

4-1-1948

The Tennessee Retailers' Sales Tax Act

Stanely D. Rose

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

Recommended Citation

Stanely D. Rose, *The Tennessee Retailers' Sales Tax Act*, 1 *Vanderbilt Law Review* 433 (2019)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol1/iss3/6>

This Comment 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.

THE TENNESSEE RETAILERS' SALES TAX ACT¹

I

CONSTITUTIONALITY OF THE TAX

The primary consideration in the adoption of a tax by a state is the constitutional framework into which it is to be fitted.² Probable litigation is a factor of importance in the choice of a tax. If there are no complicating factors, a simple tax on sales seems to be one of the forms of excise tax most easily sustainable under the Tennessee Constitution. Indeed, Tennessee at an early date had a sales tax which apparently met with court approval.³

The most inclusive authority upon which to base an excise tax in Tennessee is the clause which states that "the legislature shall have power to tax Merchants, Peddlers, and privileges, in such manner as they may from time to time direct."⁴ The extensive scope of this clause has long been established. "A privilege is whatever the Legislature choose to declare to be a privilege and to tax as such."⁵

The first case to come before the Tennessee Supreme Court on this Act confirms the right of the state to declare selling a taxable privilege.⁶ The fact that the buying is of food to eat in order to live was held to be immaterial. There is no natural right in the form of a business transaction that is inherently exempt from taxation, if the Legislature declares it to be a privilege.⁷

Will the same constitutional provision justify the tax on the "use" of property? By the terms of the statute, "Use" means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it shall not include the sale at retail of that

1. TENN. PUB. ACTS 1947, c. 3; TENN. CODE §§ 1328.22-1328.39 (Williams, Supp. 1947). Further references to the Act will be by section number in the original act, without repeating citations to the Act. The Commissioner of Finance and Taxation has published a pamphlet *Tennessee Retailers' Sales Tax Act Rules and Regulations*. Reference to these rules in this comment will be by number of the rule without further citation to this pamphlet.

2. For discussion of the constitutional framework, see generally, BRANNEN, *TAXATION IN TENNESSEE*, c. 1 (1920); Anderson, *The Constitutional Basis of Taxation in Tennessee*, 15 TENN. L. REV. 280 (1938); O'Connor, *The Availability of a Sales Tax in Tennessee*, 12 TENN. L. REV. 249 (1934).

3. TENN. CODE §§ 543-49, 553 (Meigs & Cooper, 1858). Sec. 543 reads "all sales of merchandise by a merchant or pedlar, shall be taxable," Repealed as to merchants by TENN. PUB. ACTS 1869-70, c. 45, § 1. See *The State v. Crawford, M'Neill & Co.*, 2 Head 460 (Tenn. 1859).

4. TENN. CONST., Art. II, § 28.

5. *Kurth v. State*, 86 Tenn. 134, 136 (1887). *Accord*, *The Turnpike Cases*, 92 Tenn. 369, 22 S. W. 75 (1893); *Burke v. Memphis*, 94 Tenn. 692, 30 S. W. 742 (1895).

6. *Hooten v. Carson, CCH, State Tax Reporter—Tenn.* p. 6308 (Tenn. Feb. 28, 1948).

7. See Maguire, *Taxing the Exercise of Natural Rights* in HARVARD LEGAL ESSAYS 273 (1934).

property in the regular course of business."⁸ This definition appears so broad as to fall short of complete ownership in but one particular: the power to sell at retail. But for this one exception, this would appear to be a tax on property. And yet this one limitation seems decisive. With substantially the same definition of "use"⁹ these statutes have been consistently upheld.¹⁰

Mr. Justice Cardozo stated the principle upon which the use tax is distinguished: "The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership. . . . A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively."¹¹ Since the attributes adhering to this taxable privilege fall short of being complete ownership, since the tax is not upon ownership but upon only a partial manifestation of ownership, and in view of the fact that the legislature has declared that such a transaction shall be a privilege, the tax imposed has been uniformly regarded as a privilege or excise tax and not as a property tax.¹²

The effect which certain other provisions in the Tennessee Constitution may have on the Act may be briefly adverted to at this point. Since *Evans v. McCabe*,¹³ graduated income taxes as a source of revenue are not possible. The only income taxes that appear to be constitutional are those imposed upon income derived from stocks and bonds.¹⁴ This may rule out certain forms of gross receipts taxes which might be characterized as income taxes, but would not appear to affect a sales tax.

The state constitution exempts from taxation "the direct product of the soil in the hands of the producer."¹⁵ The Tennessee Supreme Court has

8. Sec. 2(h).

9. CAL. CODE REV. & TAX § 6009 (Deering, 1944); IOWA CODE § 423.1 (1946). Such a broad definition is not necessary and might jeopardize the Act. For more restrictive definitions see MISS. CODE ANN. § 10149 (Supp. 1946); WASH. CODE § 967.1 (Pierce, 1944).

10. *Douglas Aircraft Co. v. Johnson*, 13 Cal. 2d 545, 90 P. 2d 572 (1939); *State Tax Commission v. General Trading Co.*, 233 Iowa 877, 10 N. W. 2d 659 (1943); *Vancouver Oil Co. v. Henneford*, 183 Wash. 317, 49 P. 2d 14 (1935). See Notes, 129 A. L. R. 222 (1940), 153 A. L. R. 609 (1943).

11. *Henneford v. Silas Mason Co.*, 300 U. S. 577, 582 (1937).

