Vanderbilt Law Review

Volume 17
Issue 3 *Issue 3 - June 1964*

Article 26

6-1964

State and Local Taxation – 1963 Tennessee Survey

Paul I. Hartman

State and Local Taxation—1963 Tennessee Survey

Paul J. Hartman[*]

I. Excise Tax—Entire Net Income of Domestic Corporation Engaged in Multistate Operations Attributable to Tennessee
II. Privilege Tax as Applied to Foreign Corporation—Orders Solicited in State Accepted in Foreign State
III. Applicability of Tax for Privilege of Doing Business to Foreign Corporation—Sufficiency of Local Activity
IV. Use Tax—Exclusion if Subject to Sales Tax
V. Franchise Tax—Leased Property Included in Measure
VI. Privilege Tax on Persons Engaged in Business of Collecting Accounts—Deductability of Attorney's Fees from Gross Collections
VII. Ad Valorem Tax—Applicability to Non-Domiciliary Interstate Motor Carriers
VIII. Exemption of Religious Institution from Property Taxation—Applicability During Construction of Structure To Be Used for Non-Exempt Purpose
IX. Immunity of Federal Government from Sales Tax—Taxability as Independent Contractor
X. Administrative Remedies—Exhaustion of Remedies as Condition Precedent to Seeking Judicial Relief
XI. Failure To Make Proper Collections of Sales and Use Tax—Honest Mistake as Excuse
XII. Legislative Changes

I. Excise Tax—Entire Net Income of Domestic Corporation Engaged in Multistate Operations Attributable to Tennessee

The Tennessee Supreme Court case of *John Ownbey Co. v. Butler*[1] presents the question whether the entire net income of a domestic corporation, engaged in multistate operations, is attributable to Tennessee for excise tax purposes. A second question presented is whether a tax on the entire net income from such multistate operations violates the commerce clause.

Four domestic corporations contested the excise tax as applied to their entire net income. The court viewed the case presented by the Gray & Dudley Company as the best in opposition to the tax; here only its activities will be discussed. Gray & Dudley, a manufacturer and seller of appliances, accounted for approximately five per cent of its annual sales to customers within Tennessee, while approximately

* Professor of Law, Vanderbilt University.

1. 211 Tenn. 366, 365 S.W.2d 33 (1963).

ninety-five per cent of its sales were to customers in other states. Approximately ninety per cent of the total sales were made through solicitation of orders of manufacturers' representatives with shipment from Gray & Dudley to the purchaser. This, of course, necessitated the use of channels of interstate commerce in the case of out-of-state purchases. Approximately eight per cent of these sales were made through independent warehouses located in Connecticut, New York, Louisiana and California. Gray & Dudley shipped this approximately eight per cent of its goods to such out-of-state warehouses where manufacturers' representatives operating within such states made sales and deliveries direct to the customers. Such out-of-state purchasers were billed from Gray & Dudley's Tennessee office and payment was remitted thereto. Gray & Dudley likewise made about two per cent of its out-of-state sales in Louisiana and New York through agents of Gray & Dudley located there. This two per cent of goods was shipped to these agents, who upon receipt stored the goods in their warehouses. These agents made the sales and deliveries from their warehouse inventory, received all payments for such sales, maintained books and records, and submitted a monthly inventory to Gray & Dudley's Tennessee office, accompanied by payment for the goods.

All corporations organized for profit under the laws of Tennessee and doing business in Tennessee are required annually to pay an excise tax of a certain amount on their net income from business done within the state.[2] Where a corporation does business in Tennessee and elsewhere the net earnings are apportioned. The net earnings as thus apportioned to Tennessee are deemed the earnings arising from business done within the state.[3]

For determining the amount of excise tax due on the net income of multistate manufacturing business, Tennessee has a three factor apportionment formula, each of which factors compares Tennessee value to total value in the categories of (1) tangible property, (2) manufacturing cost, and (3) sales.[4]

From 1943 until 1959 Gray & Dudley was treated by the Tennessee Tax Commissioner as doing business both within and outside Tennessee. Consequently, this taxpayer was permitted to determine the amount of business attributable to Tennessee for tax purposes by the use of the manufacturers' apportionment formula. However, beginning with the year 1959, the Commissioner took the position that Gray & Dudley was engaged in business only in Tennessee; that their entire net income was attributable to Tennessee for excise tax purposes;

2. TENN. CODE ANN. §§ 67-2701 to -2724 (1956).
3. TENN. CODE ANN. § 67-2706 (Supp. 1964).
4. TENN. CODE ANN. § 67-2707 (1956).

and that Gray & Dudley was not, for tax purposes, doing business outside Tennessee. As a result, the Commissioner refused to allow this taxpayer to use the apportionment formula to determine the amount of income attributable to Tennessee for excise tax purposes and imposed a tax on the entire net income from Gray & Dudley's multistate business. The court's opinion states that the Commissioner came to the conclusion that Gray & Dudley's entire net income was attributable to Tennessee for tax purposes because Congress had passed Public Law 86-272, which, the Commissioner thought, prevented any other state from taxing any of the income of Gray & Dudley. Hence, concluded the Commissioner, if no other state could tax any of Gray & Dudley's income, Tennessee could then claim that all of Gray & Dudley's income was earned from business done in Tennessee.

Public Law 86-272[5] denies to the states the power to impose taxes on or measured by net income derived within the state from interstate commerce if the only business activities carried on within the state are the solicitation of orders for sales of tangible personal property, where the orders are sent outside the state for approval or rejection and are filled by shipment or delivery from a point outside the state. In short, this legislation gives immunity from taxation only where there is an out-of-state seller whose only connection with the taxing state is that of soliciting orders for the sale of tangible personal property.

The Tennessee Supreme Court sustained the Commissioner and permitted the State of Tennessee to impose its excise tax on the entire net income of Gray & Dudley. The court held that for tax purposes Gray & Dudley was not "doing business" outside Tennessee. Consequently, this taxpayer was not permitted to use the apportionment formula which is applicable where a corporation is doing business in Tennessee and elsewhere.

