tend to destroy or even equalize competitive advantages they prevent the maximization of the social income and contribute to an uneconomic distribution of resources within the framework of the economic system.

This leads to a final comment upon that form of double taxation which may arise as a result of the great diversity in the tax structures of the several states. Two states, *A* and *B*, may choose to finance a given expenditure in different ways; state *A* levies a sales and use tax of, say, two percent while state *B* raises an equal revenue by an increase in property tax rates. Thus a commodity manufactured in *B* will have a higher cost of production owing to the added tax upon plant and equipment. It may be assumed, for this hypothetical example, that the price of each commodity is increased by two percent when sold in their respective states. If the manufacturer in state *B* sells any goods in state *A* the price will be increased a second time, by the amount which must be paid as sales or use tax.[17] In brief, two taxes are being levied upon the commodity, a property tax (state *B*) and a sales or use tax (state *A*). In order to compete the producer in state *B* must absorb one of the taxes and so reduce his profit margin. If that margin happens to be two percent, he may discontinue selling in state *A*. Competitive disadvantages of this type are, of course, not peculiar to the use tax. They arise whenever two states have different laws which give the producers of one an advantage over the producers of the other.

[16] See Walker, *Discussion* (1939) 32 PROC. NAT. TAX ASS'N 235-236.

[17] On the other hand, a manufacturer in state *A* may sell in state *B* at a price two percent lower than can his competitor. He will pay neither sales nor property tax on the amount thus sold.

Incidence and Burden of the Use Tax

The incidence of the use tax is a matter of first importance in view of the many claims made in behalf of the tax by its proponents. Few if any of the tax administrators give evidence of having stopped to analyze the question of incidence. They usually dispose of the problem by declaring it is intended to be a consumer tax; so of course, it falls on the consumer! No recognition is given to the types of commodities being "consumed," although they may range everywhere from a railroad freight car to a pair of shoes purchased from a mail-order house. Both are subject to use tax, but it is not at all clear that the incidence of the tax is the same in each case. The only economist who has written a volume on use taxes confines his treatment to the legal and administrative problems and completely avoids any discussion of incidence.[18]

The incidence of the tax may vary with the administrative methods of collection. Consumer collection may be sub-divided into, first, collection by the ultimate consumer and, second, that by the processor who uses machinery in his business. For the ultimate consumer any payment of use tax rests entirely upon him; the impact and incidence of the tax are identical. For the processor, however, the situation is complicated by the possibility of shifting the tax to his customers in higher prices. A use tax will increase the cost of his equipment which, like any fixed cost, must be amortized over the entire output during the service life of the machine. At the same time his direct or variable costs will be increased by use taxation of fuel and raw materials employed in processing. With the unit cost of the product greater by these additions to fixed and variable costs, the processor is faced with the alternative of absorbing the increase, thus reducing his profit margin, or shifting it in higher prices.[19]

The second half of the incidence problem follows from collection of use taxes by the seller. The types of sellers involved may vary from a small retailer negotiating a local sale with out-of-state delivery, to a large mail-order concern handling everything from its offices in another state. Here, as in the case of the processor, the seller has the alternative of absorbing or shifting the tax. Limitations of space do not permit any extended analysis. Suffice it to say that the demand side of the problem seems to be a factor of some importance for a seller dealing directly with individuals on whom the tax will be overtly placed. The extent of the public's knowledge is another factor. Wherever buyers are ignorant of any levy of a use tax by their own state, they will resist its collection by an outside retailer. Furthermore, losses in good-will, to say nothing of losses in trade, may result from enforced collection in such circumstances.

Estimates prepared by mail-order companies as to their losses in collecting the

[18] WATERS, *loc. cit. supra* note 10.

[19] There are many technical considerations entering into this problem, such as: (1) the elasticity of demand for the product, (2) the existence of competitors in non-tax states selling in the same market, (3) whether there is excess capacity in the industry, (4) whether the processor is operating under optimum cost conditions, and so on. These interesting aspects cannot be explored in this article.