12. Other distinctions have been made by courts between property and use taxes because the declaration of intention by the Legislature is not considered as conclusive: (1) The method adopted in fixing amount of tax. The property taxes usually are fixed by an assessment. A privilege tax has no prior assessment but is fixed by the extent to which the conferred privileges are enjoyed or exercised by the taxpayer, irrespective of the nature of the property; (2) The value of the property is not necessarily controlling in a privilege tax. Value is an essential consideration in imposing a property tax because almost universally the "equal and uniform" clauses apply to property taxes. See Note, 103 A. L. R. 18 (1936).

13. 164 Tenn. 672, 52 S. W. 2d 159, 617 (1932). TENN. CONST., Art. II, § 28 requires all property taxes to be equal and uniform. Exceptions to the equal and uniform clause are then set forth. Income taxes on stocks and bonds not taxed *ad valorem* are permitted. The court adopted the rule that an enumeration of exceptions excludes all others and, therefore, no other type of income could be taxed.

14. TENN. CONST., Art. II, § 28; *Shields v. Williams*, 159 Tenn. 349, 19 S. W. 2d 261 (1929).

15. TENN. CONST., Art. II, § 28.

declared that water taken from a spring on a farm and sold by its owner in a nearby city is taxable not by a tax on water but by a privilege tax levied upon the business of selling water. Thus, the privilege of selling the direct products of the soil may be taxed.¹⁶

The title of any statute is subject to the provision that it express the subject of the bill and no bill may embrace more than one subject.¹⁷ The plaintiff in *Hooten v. Carson*¹⁸ contended that the body of the Act was broader than the title, but the court simply pointed out that everything in the body of the Act was germane to the title.

The effect of the provision in the Declaration of Rights¹⁹ prohibiting the taking of a man's services without the consent of his representatives or without compensating him, will be considered in connection with the discussion of enforcement of the Act.

II

THE SALES TAX

In indicating the coverage of the sales tax, the Act declares that "every person is exercising a taxable privilege [1] who engages in the business of selling tangible personal property at retail in this State, or [2] who rents or furnishes any of the things or services taxable under this Act, or [3] who stores for use or consumption in this State any item or article of tangible personal property . . . and who leases or rents such property within the State of Tennessee."²⁰

Certain methods of exercising these privileges, such as casual sales or sales for resale, are exempted from the tax. They will be treated in the subtopic on exemptions. The nature of sales transactions remaining subject to the tax may now be analyzed and treated in detail.

(a) Retail Sales

The Act provides that a sale is the transfer of title, possession or both of tangible personal property.²¹ A retail sale is a sale to a consumer or to

16. *Seven Springs Water Co. v. Kennedy*, 156 Tenn. 1, 299 S. W. 792 (1927) (dictum that farming is a taxable privilege); *But cf. City of Nashville v. Hager*, 5 Tenn. Civ. App. 192 (1914).

17. TENN. CONST., Art. II, § 17. This clause is construed liberally. *Warren v. Walker*, 167 Tenn. 505, 71 S. W. 2d 1057 (1934). See *Couch v. State*, 140 Tenn. 156, 203 S. W. 831 (1918); *Goetz v. Smith*, 152 Tenn. 451, 278 S. W. 417 (1925).

18. *Supra* note 6.

19. TENN. CONST., Art. I, § 21.

20. Sec. 3. See Cohen, *The Taxable Transaction in Consumers' Taxes*, 8 LAW & CONTEMP. PROB. 530 (1941).

21. Sec. 2(b). See Wahrhaftig, *Meaning of Retail Sale and Storage, Use or Other Consumption*, 8 LAW & CONTEMP. PROB. 542 (1941).

any person for any purpose other than for resale.²² The usual form of this transaction is the ordinary over-the-counter cash sale.

Many products that are sold at retail are the result of extensive processing. To tax all the items that make up a finished article of tangible personal property would impose a serious burden of multiple taxation. The object is to tax each article, if possible, only once. One method of accomplishing this result is to exempt sales of those materials which retain a recognizable identity in the finished product.²³ This excludes most chemicals and other raw materials. The more general test is to exempt all those materials which become a component or constituent part of a finished product of tangible personal property intended for retail sale. If an item becomes a component part, it is not taxed until the final retail sale; if it does not, but is used incidentally to the manufacture of the finished product, it is taxed upon procurement by the processor for such use.

For example, printer's ink becomes a component part of a book for sale at retail and the sale of the ink is therefore not taxable.²⁴ Coal provides energy for the manufacturing processes but does not become a constituent part of the finished product and therefore is taxable.²⁵ The Ohio Sales Tax exempts products which are used "directly in the production of tangible personal property for sale by manufacturing. . . ." ²⁶ This would exempt coal. But this is not the case under the Tennessee Act. The exemption applies only to sales of such articles as become component parts of the finished product.²⁷

Transactions involving building materials present many difficult problems. If the owner of real property buys these materials to be used by him in the construction of a house for his own use, the purchases are clearly subject to the tax.²⁸ But suppose the owner of the realty employs a contractor to build the house for him; the contractor buys the materials and builds a house out of them and the owner pays the contractor for the house. The house, being attached to the land, is regarded as real property. The contractor has not bought tangible personal property to be resold as personal property. It was meant to be resold as real property. The contractor is thus the final user or consumer of the materials as tangible personal property and should therefore be liable for the tax.²⁹

If the owner only wants an improvement made—e.g., a concrete floor

22. Sec. 2(c) 1.

23. *Acme Printing Ink Co. v. Nudelman*, 371 Ill. 217, 20 N. E. 2d 277 (1939) [Case interpreted ILL. ANN. STATS. c. 120, § 440 (Smith-Hurd, 1940); Section amended to conform with component part test. ILL. ANN. STATS. c. 120, § 440 (Smith-Hurd, Supp. 1947)]. See Rule 40.