What constitutes "business done" in Tennessee within the meaning of the Tennessee excise tax statute is, of course, a matter to be conclusively determined by the Tennessee Supreme Court, within permissible constitutional bounds.[6] The *Ownbey* court quoted the 1943 Tennessee case of *Memphis Natural Gas Co. v. McCanless*[7] to the effect that the 1937 Tennessee legislature intended to include earnings from interstate commerce as far as they could. While that may be true, nevertheless, it is very doubtful that Public Law 86-272 would immunize Gray & Dudley from taxes on a consider-

---

5. 73 Stat. 555 (1959), 15 U.S.C. § 381(c) (1959).
6. Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948); General Trading Co. v State Tax Comm'n, 322 U.S. 335 (1944).
7. 180 Tenn. 695, 177 S.W.2d 843 (1943).

able amount of their income from their activities in states other than Tennessee. It will be recalled that some ten per cent of Gray & Dudley's total income was derived from sales through warehouses in other states. An authority in the field, commenting on the scope of Public Law 86-272, has said: "Local warehousing and delivery of goods out of a local warehouse are clearly beyond the pale of the minimum standards set up for immunity. Instead, shipment must be made from a point outside the state."[8] Moreover, the curb placed on state taxing power by Public Law 86-272 was not, in any sense, intended by Congress to increase the taxing power in any state or create new definitions of "doing business" for tax purposes. This is made crystal clear by the Senate Report No. 658 of the Committee of Finance, accompanying the bill subsequently, enacted into Public Law 86-272: "The Bill does not give to the States any power to tax income derived from interstate commerce. The power of the States in this respect will be determined with no inference from the Bill."[9] During the floor debate in the Senate, Senator Byrd stressed the fact that the bill was only a curb on state taxing power and not a grant of such power: "There is nothing in the bill which authorizes any taxation by the State. There is a tax immunity provided in the bill in certain situations, but there is nothing in the bill to give the States any power to levy a tax on interstate commerce."[10]

Also, it might be asked whether the fact that other states have not, or cannot, tax a portion of the income from the multistate activities of Gray & Dudley constitutes a justifiable basis for a grasping Tennessee tax policy of taxing the entire net income from multistate operation. The simple facts are that part of Gray & Dudley's income is attributable to activity that takes place beyond the borders of Tennessee. Under the construction of the Tennessee statute given by the *Ownbey* case, Tennessee taxing authority is permitted to reap where Tennessee clearly has not sown. This case affords an illustration of the need for uniform and equitable guide lines regulating taxation of multistate business.

In addition, there is some question as to whether the commerce clause, properly applied, would permit Tennessee to tax the entire net income of Gray & Dudley. Even though Gray & Dudley may not yet be paying taxes on their operations in other states, nevertheless, it is fairly clear that some of the other states could tax that portion of the income attributable to those states. As we have seen, it is fairly certain that Public Law 86-272 does not immunize some of Gray & Dudley's operations from an income tax by states other than

8. HELLERSTEIN, STATE AND LOCAL TAXATION 227 (2d ed. 1961).
9. S. REP. No. 658, 86th Cong., 1st Sess. (1959).
10. 105 CONG. REC. 16353 (daily ed. Sept. 3, 1959).

Tennessee. Clearly, those states have sufficient nexus with Gray & Dudley to impose a net income tax. Such a tax was sustained in the *Northwest-Stockham Valve*[11] case where the connection of the taxpayer with the taxing state was much slimmer than in the case at hand. All that was done in the taxing state by the taxpayer in the *Northwest-Stockham* case was the solicitation of orders by a foreign seller through local sales offices; and the orders were accepted and filled from an out-of-state source. Therefore, proceeding from the position that states other than Tennessee have constitutional power to tax a portion of Gray & Dudley's income, the question arises as to whether this would not subject Gray & Dudley's income to the risk of multiple tax burden not borne by local Tennessee business. When such is the situation, there is authority to the effect that the tax is a violation of the commerce clause.[12]

II. Privilege Tax as Applied to Foreign Corporation—Orders Solicited in State Accepted in Foreign State

The case of *King Merritt & Company v. Worrall*[13] presents the question of whether the commerce clause bars a Tennessee privilege tax imposed upon a foreign corporation which uses commission salesmen to solicit orders for securities, when the orders were sent to New York where they were accepted. The securities were forwarded from New York direct to the investor unless he requested that they be sent through the local Tennessee office. Tennessee sought to impose a tax for the privilege of soliciting or accepting orders for the sale of securities.[14]

Taxpayer, a New York corporation, has its principal office in New York City. It is engaged in business as a broker-dealer in securities. Taxpayer's operation is a selling organization of commission salesmen offering to the investing public shares in the various mutual funds; and using their principal office as the key to their operations, have established offices in many cities using one of their commission salesmen as a local manager. This manager also obtains and trains other commission salesmen to sell securities for taxpayer, receiving an override on the sales made by these salesmen. The offices are leased to and the rent paid by taxpayer. The telephone is listed in the

11. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).

12. J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938) (tax on the entire gross income of a domestic corporation ran afoul of the commerce clause); see Central R.R. v. Pennsylvania, 370 U.S. 607, 612-14 (1962) (property tax applied to domestic corporation subject to multiple burdens doctrine); Northwestern States Portland Cement Co. v. Minnesota, *supra* note 11 (Court indicates "multiple burdens" doctrine is applicable to net income taxes).

13. 368 S.W.2d 745 (Tenn. 1963).

14. Tenn. Code Ann. § 67-4203, Item 16(b) (1956).

name of and charges paid by taxpayer. Necessary furniture and secretarial help are supplied by taxpayer.

Over taxpayer's claim that the tax violated the commerce clause, the Tennessee Supreme Court sustained the tax as applied to the privilege of dealing in the securities sold through these local offices. The court held that the taxpayer was engaged in taxable local business in soliciting orders for the securities.

There are several cases decided by the United States Supreme Court that cast doubt on the conclusion that taxpayer is engaged in local business. Taxes, regardless of the amount, upon the privilege of carrying on interstate commerce, have uniformly been held obnoxious to the commerce clause on the ground that the privilege is given by the national government and not the state government.[15] A particular type of privilege tax frequently struck down as violative of the commerce clause is an exaction imposed on the occupation of selling goods shipped through interstate channels. One familiar form the tax takes is a levy on the occupation of selling goods prior to their interstate shipment into the purchaser's state. Many times the Supreme Court has given short shrift to this sort of tax.[16]

As the Tennessee court points out in the instant case, the pivotal point is whether taxpayer is engaged in any local business, or are all its activities in furtherance of interstate commerce. In holding the taxpayer did engage in taxable local activity, the court relied on *Norton Co. v. Department of Revenue*.[17] In that case, Illinois sought to impose her privilege tax, measured by gross receipts, upon a foreign manufacturing corporation which maintained a sales office and warehouse in Chicago. Some orders for goods were sent by Illinois customers directly by mail to the home office in Massachusetts. Other orders were forwarded by the Illinois branch office. All orders were accepted or rejected, and the orders filled by shipment from the home office in Massachusetts either directly to the customers in Illinois, or through the Illinois branch. Illinois tried to include within the taxable gross receipts the proceeds from all sales made to Illinois customers. The United States Supreme Court held that Illinois could properly include receipts from all sales that utilized the branch office (a) either in receiving the orders; or (b) in distributing the goods. Illinois was not permitted to include the proceeds from the sales of orders sent directly by the customer to the taxpayer's out-of-state home office where the order was filled and the goods shipped directly to the customer.

15. Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951); Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203 (1925); Atlantic & Pacific Tel. Co. v. Philadelphia, 190 U.S. 160 (1903).

16. *E.g.*, Nippert v. City of Richmond, 327 U.S. 416 (1946) (on solicitor).

17. 340 U.S. 534 (1951).

The *Norton* opinion is clear as to what transactions Illinois can regard as taxable local activities, but the opinion is not clear as to the exact reason why some of the transactions are taxable. The Illinois branch office maintained a stock of goods; it received orders; it held merchandise shipped in carload lots in order to save freight; and it supplied services to customers by way of repairs to machines and technical advice. The Illinois branch also made some over-the-counter purely local sales to customers. It is clear, therefore, that the *Norton* taxpayer had "localized" itself to a much greater extent than the taxpayer in the case at hand.

The case of *Spector Motor Service, Inc. v. O'Connor*[18] also casts some doubt on whether King Merritt had sufficiently localized themselves so as to be subject to a Tennessee privilege tax. In *Spector*, the Court struck down a Connecticut tax for the privilege of engaging in business. There, the taxpayer was a foreign corporation engaged in the interstate trucking business. Taxpayer, while doing an exclusively interstate trucking business, had employees, office equipment, trucks and two terminals in the taxing state where approximately one-third to one-half of its business originated. The Supreme Court held that the tax violated the commerce clause, since it was imposed on the privilege of engaging in interstate commerce.

The latest authority on the commerce clause, *Northwestern-Stockham*,[19] by citing *Spector* with approval, leaves no doubt that the privilege of engaging in interstate commerce is not a taxable local privilege. Moreover, *Northwestern-Stockham*, by implication, seems to make it clear that mere solicitation from offices within a state, where the orders are sent out of state to be filled, is purely interstate commerce. Hence, such solicitation, without more, as in *King Merritt & Company*, clearly would not be a taxable privilege. If all of King Merritt's Tennessee activities, including the maintenance of a local sales office, are simply in furtherance of its interstate sales business, under previous cases there is likely no taxable event that would support the questioned privilege tax imposed upon the privilege of solicitating orders.[20]

18. Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951).

19. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).

20. In two other cases an excise tax has been struck down, as applied to a foreign corporation, which maintained a local office in the taxing state, with stock of samples and a force of office and traveling salesmen, who obtained orders subject to approval by the out-of-state home office, where the goods were shipped directly from the home office to the customers. Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203 (1925); Cheney Brothers v. Massachusetts, 246 U.S. 147 (1918). Ozark Pipe Line Corp. v. Monier, 266 U.S. 555 (1925), would seem to support the same conclusion. There a franchise tax for the privilege of engaging in business fell before the commerce clause, although the taxpaying corporation maintained in the taxing state an office, maintained and operated automobiles and communication lines, employed

It is entirely plausible to argue that the tax in the case at hand should be sustained, although it is levied on interstate commerce, in order that taxpayer will not escape its fair share of the tax burden. However, the decided cases generally have not given much weight to that argument when the Court thinks the tax is levied on the privilege of engaging in interstate commerce.[21]

III. Applicability of Tax for Privilege of Doing Business to Foreign Corporation—Sufficiency of Local Activity

M. & M. Stamp Co. v. Harris[22] presented the question whether taxpayer, who engaged in a multistate trading stamp business, conducted sufficient local activity in Tennessee so as to be liable for a tax for the privilege of doing business. Taxpayer, a foreign corporation, sent agents into Tennessee to enter into agreements with local merchants to use their trading stamps. For some months, taxpayer maintained a redemption store in its own name in Clarksville, Tennessee. Thereafter, it entered into an agreement with a Clarksville concern to redeem its stamps in exchange for premium merchandise. Tennessee levies a tax upon each trading stamp company or agency doing the business of selling, distributing, or giving away trading stamps.[23] Over taxpayer's objection that the tax violated the commerce clause, the Supreme Court of Tennessee sustained the tax. The court held that the taxpayer was engaged in local activity which afforded a sufficient basis for the privilege tax.

The mere solicitation of orders for the trading stamps in Tennessee would not be a taxable privilege, if the orders were approved and filled by an out-of-state source, which sent the stamps directly to the Tennessee merchant.[24] However, when this foreign seller localized itself in Tennessee by establishing facilities for redemption of the stamps, Tennessee acquired sufficient nexus under the commerce clause. Interstate commerce ended when the trading stamps were delivered to the merchant. Goods that have been transported interstate, after the interstate movement ends, are no longer a subject of interstate commerce, and dealing with them may be the basis of a

---

labor and purchased and installed supplies. In striking down the tax, the Court said that all these activities were in furtherance of an exclusively interstate business.

21. For a discussion of this aspect of the matter elsewhere by the writer, see Hartman, *State Taxation of Interstate Commerce: A Survey and an Appraisal*, 46 Va. L. Rev. 1050, 1091-97 (1960).

22. 368 S.W.2d 752 (Tenn. 1963).

23. Tenn. Code Ann. § 67-4203, Item 106 (Supp. 1964).

24. Norton Co. v. Dep't of Revenue, 340 U.S. 534 (1951); Cheney Bros. v. Massachusetts, 246 U.S. 147 (1918).

privilege tax.[25] Thus, the activity of redemption of these trading stamps seems clearly to be a taxable local event which took place long after the interstate commerce had ended.

IV. Use Tax—Exclusion if Subject to Sales Tax

The applicability of a use tax to certain non-drug items purchased by druggist-taxpayer was the question in *MacFarland v. Morton Pharmaceuticals, Inc.*[26] It was found that the taxpayer actually sold these non-drug items to his customers, rather than making gifts of them to the customers. In this situation, the Supreme Court of Tennessee held that the use tax could not be applied as these items would be subject to a sales tax when they were sold to the customers.

Taxpayer, a drug manufacturer and wholesaler, purchased from suppliers quantities of non-drug items which it distributed among physicians, clinic and hospital customers in conjunction with its sale of pharmaceuticals. These customers had the choice of purchasing pharmaceuticals from either of two price lists. One of these, designated the "Morton Pharmaceutical" list afforded the purchasers the right to accumulate credits towards various "gifts" or "premiums." The other list, known as the "Modern Medicine" price list, extended to the purchasers no such rights. The prices of the same medicines in the respective catalogs were very much larger in the pharmaceutical catalog than in the "Modern Medicine" catalog. The costs of the non-pharmaceutical merchandise ("gifts" and "premiums") to the taxpayer was reflected in the profit and loss statement as a selling expense.