use tax provide a good study in tax incidence, although they must be considered in light of the fact that the problem of shifting the use tax is clearly more acute for the mail-order concern than it is for the local retailer who deals with the customer over the counter. If the customer fails to include the tax with his remittance to the mail-order concern, the order is filled anyway and a deficiency bill sent for the amount of the tax. Experience of the Sears Roebuck and Montgomery Ward companies in sales tax collections on mail orders indicates that only 65 to 75 percent of the orders remit the tax. Roughly half of the deficiency bills are collected. Collection at the source consequently imposes a considerable burden upon the mail-order firms. On the basis of $5,000,000 mail-order sales in Iowa, for 1937 the two percent use tax liability of Sears Roebuck would be $100,000. If notices were printed in their catalogs the company would expect about $68,000 in tax collection at an administrative cost (clerical and mailing expense for deficiency bills) of $13,000. On the other hand, if no notices were inserted, collections would only be $35,000 at a cost of about $18,000 in clerical expenses. Thus Sears Roebuck stands to lose: $21,000 in uncollected taxes plus $13,000 expense, or a total of $34,000 if a notice is inserted; without such a notice the loss would be $65,000 in uncollected taxes plus $18,000 expense, or a total of $83,000. To be sure, these are only estimates but after making any reasonable allowance for error the company is still left with a substantial tax burden. In the latter example it may cost the company $83,000 in order to pay $100,000 to the state of Iowa! This burden rests entirely upon the Sears Roebuck Company; no further shifting to the consumer is feasible.

From this brief analysis of the incidence of the use tax one conclusion seems inescapable. It is that an error has been committed by most tax administrators in ignoring the problem, or declaring categorically that use taxes fall on the consumer. There are evidently a number of highly probable conditions which may lead to different results. For instance, a processor faced by competition from non-tax producers and by excess capacity in the industry will absorb the use tax. A retail seller may absorb or shift the tax depending upon which of two forces is dominant: (1) competition from tax-free retailers and/or lack of knowledge on the part of buyers will encourage absorption; (2) small profit margins coupled with inability of the consumer to get tax-free commodities from other sources will probably result in a shifting of the tax.

An analysis of use tax receipts[20] reveals some interesting facts regarding the burden of the exaction. In the state of Oklahoma, for example, oil, public utilities (including transportation), and construction industries (including building materials) accounted for 80 percent of total revenue. The other 20 percent was scattered among all other types of business operating in the state, no one of which produced as much as 5 percent of the use tax revenue.[21] This situation reveals the hollowness

[20] Actual use tax collections for 1940, expressed as a percentage of sales tax revenue, varied from less than 1 percent in Mississippi to about 7 percent in Washington.

[21] Okla. Tax Comm., *Ann. Rep. of Consumers and Use Tax Statistics* (1940 and earlier years). A study of comparable data from Iowa and New Mexico yields similar results.

of the familiar argument that use taxation protects local industry, especially the retailers of food, wearing apparel and general merchandise. Manufacturers in practically every case buy their equipment outside the state because their special needs cannot be filled locally. Hence the use tax becomes a new and independent source of revenue to the state and bears no relation to the sales tax which it was, ostensibly, to supplement.

CONCLUSION

Several inferences may be drawn from the above examination. In the first place the problem of use tax incidence is primarily a question of a tax on the processor since such taxes make up the great bulk of use taxes collected. Subsidiary questions arise with reference to public utilities and government units where the incidence may conceivably fall more directly upon the final consumer, *e.g.*, the utility customer who pays a regulated price and the taxpayer who must provide for his local government's expenditures.

Secondly, the allegation of use tax administrators that the tax is a levy on consumers to supplement the sales tax is completely erroneous. The use tax is a new source of revenue whose full weight falls upon certain industries which have always purchased raw materials and equipment outside the state. Moreover, in most cases there is no local industry in the heavy goods range to be "protected."

Thirdly, the above points have significance for the questions of discrimination and burdens in interstate commerce. The use tax was upheld by the Supreme Court on the basis of a privilege, an attribute of property, which was taxable by the state. But suppose the only privileges which can be reached for taxation are those of a limited group, small in number but possessing substantial wealth in a form accessible to the tax collector? Is a statute which may be valid on its face, still valid if it is so administered as to exempt the vast majority of the very privileges it set out to tax? A tax may be levied upon a proper object within the plenary power of the state; it may be measured in an acceptable manner. Yet the subsequent operation of the tax cannot always be foreseen by the courts, and judged by the economic criterion of equity, a tax which is only administered over half the field is perhaps worse than no tax at all.

As noted elsewhere in this issue,[22] a program to check the spread of interstate trade barriers should work for the revision of present state laws to eliminate the barriers contained in them. Such action might be facilitated by demonstrating to the respective legislatures first, that the benefits expected from such a device as the use tax are illusory; second, that it fails to accomplish its stated objective, namely the protection of local business; and third, that it constitutes just one more tax upon business enterprises in that state. If such a demonstration could be made for the several types of trade barriers, and presented effectively by an interested group in each state, some real progress might be made in removing such statutes from the books.

[22] See Truitt, *Interstate Trade Barriers in the United States*, *supra* this issue.