24. Rule 67.

25. Rule 15.

26. OHIO GEN. CODE §§ 5546-1, 5546-25 (Page, Supp. 1947).

27. Sec. 2(c) 2.

28. Rule 7.

29. *Ibid.*

in the basement—the same reasoning applies. The contractor buys cement to be used in making the concrete, the cement becomes a component part of the finished product, but the finished product is real property, not tangible personal property. By the analysis above, the contractor was the final user and must pay the tax on his purchase of the cement.

The presumption that a fixture is intended should not be conclusive. The owner may purchase a cabinet or a stove that he does not intend to become a part of the realty. The owner then would have bought tangible personal property and he should pay the tax. The presumption appears reasonable, however, that the contractor purchases in order to sell fixtures and he should bear the burden of proof that he is actually selling tangible personal property.

Suppose the contractor claims that he is really not selling property or that what he sells forms only a very small proportion of what he turns over to the owner. To tax his purchases is to tax his skill and the services he is rendering. Under a statute like that in Illinois, where the tax was on anyone engaged in the occupation of selling tangible personal property at retail,³⁰ it was held that such a contractor was not engaged in the occupation of making retail sales.³¹ Under a tax of this character it becomes immaterial what sort of property passes. The controlling factor is the occupation of him who transfers the property. But when, as under the Tennessee tax, what is taxed is the privilege of engaging in a retail sale and a retail sale is the transfer of title, possession, or both, any person who in the course of his business does any retail selling will be taxed. Service and skill enter into any human activity and the proportionate amounts are immaterial if they form part of a transaction that includes a retail transfer of tangible personal property.³²

The amount of sales tax paid is determined by the sales price of the property at the time of transfer. The Tennessee Act expressly states that the sales price includes "any services that are a part of the sale . . . without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service costs, . . . or any other expense whatsoever. . . ." ³³

Under the Tennessee Act, if a party supplied cloth to a tailor to make a suit for him, he would pay a sales tax on this finished product of tangible

30. ILL. ANN. STATS. c. 120, § 441 (Smith-Hurd, 1940).

31. *Material Service Corporation v. McKibbin*, 380 Ill. 226, 43 N. E. 2d 939 (1942). In *Babcock v. Nudelman*, 367 Ill. 626, 12 N. E. 2d 635 (1937) optometrists were declared to be professional men not subject to the tax even for the frames and lenses they transfer to patients. See Herman, *Who Are Taxable?—Basic Problems in Definition Under the Illinois Retailers' Occupation Tax Act*, 8 LAW & CONTEMP. PROB. 522 (1941).

32. *Cusick v. Commonwealth*, 260 Ky. 204, 84 S. W. 2d 14 (1935); *People ex rel. Walker Engraving Corporation v. Graves*, 243 App. Div. 652, 276 N. Y. Supp. 674 (3d Dep't 1935).

33. Sec. 2(d).

personal property.³⁴ A tax would be paid on the sales price of a portrait painting even though the actual materials used would be but a minute percentage of the actual sales price.³⁵

To facilitate administration, certain transactions are declared to be services where difficulty would be encountered in ascertaining with precision the value of the property transferred. By the Commissioner's ruling³⁶ shoe repairmen are deemed to be rendering a service and payments to them for such services are not taxed. These repairmen pay a tax on the goods purchased by them and used in the performance of such services. If services rendered include the installation of parts and the parts are billed separately, a ruling³⁷ permits payment of the tax on the parts only. If there is no separate billing and the parts are computable, the tax is on the whole transaction. These distinctions of the Commissioner seem tenuous and appear not entirely justified in view of the all inclusiveness of the definition of "sales price" in the act.³⁸ The reason they are made is probably one of expediency and administration before which logic and purity of analysis frequently must bow.

(b) *Conditional Sales*

Conditional sales in which "the possession of property is transferred but the seller retains title as security for the payment of the price" are expressly considered sales and are thus taxable to the full amount of the contract price.³⁹ It is immaterial that installment payments are extended over a period of time.⁴⁰

There is no right to a refund of the tax paid upon recapture or repossession of the merchandise sold under a conditional sales contract.⁴¹ The dealers will bear such losses themselves.⁴² This is not unreasonable because a statute requires the seller of repossessed property in a conditional sale to sell to the highest bidder⁴³ and if any deficiency results from this sale, the seller still has a claim against the buyer.⁴⁴ On the other hand, when purchases are returned by the buyer and the dealer makes a refund, the Act provides

34. Sec. 2(b).

35. Rule 6; *cf.* *Saverio v. Carson*, 208 S.W.2d 1018 (Tenn. 1948) (operator of diaper service who rented diapers to customers and then laundered these diapers for such renters, was liable for the tax regardless of the relative value of service rendered as compared with the return on the property rented).

36. Rule 69.

37. Rule 54.

38. *Supra* note 33.

39. Sec. 2(b).

40. *Gardner-White Co. v. Dunkel*, 296 Mich. 225, 295 N. W. 624 (1941); *Olympic Motors v. McCroskey*, 15 Wash. 2d 665, 132 P. 2d 355 (1942); Rule 28.