The Commissioner of Revenue took the position that the "gifts" or "premiums" acquired by the taxpayer were tangible personal property purchased for taxpayer's own use, and asserted against taxpayer a use tax. Payment of 30,000 dollars was made under protest and suit was instituted to recover that amount. There was a controversy as to whether taxpayer actually charged for these non-drug items. The chancellor found that since it had been shown that they were charged for, and that a profit was made on them by taxpayer, these non-drug items were sold for a consideration to the customer. Since a sales tax had been paid on the gross amount of the charge, the chancellor concluded that there was no use tax liability. The

25. Henneford v. Silas Mason Co., 300 U.S. 577 (1937); Edelman v. Boeing Air Transp., Inc., 289 U.S. 249 (1933); Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933); Browning v. City of Waycross, 233 U.S. 16 (1914). Redeemable coupons sent with goods by an out-of-state seller to a local merchant who made the sales are not within commerce clause protection. Rast v. Van Deman & Lewis, 240 U.S. 342 (1916).

26. 368 S.W.2d 756 (Tenn. 1963).

supreme court adopted the findings of the chancellor and held that a use tax could not be applied to the non-drug items, because it thought this personal property was actually sold to the purchasers and a profit made thereon by the taxpayer.

Based on the finding that the non-drug items were sold to the customers who paid a sales tax thereon, and keeping in mind that the use tax is normally designed to complement the sales tax by taxing items not subject to the sales tax, the result in the case at hand appears reasonable.

V. Franchise Tax—Leased Property Included in Measure

The case of *Memphis Peabody Corp. v. MacFarland*,[27] had to deal with a knotty problem in connection with the Tennessee franchise tax. Tennessee provides that all domestic business corporations shall pay annually a franchise tax for the privilege of engaging in business. This tax is in addition to all other taxes,[28] and is in the amount of fifteen cents per one-hundred dollars of the issued and outstanding stock, surplus and undivided profits of the corporation as shown by its books and records. The statute further provides that the measure of the tax shall in no case be less than the value of the real and tangible personal property owned or used by the corporation.[29]

The complaining taxpayer used leased property in the conduct of its business. The lessor corporation paid its franchise tax for the period in question and included in the measure of the tax the real property and improvements leased to the lessee-taxpayer. The taxpayer had made improvements on its leasehold interest and such improvements were carried on its books and records, and the values thereof were used in determining its franchise tax liability. The issue in the case was whether the taxpayer was required, in computing its franchise tax, to include in the minimum measure the assessed value of the leased property. The Supreme Court of Tennessee held that, under the circumstances, the taxpayer need not include the value of the leased property, because the court did not consider it an asset of the taxpayer.

As this case demonstrates, the problem of what to do with leased property in computing the measure of franchise and excise taxes has been troublesome. In net income taxes and excise taxes based on net income, apportionment formulas generally include, as one factor, personal and real property. Troublesome questions arise

27. 211 Tenn. 384, 365 S.W.2d 40 (1963).
28. Tenn. Code Ann. § 67-2902 (Supp. 1964).
29. Tenn. Code Ann. § 67-2909 (Supp. 1964).

concerning the way in which a lessee-taxpayer should deal with the leased property. Here is an area where some specific legislation is helpful. Many states, Tennessee now among them, by statute include rented as well as owned property within the property factor in a multi-factor apportionment formula. Some of the states having such a formula provide for valuation of the rented property at eight times the annual gross rent, with gross rent including all consideration paid by the taxpayer for the use of the rented property.[30] Inclusion of property rented by the taxpayer in the property factor eliminates otherwise arbitrary differences in taxes as between businesses that own property and those that rent them. With the rapid spread of leasing as a substitute for the purchase of buildings, machinery, vehicles and equipment, as well as other property, a statutory provision governing leased property is of increasing importance.

VI. Privilege Tax on Persons Engaged in Business of Collecting Accounts—Deductibility of Attorney's Fees from Gross Collections

Dun & Bradstreet v. Worrall[31] interprets the Tennessee privilege tax imposed on persons engaged in the business of collecting accounts. The statute provides that such persons shall pay a privilege tax based on the gross collection of each collector.[32] There were two questions in the case at hand. First, did the gross collections on which the tax was computed include collections made by attorneys hired by the taxpayer to do the collecting; and second, could the attorney's fee be deducted from the gross collections for the purpose of computing the amount of tax?

The complaining taxpayer had an arrangement with the creditors for whom it collected whereby the creditor authorized taxpayer to hire a licensed attorney to aid in the collections, if the creditor did not designate an attorney. In nearly all cases taxpayer selected the attorney. The taxpayer kept records of all the sums collected by such attorneys, including all the fees charged by them; and when an attorney remitted the amount collected, less the fee, to taxpayer, it deducted its commission or fee and remitted the balance to the creditor. The commission taxpayer charged the creditor for collecting was based on the total amount collected by the taxpayer itself,

30. Elsewhere the writer has made a short analysis of this facet of the problem. See Hartman, *State Taxation of Income from a Multistate Business*, 13 Vand. L. Rev. 21, 67-68 (1959). Tennessee now includes rental property in the franchise tax, using varying multiples for different property. Tenn. Code Ann. § 67-2909 (Supp. 1964). See note 76 *infra* and accompanying text.

31. 211 Tenn. 558, 363 S.W.2d 752 (1963).

32. Tenn. Code Ann. § 67-4201 to -4203, Item 28 (Supp. 1964).

plus the amount collected by the attorneys, including the amount retained by the attorney as a fee.

Under the circumstances of the case, the Supreme Court of Tennessee held that for privilege tax purposes, gross collections included not only collections made by attorneys, but also the sums retained by the attorneys as fees.

The writer is unable to find any basis for disagreement with the result reached by the court. Taxpayer seems to be trying to "have his cake and eat it too." It had authority generally to hire the attorneys, and its commission for collecting was based on the amount collected by the attorneys, including the amount the attorneys retained as fees for their services. Taxpayer claims these attorneys as agents for the purpose of increasing the amount of the taxpayer's compensation, but he disclaims the attorneys as agents when it comes to determining the amount he should pay the state for the privilege of making money through the use of these attorneys.