42. Rule 52.

43. TENN. CODE, § 7287 (Williams, 1934).

44. *Id.*, § 7290.

that the dealer may reimburse himself for the amount of the tax previously paid.⁴⁵

(c) *Rentals and Leases*

As previously indicated, a sale is the transfer of title, possession, or both.⁴⁶ Leases and rentals present the fact situations where only possession passes with no intention to pass title.⁴⁷ Not every bailment is a lease or rental; only such leases or rentals of tangible personal property are taxed which are the business or part of the established business of the lessor or renter.⁴⁸ Common taxable situations are the rental of motion picture films by a distributing agency which have been uniformly upheld⁴⁹ and, with the exception of Arkansas,⁵⁰ the rental of an automobile without a driver.

III

THE USE TAX

When a state imposes a sales tax, the immediate reaction of all potential buyers is to shop elsewhere to avoid the payment of this tax. Some device is necessary to protect sellers within the taxing state and also to protect the sales tax itself, the revenues from which are needed by the state. The answer to this problem is the use tax.⁵¹

The question of whether use, even when very broadly defined, can be the basis for a privilege tax has been considered. The answer has been consistently in the affirmative. The Tennessee Act after defining "use,"⁵² declares that for the purposes of the statute "the use, or consumption, or distribution, or storage to be used or consumed in this State of tangible personal property shall each be equivalent to a sale at retail."⁵³ This would appear to fix the coverage of the use tax on tangible personal property purchased outside the state as though bought from a Tennessee vendor.⁵⁴ All the exemptions and limitations that apply to the sales tax apply likewise to the use

45. Sec. 13.

46. Sec. 2(b).

47. Sec. 2(f); Rule 32.

48. Sec. 3(c); *Saverio v. Carson*, *supra* note 35.

49. *Saenger Realty Corporation v. Grosjean*, 194 La. 470, 193 So. 710 (1940); *United Artists Corporation v. Taylor*, 248 App. Div. 207, 288 N. Y. Supp. 946 (1st Dep't 1936) *aff'd*, 273 N. Y. 334, 7 N. E. 2d 254 (1937).

50. *U-Drive-Em Service Co. v. State*, 205 Ark. 501, 169 S. W. 2d 584 (1943) (The court distinguished between permanent and temporary possession and in this case "The rentee simply has the temporary custody of the car and is a mere temporary bailee.").

51. *People's Gas & Electric Co. v. State Tax Commission*, 28 N. W. 2d 799 (Iowa 1947); *Brown*, *The Future of Use Taxes*, 8 LAW & CONTEMP. PROB. 495 (1941); *Comment*, *The Use Tax*, 16 IND. L. J. 260 (1940).

52. Sec. 2(h).

53. Sec. 4.

54. Introduction, *Rules and Regulations Relating to The Tennessee Use Tax*. *Supra* note 1.

tax. "Use" does not include sale at retail.⁵⁵ Extra-state purchases of agricultural products bought directly from the farmer are not taxable.⁵⁶

The use of an article is taxed according to its cost price⁵⁷ at the time of its importation into the state "after it has come to rest in this State and has become a part of the mass of property in this State."⁵⁸

Mr. Justice Frankfurter has pointed out that "A sales tax is a tax on the freedom of purchase. . . . A use tax is a tax on the enjoyment of that which was purchased."⁵⁹ The use tax is not an additional tax. It is not paid if a sales tax of equal amount has already been paid upon the transaction.⁶⁰ It does not penalize or place at any disadvantage these extra state sales. It merely makes them subject to an equal tax.

IV

EXEMPTIONS

(a) *Sales of Agricultural Products*

The exemption of farm products is one of the most debated points of discussion in the general field of sales taxes. The finding that this exemption is unreasonable could result, as it did in Illinois,⁶¹ in the invalidating of the entire act. The theory of statutory construction leading to this result is that when exemptions in a statute are found to be invalid, the entire act may be declared void if it appears that the coverage of the tax has been so widened that it is improbable that the legislature would have passed the act at all if it were necessary to tax this exempted class.⁶² There is no separability clause in the Sales Tax statute and it is uncertain whether the court would find this clause separable if the exemption were invalidated.

The equal and uniform protection of the laws clause in the Tennessee Constitution refers only to property taxed *ad valorem*.⁶³ A person being subjected to an excise tax is protected by the other provisions that he be not the object of a special law⁶⁴ and that he be not deprived of his property, "but by the judgment of his peers or the law of the land."⁶⁵

55. *Supra* note 52.

56. *Supra* note 54.

57. Sec. 3(b). Cost price defined in Sec. 2(e).

58. Sec. 4.

59. *McLeod v. Dilworth Co.*, 322 U. S. 327, 330 (1944).

60. Sec. 4.

61. *Winter v. Barrett*, 352 Ill. 441, 186 N. E. 113 (1933).

62. 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 2412 (3d ed. Horack, 1943); *Pettit v. White County*, 152 Tenn. 660, 280 S. W. 688 (1926); *Edwards v. Davis*, 146 Tenn. 615, 244 S. W. 359 (1922).

63. TENN. CONST., Art. II, § 28; *Shields v. Williams*, 159 Tenn. 349, 19 S. W. 2d 261 (1929).

64. TENN. CONST., Art. XI, § 8; *Cumberland University v. Golladay*, 152 Tenn. 82, 274 S. W. 536 (1924).

65. TENN. CONST., Art. I, § 8.

"The clause 'LAW OF THE LAND,' means a general and public law, equally binding upon every member of the community."⁶⁶ Neither a tax nor any other general law has to apply to every person in the state. All that is required is that the general law be made to refer to a class of persons, that the class be selected on a reasonable basis, and that no persons, ostensibly of that class, be arbitrarily or unreasonably exempted from the effects of this general law.

"[T]he Legislature has a wide range of discretion in distinguishing, selecting, and classifying objects of legislation because of the function of the legislation and the purposes to which it is addressed. It suffices, if it is practical, and is not reviewable unless palpably arbitrary."⁶⁷

In order for this Act to be valid in view of these general principles, there must be a reasonable basis for exempting from the sales tax a transaction that apparently is a retail sale, e.g., the farmer selling poultry to a consumer.

The Act declares that it is a taxable privilege to engage in the business of selling tangible personal property at retail in this state.⁶⁸ "The term 'business' shall not be construed in this act to include occasional and isolated sales or transactions by a person who does not hold himself out as engaged in business."⁶⁹ Farmers are not usually in the business of retail selling. They are primarily engaged in producing and generally sell to grain and produce houses for processing or further sale. These transactions would be exempted as being a sale for resale.⁷⁰

The Tennessee Act specifically points to the exemption as applying only to sales direct from the farm by the farmer himself. The phrase, "direct from the farm" probably precludes a retail store elsewhere for the sale of such produce,⁷¹ but would it preclude peddling in a nearby city by the farmer?

Any taxation of farmers' sales creates a difficult administrative problem. Two writers on the subject have remarked that their experience "would lead one to think that the farmers make little pretense of collecting the tax on products sold to consumers."⁷² These problems of collection

66. *Vanzant v. Waddel*, 2 Yerg. 259, 270 (Tenn. 1829); *State of Tennessee for use of Roane County v. Burnett*, 53 Tenn. 186, 189 (1871).

67. *Cavender v. Hewitt*, 145 Tenn. 471, 476-7, 239 S. W. 767, 769 (1922). "[W]hen the classification made and stated in a statute is challenged, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed." *Scott v. Nashville Bridge Co.*, 143 Tenn. 86, 108, 223 S. W. 844, 850 (1920). "It is unnecessary that the reasons for the classification shall appear on the face of the legislation." *Knoxtenn Theatres v. McCannless*, 177 Tenn. 497, 505, 151 S. W. 2d 164, 167 (1941).

68. Sec. 3.

69. Sec. 2(i).

70. Sec. 2(c) 1.

71. *Curry v. Reeves*, 195 So. 428 (Ala. 1940).

72. *BLAKEY & BLAKEY, SALES TAXES AND OTHER EXCISES* 20 (1945).

from persons "widely scattered and inured to habits of individualism"⁷³ appear self-evident. A classification on the basis of administrative necessity⁷⁴ in a situation like this seems reasonable.

Most of the states faced with the problem have found this exemption reasonable and have upheld it.⁷⁵ But to an Illinois court it was a matter of common knowledge that there are many farmers who not only produce but also conduct the business of selling produce only to consumers at retail.⁷⁶ As to this type of farmer, the court insisted that an exemption could not be validly made and voided the entire statute.

There seems little reason to suppose that this exemption would be found unreasonable under the equal protection clause of the Fourteenth Amendment. Mr. Justice Stone has declared that the "legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it."⁷⁷ The Supreme Court has indicated that it regards farmers as a distinct class in our society with "a different economic significance"⁷⁸ and, as such, the Court is not likely to object to the exemption of farmers from a sales tax.

(b) *Sales of Particular Products and Specific Classes of Sales*

A number of products are specifically exempted from this tax.⁷⁹ In most cases they are taxed under other statutes.⁸⁰ In other instances, public policy withdraws them from this taxable privilege, e.g., school books and school lunches.⁸¹

The tax is on the sale of tangible personal property and the term

73. *Tigner v. Texas*, 310 U. S. 141, 145 (1940).

74. *Developments in the Law—Taxation—1933*, 47 HARV. L. REV. 1209, 1228 (1934).

75. *Moore v. State Board of Charities and Corrections*, 239 Ky. 729, 40 S. W. 2d 349 (1931); *State ex rel. Botkin v. Welsh*, 61 S. D. 593, 251 N. W. 189 (1933); *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 25 P. 2d 91 (1933).

76. *Winter v. Barrett*, 352 Ill. 441, 186 N. E. 113 (1933).

77. *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 509 (1937). See Sholley, *Equal Protection in Tax Legislation*, 24 VA. L. REV. 229, 388 (1938).

78. *Tigner v. Texas*, 310 U. S. 141, 145 (1940).

79. Sec. 6. See Conlon, *Express or Implied Exclusions from Consumption Excises—Types of Consumers*, 8 LAW & CONTEMP. PROB. 594 (1941); Frampton & Smith, *Commodities and Transactions Exempt from Consumption Taxes*, 8 LAW & CONTEMP. PROB. 579 (1941).

80. (1) Gasoline; (2) motor vehicle fuel now taxed 7¢ per gallon; (3) manufactured tobacco products; (4) alcoholic beverages; (5) beer; (6) water (not including mineral or carbonated water, or any water put up in bottles, jugs, or other containers); (7) electric power or energy; (8) natural or artificial gas (not including butane or other liquefied gas unless used by a municipality as part of a gas distribution system).

81. Also (1) fertilizer and containers for farm products; (2) field and garden seeds when sold directly to the farmer; (3) newspapers. By § 2(c) 2, "materials, containers, labels, sacks or bags used for packaging tangible personal property for shipment or sale" is exempted from both sales and use tax.