VII. Ad Valorem Tax—Applicability to Non-Domiciliary Interstate Motor Carriers

Three Tennessee cases quite properly held, it seems, that an ad valorem property tax can be applied to non-domiciliary interstate motor carriers operating in Tennessee, although the carriers did not follow regular routes. The cases are *E & L Transport Co. v. Ellington,*[33] *Jack Cole Co. v. Ellington,*[34] and *Howard Sober, Inc. v. Clement.*[35]

The Jack Cole Co. and the E & L Transport Co. are foreign corporations, and Howard Sober, Inc. may be a foreign corporation. All three complaining taxpayers are irregular route motor carriers whose trips are not scheduled as to time, route or number. These taxpayers are engaged in interstate transportation business as well as in Tennessee. Seemingly none of the taxpayers had any property located in Tennessee. The taxes were assessed on the basis of the proportion of miles traveled by each carrier in Tennessee to total miles traveled in all states.[36]

Over both due process and commerce clause objections, the Tennessee Supreme Court and two courts of appeals sustained the validity of the taxes as applied to these objecting taxpayers.

The Supreme Court of the United States seemingly has not squarely decided that an ad valorem property tax can be applied by a non-domiciliary state to non-scheduled interstate carriers, or to

33. 371 S.W.2d 456 (Tenn. 1963).
34. 372 S.W.2d 204 (Tenn. App. M.S. 1961).
35. 372 S.W.2d 202 (Tenn. App. M.S. 1960).
36. Tenn. Code Ann. § 67-901 to -934 (1956).

interstate carriers using irregular routes, as distinguished from interstate carriers using scheduled, regular routes. Nevertheless, the Court has unequivocally declared that such is constitutionally permissible under the commerce and due process clauses.[37] On well established principles, no reason appears why such interstate carriers should be exempt, and the three Tennessee courts so held, pointing out that these were ad valorem property taxes applied to interstate carriers, and not a forbidden privilege tax on the privilege of engaging in interstate commerce.

Taxes imposed on interstate carriers for the privilege of engaging in interstate commerce are forbidden by the commerce clause.[38] This has not generally been true with respect to local property taxes applied to vehicles of interstate commerce. Although vehicles are employed to transport interstate commerce, that fact alone does not afford either due process or commerce clause insulation from nondiscriminatory state and local property taxes. A property tax on the vehicles of interstate commerce, such as barges, tank cars, pipe lines, rolling stock, trucks, busses, and airplanes is a familiar type of sanctioned tax. As to vehicles moving in interstate land transportation, such as in the three cases at hand, it has long been settled that a non-domiciliary state can levy a property tax on the basis of the "fair average" number of vehicles permanently within the taxing state during the tax year, although the individual vehicles traveling into, through, and out of the state differ.[39] Vehicles of interstate transportation, if moving over fixed routes and regular schedules, may thus acquire a tax situs in several states, providing the states fairly apportion the taxes. The tax is open to attack on both due process and commerce clause grounds where it is not fairly apportioned to the use of the vehicles within the taxing state as compared to their use without.[40]

Where vehicles of interstate transportation consist of ships, formerly only a property tax levied by the state of domicile of the ships' owner could reach ships unless they had a permanent port elsewhere, even though the ships had regular ports of call in nondomiciliary states.[41] Now, however, water craft seem to be taxable by the same standards as applied to vehicles used in land transportation

37. Central R.R. v. Pennsylvania, 370 U.S. 607, 615 (1962).

38. Bingaman v. Golden Eagle Western Lines, Inc., 297 U.S. 626 (1936); Helson & Randolph v. Kentucky, 279 U.S. 245 (1929).

39. Nashville, C. & St. L.R.R. v. Browning, 310 U.S. 362 (1940) (apportionment ratio of mileage within state to mileage without state); see Union Refrigerator Transit Co. v. Lynch, 177 U.S. 149 (1900).

40. Johnson Oil Ref. Co. v. Oklahoma, 290 U.S. 158 (1933); Union Tank Line Co. v. Wright, 249 U.S. 275 (1919).

41. Southern Pac. Co. v. Kentucky, 222 U.S. 63 (1911).

in interstate operations.[42] Moreover, even a domiciliary state is forbidden, on due process grounds, to tax more than its just share of watercraft, if the other states have acquired jurisdiction to tax the vessel.[43] Also, the same rules now seem to apply to property taxation of airplanes as apply to vehicles of land and water transportation.[44]

While it may be more difficult fairly to apportion a tax where the interstate carrier does not have a regular, scheduled route, as in the three cases at hand, nevertheless, such carriers should also pay their fair share of the cost of the state and local governments whose protection they receive and whose opportunities and benefits they enjoy. Moreover, exemption of these carriers from the tax would give them a competitive advantage over local carriers who must shoulder the tax burden.

VIII. Exemption of Religious Institution from Property Taxation—Applicability During Construction of Structure To Be Used for Non-Exempt Purpose

Mid-State Baptist Hospital, Inc. v. City of Nashville[45] presents this question: Where property has been exempt for many years, and the tax exempt institution (Mid-State Baptist Hospital) commences construction of a structure on the property, with a portion of the completed building to be used commercially, does the property continue to be tax exempt until the building is completed and put into actual use? The Supreme Court of Tennessee answered this question in the affirmative, thereby giving the taxpayer an exemption from a Nashville property tax until the building is put into actual commercial use.

The Tennessee statute giving tax exemption to religious institutions expressly exempts the real estate of a religious, charitable, scientific or educational institution when occupied by such institution or its officers exclusively for carrying out thereupon one or more of the purposes for which the institution was created or exists.[46] The statute has two further provisions that are pertinent here. First, it provides that the property of such institution shall not be exempt if the owner, or any stockholder, officer, member or employee of

42. Ott v. Mississippi Barge Line Co., 336 U.S. 169, 174 (1949) (ratio of intrastate ship milage to total interstate milage).

43. Standard Oil Co. v. Peck, 342 U.S. 382 (1952).

44. See Braniff Airways, Inc. v. Nebraska, 347 U.S. 590 (1954); Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944), *as explained and limited*, Standard Oil Co. v. Peck, 342 U.S. 382 (1952). Elsewhere the writer has had a good bit more to say about taxation of vehicles of interstate commerce. See Hartman, State Taxation of Interstate Commerce 79-95 (1953).

45. 211 Tenn. 599, 366 S.W.2d 769 (1963).

46. Tenn. Code Ann. § 67-502(2) (1956).

such institution shall receive or may be lawfully entitled to receive any pecuniary profit from the operations of that property in competition with like property owned by others which is not exempt, except reasonable compensation for services. In the second place, the statute provides that the real property of any such institution not so used exclusively for carrying out thereupon one or more of the specified exempt purposes, but leased or otherwise used for other purposes, whether the income received therefrom be used for one or more of such purposes or not, shall not be exempt.