"tangible" is specifically declared not to include "stocks, bonds, notes, insurance, or other obligations or securities."⁸²

Certain types of sales are exempted regardless of any other factor. No sale for resale is taxable. No casual sale is taxable. No sale of other than tangible personal property is taxable. There is no tax upon a sale that has already borne another similar tax in another state of an amount equal to the Tennessee tax. If the amount of the prior tax is less than the Tennessee tax, the Tennessee buyer must pay the difference.⁸³

(c) *Sales to Particular Purchasers*

The tax "shall not apply to the use, sale, or distribution of religious publications to or by Churches or other religious or charitable institutions for use in the customary religious or charitable activities."⁸⁴ The exemption is limited to the transfer of religious publications and all other sales by or to such institutions are taxable.⁸⁵

All "sales made to the State of Tennessee or any County or municipality within the State" are exempted from this tax.⁸⁶ This exemption directs attention to the constitutional question: Are sales to the Federal government or one of its agencies taxable? The *Panhandle Oil* case said that they were not.⁸⁷ The court later refused to exempt the holder of a cost-plus government contract.⁸⁸ Mr. Justice Stone said that this latter case overruled the *Panhandle Oil* case.⁸⁹ This result is not certain due to the clear differences in the fact situations of the two cases.⁹⁰ The Commissioner has ruled that sales when "billed and sold directly to, and . . . paid for by the government of the United States, its departments or agencies . . ." are not taxable.⁹¹

(d) *Sales in Interstate Commerce*

Neither Congress⁹² nor any state⁹³ has the power to tax exports to a foreign country. A state may not tax the sale of articles destined for foreign shipment.⁹⁴ These are settled matters in constitutional law. The

82. Sec. 2(1).

84. Sec. 4.

85. Rule 51.

86. Sec. 6.

87. *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U. S. 218 (1928) (gasoline purchases by Coast Guard).

88. *Alabama v. King & Boozer*, 314 U. S. 1 (1941); see Note, *Constitutional and Legislative Bases of Intergovernmental Tax Immunities*, 51 *YALE L. J.* 482 (1942).

89. *Penn. Dairies v. Milk Control Commission*, 318 U. S. 261, 277 (1943).

90. See Note, *A Review of Intergovernmental Immunities from Taxation*, 4 *WASH. & LEE L. REV.* 48 (1946).

91. Rule 58.

92. U. S. CONST. Art. I, § 9.

93. *Id.* § 10.

94. *Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69 (1946) (oil from California to New Zealand); Note, 14 *U. of CHI. L. REV.* 669 (1947); 42 *ILL. L. REV.* 251 (1947); 59 *HARV. L. REV.* 627 (1946).

Tennessee statute specifically exempts from taxation any tangible personal property "imported into this State or produced or manufactured in this State for export."⁹⁵ If "export" connotes shipment to a foreign country—as it does in the Federal courts—⁹⁶ this exemption is as it should be. If "export" includes shipment to a sister state, the language is too broad in that it is by no means certain that the shipping state is precluded from taxing. The factors determining the taxability of property under a sales tax do not include the motive in manufacture.

A state may not tax imports,⁹⁷ but as indicated above a state may tax the privilege of use of property imported into the state, either from a foreign country or another state, when the goods "are sold, removed from the original package, or put to the use for which they are imported,"⁹⁸ or, as the Act puts it, the property may be taxed "after it has come to rest in this state and has become a part of the mass of property in this state."⁹⁹

In examining state taxation of interstate commerce, there are only two situations that are settled law. If the sale takes place entirely in Tennessee, the domicile of the parties and the proposed destination of the goods are immaterial. The sale is then taxable by Tennessee.¹⁰⁰ If the sale is consummated outside of Tennessee and the goods are brought into this state for use or consumption in this state, the goods are taxable in Tennessee, not by the sales tax¹⁰¹ but by the use tax.¹⁰² The sole restriction on this use tax is that it may not be imposed if a similar tax of equal amount has already been imposed on the transaction in another state.¹⁰³ It is settled that interstate commerce must bear its fair share of the tax burden¹⁰⁴ but it must not be subjected to multiple taxation simply because it is interstate commerce.¹⁰⁵

The problems arise over the variations within these extremes. In attempting to prevent multiple taxation of a single transaction through the

95. Sec. 4.

96. *Swan and Finch Co. v. United States*, 190 U. S. 143 (1903).

97. *Supra* note 93.

98. *Hooven & Allison Co. v. Evatt*, 324 U. S. 652, 657 (1945). See note by Thomas Reed Powell on when an import ceases to be an import. 58 *HARV. L. REV.* 858 (1945); see *Cases Noted*, 45 *COL. L. REV.* 661 (1945).

99. Sec. 4.

100. *International Harvester Co. v. Department of Treasury of State of Indiana*, 322 U. S. 340 (1944). *Accord*, Rule 29 ("It is immaterial that the property purchased will be later transported outside the State."). See *Recent Case*, 13 *GEO. WASH. L. REV.* 115 (1944).

101. *McLeod v. Dilworth Co.*, 322 U. S. 327 (1944); *Recent Case*, 13 *GEO. WASH. L. REV.* 117 (1944).

102. *General Trading Co. v. State Tax Commission*, 322 U. S. 335 (1944).

103. Sec. 4.

104. *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250 (1938); Warren & Schlesinger, *Sales and Use Taxes: Interstate Commerce Pays Its Way*, 38 *COL. L. REV.* 49 (1938).

105. *Adams Manufacturing Co. v. Storen*, 304 U. S. 307 (1938); Gwin, White & Prince v. Henneford, 305 U. S. 434 (1939); *Freeman v. Hewit*, 329 U. S. 249 (1946); Note, 56 *YALE L. J.* 898 (1947).

use of the interstate commerce clause, the Court may possibly be applying the principles of conflict of laws to determine the state in which the sale is consummated and that state alone may be permitted to tax. For example, Indiana could not tax a sale of stock made in New York by an Indiana broker,¹⁰⁶ but New York could tax a sale of Pennsylvania coal when the sale was completed in New York.¹⁰⁷ Arkansas could not tax a sale in Tennessee of goods destined for Arkansas¹⁰⁸ but New Mexico could impose a tax on advertising space sold by a magazine published in New Mexico and destined for intra and extra-state circulation.¹⁰⁹ But the law still remains in much confusion,¹¹⁰ and with a situation of such uncertainty, the phrasing of the Tennessee Act seems prudent: "[N]or is it the intention of this Act to levy a tax on bona fide interstate commerce."¹¹¹

V. ENFORCEMENT OF THE ACT

The tax levied by the Act is imposed upon the purchaser and collected by the dealer.¹¹² The dealer cannot advertise that he will absorb the tax¹¹³ and if he fails to collect it he is liable for it himself.¹¹⁴ The dealer is therefore the collecting agent of the state and in the performance of his duties is required to keep records, file returns, and remit the tax. This is not a deprivation of property or services without due process and is not a violation of the Fourteenth Amendment.¹¹⁵ The Tennessee constitution forbids the taking of a man's particular services without the consent of his representatives or without just compensation to him for such services.¹¹⁶ Presumably passage of this law expresses validly the consent of each dealer's representatives, and the Act provides for compensation to the dealer for his services as the state's collecting agent.¹¹⁷

But when these duties are imposed upon out-of-state vendors, is this not a burden on interstate commerce? The answer has been uniformly in

106. *Freeman v. Hewitt*, 329 U. S. 249 (1946); Comment, 46 MICH. L. REV. 50 (1947).

107. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940).

108. *McLeod v. Dilworth Co.*, 322 U. S. 327 (1944).

109. *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250 (1938).

110. For detailed treatment of the cases, see Lockhart, *The Sales Tax in Interstate Commerce*, 52 HARV. L. REV. 617 (1939); Powell, *New Light on Gross Receipts Taxes*, 53 HARV. L. REV. 909 (1940); Powell, *More Ado About Gross Receipts Taxes*, 60 HARV. L. REV. 501, 710 (1947); Dunham, *Gross Receipts Taxes on Interstate Commerce*, 47 COL. L. REV. 211 (1947); McNamara, *Jurisdictional and Interstate Commerce Problems in the Imposition of Excises on Sales*, 8 LAW & CONTEMP. PROB. 482 (1941); Overton, *State Taxation of Interstate Transactions*, 19 TENN. L. REV. 870 (1947).

111. Sec. 4.

112. Sec. 5(b). In general, see Huston & Berryman, *Collection and Enforcement of State Consumption Excise Taxes*, 8 LAW & CONTEMP. PROB. 506 (1941).

113. Sec. 5(e).

114. Sec. 5(d).

115. *Pierce Oil Corporation v. Hopkins*, 264 U. S. 137 (1924); *Monamotor Oil Co. v. Johnson*, 292 U. S. 86 (1934).

116. TENN. CONST. ART. I, § 21.

117. Sec. 8(b) (dealer may deduct 2% of tax due).

the negative.¹¹⁸ This is a reasonable price for the privilege of doing business in the state. The authority to impose these duties has been said to exist even after the power to force compliance has gone. The "impotence of state power" to get jurisdiction over an extra-state vendor does not affect the vendor's duty to collect.¹¹⁹ But this impasse is prevented under the Tennessee Act by making both the vendee and the vendor dealers for the purposes of the use tax.¹²⁰ The out-of-state vendor may be authorized to collect the tax if he applies for a certificate of registration.¹²¹ If he has no such certificate, the Tennessee purchaser must remit the tax to the Commissioner.¹²²

In case of failure on the part of the dealer to remit the tax whether he collected it or not, the Commissioner has the power to issue a distress warrant and levy on the dealer's property.¹²³ Suppose that instead of doing this, the Commission went into equity and petitioned for a mandatory injunction against a dealer who had not collected the tax in the past and indicated that he would not do so in the future, ordering him to collect and pay the tax. A Mississippi court granted such an injunction on the ground that the defendant's actions were seriously impairing the efficiency of the state tax collector.¹²⁴ This is clearly an injunction to restrain a crime, and aside from the burden imposed upon equity courts, is not a recommended solution to the Commissioner's troubles.

All sellers in the state must register with the Commissioner,¹²⁵ keep records, and have them available for inspection by the Commissioner.¹²⁶ This control extends also to wholesalers and jobbers who are in a position to know of all sales of tangible personal property in this state. They too must keep this information available for the Commissioner at all reasonable hours.¹²⁷ Transportation companies must open their books to the commissioner so that he may "determine what dealers . . . are importing or otherwise shipping articles of tangible personal property which are liable for said tax."¹²⁸

118. *Felt & Tarrant Manufacturing Co. v. Gallagher*, 306 U. S. 62 (1939); *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359 (1941); *General Trading Co. v. State Tax Commission*, 322 U. S. 335 (1944); Recent Case, 7 Mo. L. Rev. 86 (1942); Note, 57 HARV. L. REV. 1086 (1944) (author is Thomas Reed Powell).