Construing these provisions together, the court appears to have reached a reasonable result in holding that the property remained exempt until it actually was used commercially. That conclusion is supported, in part, by the fact that that is the time when the property is going to come into competition with other tax-paying property.[47]

IX. IMMUNITY OF FEDERAL GOVERNMENT FROM SALES TAX—TAXABILITY AS INDEPENDENT CONTRACTOR

The recurring problem of "governmental immunity" from state taxation was the pivotal point in *United States v. Boyd*.[48] Two objecting taxpayers, Union Carbide Corporation and the Ferguson Company, objected to the payment of both sales and use taxes on tangible personal property used by them pursuant to contracts with the Atomic Energy Commission on the ground that they were agents of the United States Government, and thus immune from the taxes. Upon payment of the taxes under protest, each taxpayer, joined by the United States Government, brought suit to recover the taxes. Holding that taxpayers were purchasing agents for the United States Government, the court struck down the sales tax as applied to sales to the taxpayers. However, the court sustained the use tax as applied to materials used by taxpayers on the ground that, in the performance of their contracts with the Atomic Energy Commission, the taxpayers were independent contractors.

Tennessee imposes a sales tax on the privilege of selling tangible personal property at retail. "Sale" is defined as any transfer of title or possession, or both, for a consideration, and includes the fabrication of tangible personal property for consumers. The Tennessee statute imposes a use tax on the privilege of using property, irrespective of the title, ownership of the property, or of any tax immunity

47. In another connection the writer has discussed somewhat more in detail the Tennessee exemption statute as applied to religious institutions. See Hartman, *State and Local Taxation—1962 Tennessee Survey*, 16 VAND. L. REV. 865 (1963).

48. 211 Tenn. 139, 363 S.W.2d 193 (1962). After this article was written, the *Boyd* case was affirmed by the United States Supreme Court. 84 Sup. Ct. 1518 (1964).

which may be enjoyed by the owner of the property. The use tax statute expressly applies to contractors who use tangible personal property in the performance of a contract, unless such property has been previously subjected to a sales or use tax, and the tax due thereon has been paid. The use tax is measured by the purchase price or fair market value of the property, whichever is greater.

The State of Tennessee sought to apply its sales or use tax, whichever might be applicable, to materials sold and used by taxpayers for the performance of certain experimental and production work as part of a national research and development program whose objective is the production of atomic bombs. In most material respects the Atomic Energy Commission's contracts with Carbide and Ferguson appear identical. Under the terms of their contract with the Atomic Energy Commission, taxpayers' responsibilities are the management, operation and maintenance of plants engaged in nuclear research and development. The contracts recite that taxpayers have organizations of personnel with the initiative, ingenuity, and other qualifications necessary for providing the desired services. The contract further provides that, in the absence of instructions from the Atomic Energy Commission, taxpayers will use their best judgment, skill, and care in all matters pertaining to the performance of their contracts. Taxpayers hired their own employees, however, the Atomic Energy Commission could require dismissal of employees deemed incompetent, or careless, or whose employment was thought inimical with the public interest. Taxpayers' compensation was based on a cost-plus-fixed-fee arrangement, which included all taxes required to be paid by taxpayers. The taxpayers were charged with the duty of procuring many materials, supplies, equipment and facilities necessary in the performance of their contracts. Payments were made with funds advanced by the Atomic Energy Commission by means of special bank accounts. Title to all property bought and used by taxpayers passed directly from the vendor to the Commission.

The Tennessee Supreme Court was of the opinion that taxpayers were purchasing agents for the Atomic Energy Commission, and as such, were entitled to recover the sales taxes paid on purchases made by them. Governmental immunity was held to preclude the imposition of the sales tax under the authority of *Kern-Limerick, Inc. v. Scurlock.*[49] There the United States Supreme Court struck down an Arkansas sales tax as applied to sales of tractors to private contractors who, as purchasing agents of the United States Government, purchased the tractors to build a naval ammunition depot.

However, the Tennessee Supreme Court held that, in the per-

49. 347 U.S. 110 (1954).

formance of their contracts, the taxpayers were independent contractors, rather than agents of the Atomic Energy Commission. As such, they were held liable for the use tax applied to the use of the property by them, although the property was owned by the Atomic Energy Commission. The Atomic Energy Commission would have been immune to a property tax.[50] However, the privilege of *using* this tax exempt property by taxpayers, as independent contractors, is a constitutionally taxable privilege under recent authority.[51]

Policywise, it is most difficult for this writer to see any good reason why the United States Government should be able by means of contractual arrangement to drop its mantle of tax immunity on a purely private contractor with a Government contract, so as to ward off a completely non-discriminatory sales or use tax, irrespective of whether the private contractor is called an agent of the Government or an independent contractor. In virtually all the recent cases involving governmental immunity, as in the *Boyd* case, the Federal Government has agreed to pay the tax if the contractor became liable. This means the Federal Government has not escaped any tax if the contractor is liable. In any event, the contractor is granted a competitive advantage over his taxpaying competitors who are taxed to pay the cost of the state government, whose benefits and protection the tax immune contractor enjoys. Moreover, how does the Federal Government have any reasonable basis for fearing destruction, or even hampering, at the hands of the state taxing power, as Marshall put it, in light of the fact that the Federal Government has by contract voluntarily assumed the questioned tax liability of the contractor.

X. Administrative Remedies—Exhaustion of Remedies as Condition Precedent to Seeking Judicial Relief

Elliott v. Equalization Board of Carter County[52] is a repetition of a familiar warning to taxpayers to exhaust their administrative remedies before going to court. A Tennessee statute provides that when the County Board of Equalization shall have determined the matters of equalization and values before it and within its jurisdiction, such action shall be final, except insofar as the same may be reviewed or changed by the State Board of Equalization.[53]

The complaining taxpayer (also tax assessor) did not follow this remedy. After losing in the County Board, he brought suit in the

50. United States v. Allegheny County, 322 U.S. 174 (1944).

51. City of Detroit v. Murray Corp. of America, 355 U.S. 489 (1958); United States v. City of Detroit, 355 U.S. 466 (1958).

52. 372 S.W.2d 181 (Tenn. 1963).