119. Mr. Justice Douglas in *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359, 364 (1941).

120. Sec. 4.

121. Rules 202 & 206.

122. Rule 208.

123. Sec. 11.

124. *State ex rel. Rice v. Allen*, 180 Miss. 659, 177 So. 763 (1938). See Wade, *The Work of the Mississippi Supreme Court for the September, 1937, and the March, 1938, Terms: Taxation*, 11 Miss. L. J. 65, 75 (1938).

125. Sec. 16.

126. Secs. 8(a) (e). The records required are listed in Rule 80.

127. Sec. 8(f).

128. Sec. 9(a).

Finally, no one not a common carrier may import goods into the state without a special permit. Importation without such a permit, "shall be construed as an attempt to evade payment of said tax" and the vehicle used may be seized and is subject to forfeiture and sale.¹²⁹ The very general terms of this latter authority in the Commissioner seem to state that no one, without a permit, even if on a vacation trip, may bring a purchased article, of whatever value, into this state without being subject to having his car seized. The words in the statute and Rules, "consignee" and "consignor,"¹³⁰ indicate that this possibility is not the contemplated one but the statutory words are most certainly too broad.¹³¹

The Act provides both civil and criminal punishments for violations of the statute. The civil penalties are all in one section.¹³² The criminal punishments are scattered through the Act with no apparent guiding principle. No two punishments are the same. In one instance, the same offense is punished in different sections by mutually exclusive penalties.¹³³ Some offenses are assigned specific penalties and others are simply declared misdemeanors and "punishable as such"¹³⁴ or "shall be punished as provided by the general law."¹³⁵ The general code section provides for punishments far greater than any of those specially mentioned in the Act.¹³⁶

This, of course, presents no legal problems but does indicate a certain amount of careless draftsmanship of the Act. The statute was closely modelled on that similar act of Louisiana,¹³⁷ and yet in this matter of criminal punishments there is a complete deviation. More uniformity and more careful adjustment of penalties to offenses would have made this feature of the Act more satisfying.

VI. REMEDIES OF DISSENTING TAXPAYERS

Upon any claim of illegal assessment and collection, the Act gives the

129. Sec. 12; Rule 216.

130. Sec. 12 reads "... apply ... for a permit stating ... the name and address of the consignee"; Rule 216 reads "... must first obtain ... a permit stating ... the name and address of the consignor and the name and address of the consignee."

131. The use tax is very difficult to administer and a great burden is lifted by the common general exemption which runs as high as \$50 a month. *BLAKEY & BLAKEY, SALES TAXES AND OTHER EXCISES 19 (1945)*.

132. Sec. 8(c).

133. Sec. 10(e) states that "Any dealer ... failing or refusing to furnish any return ... or shall violate any other provision of this Act, punishment for which is not otherwise herein provided, shall be guilty of a misdemeanor. ..." Punishment is \$200 fine, 60 days or both. Sec. 10(g) reads "Any dealer who shall violate any other provision of this Act, punishment for which is not otherwise herein provided, shall be guilty of a misdemeanor. ..." Punishment is \$10 to \$100 fine, 30 days, or both.

134. Sec. 7(c).

135. Secs. 9(b) and 16.

136. *TENN. CODE § 10756 (Williams, 1934)* ("... shall be punished by imprisonment ... not more than one year, or by fine not exceeding one thousand dollars, or by both. ...").

137. *LA. GEN. STATS. §§ 8648.26 et seq. (Dart Supp. 1947)*.

dissentient the usual remedy—pay the tax, protest at time of payment, and sue within thirty days.¹³⁸

A problem not peculiar to sales taxes but one which frequently arises under them is the case of the dissenting collector who, having taken the tax from the purchaser, is now unwilling to turn the tax over to the state because of a claim that the tax is unconstitutional. Such dealer will not be heard by the courts. It would be unjust enrichment for him to keep the money he has collected from willing taxpayers.¹³⁹ And further, having collected from such purchaser by claim of duty under the law, he will now be estopped to deny the validity of the law in order to avoid remission to the state of taxes so collected.¹⁴⁰

STANLEY D. ROSE

138. Sec. 11. The general code sections stating these remedies are §§ 1790 *et seq.* In *Saverio v. Carson* 208 S. W. 2d 1018 (Tenn. 1948) plaintiff petitioned for a declaratory judgment.

139. *Cook v. Sears-Roebuck & Co.*, 206 S. W. 20 (Ark. 1947); *Wade v. State*, 97 Colo. 52, 47 P. 2d 412 (1935); *Shannon v. Hughes & Co.*, 270 Ky. 530, 109 S. W. 2d 1174 (1937); *Kesbee v. McGoldrick*, 278 N. Y. 293, 16 N. E. 2d 288 (1938). See Note, *Disposition of Illegally Collected Sales Tax Receipts*, 48 *YALE L. J.* 695 (1939); 18 *B. U. L. REV.* 790 (1938); Recent Case, 52 *HARV. L. REV.* 330 (1938).

140. *Henry County v. Standard Oil Co.*, 167 Tenn. 485, 487, 71 S. W. 2d 683 (1934) (The county was seeking to recover taxes collected under a tax already declared unconstitutional. Recovery denied. The court stated that "while estoppel may be urged for the protection of a right, it can never create a right").