53. Tenn. Code Ann. § 67-809 (1956).

chancery court to enjoin the County Board without first appealing to the State Board of Equalization. Taxpayer alleged that the County Equalization Board passed a resolution to the effect that all property located within the county would be assessed at thirty-three and one-third per cent of its actual value, and that such is in violation of the state law which requires that the property be assessed at its actual cash value. Taxpayer also claimed that the County Equalization Board was assessing the property on the basis of the preceding year's assessment, in an attempt to equalize the property values for the year in question. A demurrer to the taxpayer's bill of complaint was sustained by the Tennessee Supreme Court and the suit dismissed. The court held that the remedy available was an appeal to the State Equalization Board, rather than a suit in the courts. In short, the court held that taxpayer did not exhaust his administrative remedy.

It is the general rule that a taxpayer seeking judicial relief from an erroneous assessment must have exhausted his remedies before the administrative body empowered initially to correct the error.[54] However, the administrative remedies need not be exhausted before the taxpayer seeks judicial relief if the taxes are illegal or void.[55] Article II, section 28 of the Tennessee Constitution provides that all property shall be assessed according to its value. This section of the constitution is said to be mandatory.[56] Has not the complaining taxpayer come pretty near to alleging that the County Board's action in the *Elliott* case is illegal, when he alleges that it was assessing the property at only one-third of its value, in light of the fact that the constitution provides that it shall be assessed at its true value?

A recent New Jersey case[57] would seem to say that such action by the County Board of Equalization is illegal. New Jersey has a requirement that property must be assessed at full value. A group of taxpayers brought a proceeding against the township assessors seeking a mandamus order directing them to assess all property at its full value, according to the statutory requirement. In one of the most momentous decisions in property tax law in modern times, the New Jersey Supreme Court, writing a virtual treatise on the evils

54. Security-First Nat'l Bank v. Los Angeles, 35 Cal. 2d 319, 217 P.2d 946, *cert. denied,* 340 U.S. 891 (1950).

55. Bank v. Memphis, 107 Tenn. 66, 64 S.W. 13 (1901); Hale's Cut Rate Drug Store v. State, 45 Tenn. App. 110, 321 S.W.2d 262 (M.S. 1958); see Stason, *Judicial Review of Tax Errors—Effect of Failure To Resort to Administrative Remedies,* 28 MICH. L. REV. 637, 646 (1930).

56. Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 151, 160-61, 36 S.W. 1041 (1897).

57. Switz v. Township of Middletown, 23 N.J. 580, 130 A.2d 15 (1957).

of departing from the statutory mandate that properties be assessed at full value, held that the mandamus order should issue.

There is one further point that needs to be considered in determining whether the complaining taxpayer had a right to seek judicial relief without first appealing to the State Board of Equalization. The Tennessee statute describing the jurisdiction of the State Board of Equalization provides that a taxpayer shall have a right to a hearing and determination by the State Board of Equalization of any complaint he may make on the ground that property other than his own has been assessed at less than the actual cash value thereof.[58] Even though the tax in the case at hand is considered illegal, which normally would give direct access to the courts without first pursuing the administrative remedy, nevertheless, this right of appeal to the State Board of Equalization might be construed to require an attempt to obtain administrative relief before seeking judicial relief. The case at hand apparently so construes the matter.

XI. FAILURE TO MAKE PROPER COLLECTIONS OF SALES AND USE TAX—HONEST MISTAKE AS EXCUSE

The Tennessee Supreme Court in *General Electric Co. v. Butler*[59] once again emphasizes that honest mistakes will not relieve a seller from penalties for failure to make proper collections of sales and use taxes. The court applied *Swartz v. Atkins*,[60] where it had held that the legislature in making the five per cent penalty intended for it to apply in any instance where the taxpayer had failed to make his return and make the payments on time. This is rather sweeping language, but the element of "wilful intent" in failing to pay a tax is required by the statute only where the penalty is much larger than five per cent.[61]

The Tennessee Retailers' Sales Tax Act imposes privilege taxes in the form of sales and use taxes on various types of transactions.[62] One of those taxable privileges is the business of selling tangible personal property at retail. It is only a "retail sale" or "sale at retail" that is taxable. Those taxable sales mean a sale to a consumer or to any person for any purpose other than for resale. Under the rules and regulations promulgated by the Department of Revenue,

---

58. TENN. CODE ANN. § 67-821 (1956).
59. 211 Tenn. 196, 364 S.W.2d 361 (1963).
60. 204 Tenn. 23, 315 S.W.2d 393 (1958).
61. TENN. CODE ANN. § 67-3206 (1956). On two prior occasions the writer has had occasion to comment on the penalty provisions of this statute. See Hartman, *State and Local Taxation—1962 Tennessee Survey*, 16 VAND. L. REV. 879 (1963); Hartman, *State and Local Taxation—1959 Tennessee Survey*, 12 VAND. L. REV. 1346 (1959).
62. TENN. CODE ANN. § 67-3001 (1956); TENN. CODE ANN. §§ 67-3001 to -3003 (Supp. 1964).

it is provided that when a dealer (here complainant-General Electric) sells its property free of the sales or use tax on a certificate of re-sale, when the dealer knows, or should know in the use of ordinary care, that the property is not for re-sale by the purchaser, but is for his use, then the dealer shall be liable for the tax.[63]

General Electric sued to recover penalties paid under protest. The contention of complainant was based upon the proposition that it was guilty only of honest mistakes or a mistaken interpretation of the law relating to the sales and use tax, consequently, it could recover payment of penalties under the equitable power of the court. As authority for its position, complainant relied upon *Tennessee Products and Chemical Corp. v. Dickinson*.[64] Essentially repudiating the rationale of the *Dickinson* case, the court denied recovery of the penalties and rejected complainant's position.

There were several different types of transactions involved in the case at hand. The court affirmed the chancellor's denial of recovery on two types of sales where the penalties arose as a result of an honest mistake by complainant in calculating the amount of tax due. The court then reversed the chancellor and denied recovery in other types of transactions.

First, there were sales by complainant to the Standard Disinfectant Co. on which complainant failed to collect the sales and use taxes. Standard was engaged in selling janitorial supplies and it held a certificate which would exempt it from the sales tax where it bought things for re-sale. Under the Tennessee taxing statute, these sales to Standard for re-sale by Standard would not have been taxable. However, the items in question were purchased by Standard to be used as gifts and premiums to Standard's customers. Since these items were not for re-sale, but purely for the use and consumption by Standard, they were subject to the sales tax. The chancellor allowed recovery of the penalties. The supreme court reversed. It concluded that when it appeared to complainant that Standard was not in the business of reselling the items in question, then it became the duty of complainant to collect the tax from Standard. Since complainant did not make collections of the tax, it became liable for the statutory penalty. The court concluded that the burden was cast upon complainant to determine whether or not the sales were taxable.

Under the rationale of this phase of the court's opinion, it is clear that a seller has a very strict liability to determine whether items sold are for re-sale and not taxable; or whether they are to be used

63. Tennessee Sales and Use Tax Reg., No. 68.
64. 195 Tenn. 63, 256 S.W.2d 709 (1953).

or consumed by the purchaser and are, therefore, taxable sales.

A second type of sales transaction involved in the case at hand concerned sales made by complainant to the Borden Electric Company. Borden was both a dealer and a contractor, but in the instances out of which the tax in question arose, the sales were of certain products for the use on a construction project. The chancellor had allowed complainant to recover. In reversing the chancellor, the supreme court concluded that, since the complainant knew the vendee (Borden) was both a dealer and a contractor, there was an obligation on the complainant-vendor to determine whether or not the articles in question were tax free. The court also expressed the view that there was some indication from the record that complainant had actual knowledge that these items in question were being sold to Borden for use on the job and not for resale.

The third type of sales transactions involved in the *General Electric* case concerned sales to the Shannon Electric Co. Seemingly these sales were wholly consummated within Tennessee by a Tennessee vendee (Shannon), although the items were to be shipped to Fort Campbell, Kentucky. The goods in question were to be used in that portion of Fort Campbell which lies within Tennessee.

The chancellor had allowed recovery of the penalty by Shannon on the ground that the transaction was in interstate commerce. The supreme court reversed, holding that even though the carrier did cross the state line with the goods in question, nevertheless, that did not make the transaction interstate commerce, since the goods returned to Tennessee.

While agreeing with the result reached by the supreme court regarding the sales to Shannon, there might well be some question as to the correctness of the reasoning by which the court reached that result. In holding that the shipment to Ft. Campbell, Kentucky did not constitute interstate commerce, since the goods returned to Tennessee, the court relied on *Lehigh Valley R.R. v. Pennsylvania*,[65] decided in 1892. That case supports the holding of the court. However, two subsequent cases decided by the United States Supreme Court cast doubt on the validity of the *Lehigh Valley* holding. Twenty-eight years after *Lehigh*, the Supreme Court decided *Western Union Telegraph Co. v. Speight*,[66] where a telegraph company transmitted a message from one point to another in the same state by sending the message into another state and back to the sending state. While it would have been possible to send the message without sending it into the second state, it was sent over the route

65. 145 U.S. 192 (1892).
66. 254 U.S. 17 (1920).

ordinarily used, was quicker, more convenient, and more economical for the company. Speaking through Mr. Justice Holmes, the Court declared that the "transmission of a message through two States is interstate commerce as a matter of fact," and the "fact must be tested by the actual transaction." "Moreover, the motive for sending the message through the second State," declared the Court "would not have made the business intrastate."[67] When a tax on transportation was contested in *Greyhound Lines, Inc. v. Mealey*,[68] in 1948, the Supreme Court cited the *Speight* case with approval and declared: "It is too late in the day to deny that transportation which leaves a State and enters another State is 'Commerce . . . among the several States' simply because the points from and to are in the same State."

However, the tax on the sales to Shannon can be sustained even though the items sold were transported in interstate commerce. The actual sale appears to have been consummated in Nashville by the vendee (Shannon). If Shannon took delivery of the goods in Nashville, and subsequently shipped the goods in interstate commerce, the sale seemingly would remain a taxable local event under the commerce clause,[69] as the sale took place before interstate commerce started. Of course, too, the consumption and use of the goods by Shannon in the Tennessee portion of Ft. Campbell affords a constitutional basis for a use tax even though the goods were shipped to their destination in interstate commerce.[70]

XII. Legislative Changes

Some rather significant changes were made in the taxing statutes of Tennessee by the 1963 legislature. In the property tax field, the legislature created certain personal property exemptions from county and municipal ad valorem taxes. Thus, personal property in the hands of the manufacturer, processor or assembler transported to a plant, warehouse, or establishment within the state from outside the state for storage, processing, assembling, or repacking and held for eventual sale or other disposition, other than at retail, to a destination outside the state is not subject to ad valorem property taxation.[71] This curb on county and municipal taxing power should prove to be a stimulus for the warehousing business in Tennessee.

67. *Id.* at 18.
68. 334 U.S. 653, 655-56 (1948).
69. Utah Tax Comm'n v. Pacific Pipe Co., 372 U.S. 605 (1963); see International Harvester Co. v. Department of Treasury, 322 U.S. 340 (1944) (class D type sales); Department of Treasury v. Wood Preserving Corp., 313 U.S. 62 (1941).
70. Henneford v. Silas Mason Co., 300 U.S. 577 (1937).
71. Tenn. Code Ann. § 67-502(10) (Supp. 1964).

The legislative change creating perhaps the most interest and certainly causing the most comment, lies in the field of the sales tax. The sales tax was extended to include the furnishing of public utilities (water, gas, electricity, fuel oil, coal and other energy fuels). Sales to manufacturers are taxed at the rate of one per cent; sales to purchasers other than manufacturers are subject to a tax at the rate of three per cent.[72] Also, the sales tax was extended to telephone and telegraph service, repair services with respect to any kind of tangible personal property as an incident to the sale thereof.[73]

The 1963 Tennessee legislature also authorized counties and incorporated cities and towns to levy and collect sales and use taxes subject to approval of voters of the county or city.[74] The legislature requires local governments levying the tax to give certain exemptions. Thus, the sale, purchase, use, consumption or distribution of electric power or energy, natural or artificial gas, or coal and fuel oil are exempt from the tax. Also, the legislature placed a ceiling on the rate and amount of the tax which cities, counties, and towns can impose. The rate cannot exceed one-third of the rates levied by the state. Moreover, any tax levied by cities, counties and towns shall not exceed five dollars on the sale or use of any single article of personal property.

In the field of the excise tax on corporate earnings, the rate was increased from 3.75 per cent to four per cent of the net earnings.[75]

The corporate franchise tax statute was also amended by the 1963 legislature. In determining the measure of the tax, rental property is now included in taxpayer's tangible property. In cases where part or all of the property is rented, the actual value of property will be deemed to be the book value of all property. The value of rental property is determined by multiplying the net annual rental by certain multiples (real property multiple is five, machinery is three, furniture is two, and mobile equipment is one).[76]

72. TENN. CODE ANN. § 67-3003 (Supp. 1964).
73. TENN. CODE ANN. § 67-3002 (Supp. 1964).
74. TENN. CODE ANN. § 67-3050 (Supp. 1964.)
75. TENN. CODE ANN. § 67-2701 (Supp. 1964).
76. TENN CODE ANN. § 67-2909 (Supp. 1964).