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# WHAT IS A SALE FOR SALES TAX PURPOSES?

· CLYDE L. BALL\*

Each of the states which has adopted some form of sales tax<sup>1</sup> has also adopted its own individual definition of the term "sale" or "retail sale."<sup>2</sup> So long as a tax upon a business transaction does not offend some constitutional principle, a legislature is free to include such transaction within its statutory definition of a sale for purposes of an excise tax levy.<sup>3</sup> The statutory definitions, then, are conditioned not by the normal denotation or connotation of the word "sale," but rather by the taxing policies of the several legislative bodies. Synthesis of these varying statutes into an acceptable general statement is hardly possible; about the most one can do is to classify and catalogue.

If one strips from the various statutory definitions those elements which lie clearly outside the ordinary concept of sale, a problem of definition still remains. It is a commonplace that words have precise meaning only when considered within the context in which they are used. Thus, quite aside from the special statutory definition, a transaction may be a sale for one purpose and not for another.<sup>4</sup> The purpose

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1. Sales taxes have been classified as (1) retail sales taxes, (2) general sales taxes, (3) gross receipts taxes, and (4) gross income taxes. HAIG AND SHOUP, *THE SALES TAX IN THE AMERICAN STATES* 3-4 (1934). See also, HELLERSTEIN, *CASES AND MATERIALS ON STATE AND LOCAL TAXATION* 337-38 (1952); JACOBY, *RETAIL SALES TAXATION* 10-12 (1938).

2. ALA. CODE ANN. tit. 51, § 752(1)(e) (Supp. 1953); ARIZ. CODE ANN. § 73-1303(c) (Supp. 1954); ARK. STAT. ANN. § 84-1902(c) (1947); CAL. REV. & TAX. CODE ANN. § 6006 (Deering Supp. 1955); COLO. REV. STAT. ANN. § 138-6-2(3) (1953); CONN. GEN. STAT. § 2091(3) (1949); D.C. CODE § 47-2601(17) (1951); FLA. STAT. ANN. § 212.02(2) (Supp. 1954); GA. CODE ANN. § 92-3403a(B) (Supp. 1954); ILL. STAT. ANN. § 119.450 (Jones 1940) ("sale at retail"); IND. ANN. STAT. § 64-2601(k) (Burns Supp. 1955) ("selling at retail"); IOWA CODE ANN. § 422.42(2) (1949); KAN. GEN. STAT. ANN. § 79-3602(c) (Supp. 1953); LA. REV. STAT. § 47-301(12) (1950); ME. REV. STAT. ANN. c. 17, § 2 (Supp. 1955); MD. ANN. CODE GEN. LAWS art. 81, § 320 (1951); MICH. COMP. LAWS § 205.51 (1948) ("retail sale"); MISS. CODE ANN. § 10104(6) (Supp. 1954); MO. ANN. STAT. § 144.010(7) (1952); N.M. STAT. ANN. § 72-16-2(h) (1953) ("retail"); N.C. GEN. STAT. § 105-167(8) (Supp. 1955); N.D. REV. CODE § 57:3901(2) (Supp. 1949); OHIO REV. CODE § 5739.01(B) (Baldwin 1953); OKLA. STAT. ANN. tit. 68, § 1251a(c) (1954); PA. STAT. ANN. tit. 72, § 3407-102(7) (Purdon Supp. 1954) ("retail sale"); R.I. Acts 1947, c. 1887, art. II, § 6; S.C. CODE § 65-1360 (1952); S.D. CODE § 57.3101(7) (1939); TENN. CODE ANN. § 67-3002 (1955); UTAH CODE ANN. § 59-15-2(b) (1953); WASH. REV. CODE § 82.04.040 (1952); W. VA. CODE ANN. § 999(2)(4) (1955); WYO. COMP. STAT. ANN. § 32-2502(b) (1945).

3. *Wray's Pharmacy v. Lee*, 145 Fla. 435, 199 So. 767 (1941); *Bradley Supply Co. v. Ames*, 359 Ill. 162, 194 N.E. 272 (1934); *Sandberg Co. v. Iowa State Bd. of Assessment and Review*, 225 Iowa 103, 278 N.W. 643, *modified on rehearing*, 225 Iowa 111, 281 N.W. 197 (1938); *Blauner's, Inc. v. Philadelphia*, 330 Pa. 342, 198 Atl. 889 (1938).

4. For a discussion of this feature within the context of an income tax statute, see Moore, *When is a Sale Not a Sale?* 25 TAXES 326 (1947).

of this article is to consider what kinds of transactions generally fall within the meaning of the term "sale" as the word is used in the expression, "retail sale of tangible personal property"—the common statutory statement of the taxable transaction in sales tax statutes.

The problems which arise may be placed in two general categories—transactions which are not in form a sale at all, but which may be within the scope of the taxing statute; and transactions which clearly are sales, but which may be without the scope of the taxing statute because the sale element is but an incident to a service or repair transaction, or because the sale is something other than a retail transaction. These two general categories can be broken down into sub-classifications which overlap each other to a degree, and which may cut across the boundary between the general classifications.

The Uniform Sales Act defines a "sale" as "an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price."<sup>5</sup> Contracts for the rendition of services, and contracts of rental, leases and license to use do not come within this definition, but they may nevertheless be subject to a "sales" tax. Where such transactions are taxed because the legislature, as a matter of taxing policy, defined the term "sale" to include other types of transactions, the result may be simply a matter of routine statutory application and may pose no particular problem.<sup>6</sup> There is another type of situation, however, where a non-sale transaction is taxed because either the legislature or the courts, or both, have felt that the transaction was consummated outside the framework of a sale in order to avoid the tax, or because the practical substance of the transaction is the same as that under a sale, and the transaction should, as a matter of economic justice, bear the same tax burden.<sup>7</sup>

#### *Service Transactions*

When a transaction does not involve any transfer of property at all, the transaction will not be taxable in the absence of special statutory provision. Thus the services of a barber in cutting one's hair, or of a jeweler in cleaning a watch<sup>8</sup> would not be taxable.

5. UNIFORM SALES ACT § 1(2).

6. *E.g.*, the Florida statute defines "sale" as meaning, in addition to its ordinary definition, "any transfer of title or possession . . . or . . . lease or rental . . . of tangible personal property for a consideration, and shall include the rental of living quarters. . . ." FLA. STAT. ANN. § 212.02(2) (Supp. 1954).

7. An example of expressed legislative intent that only those non-sale transactions which have tax avoidance as their purpose should be included within the expanded definition of "sale" is found in the California statute: "Sale means and includes: (a) any transfer of title or possession, exchange, barter, lease, or rental . . . of tangible personal property for a consideration. 'Transfer of possession,' 'lease,' or 'rental' includes only transactions found by the board to be in lieu of a transfer of title, exchange, or barter." CAL. REV. & TAX. CODE § 6006 (Deering Supp. 1955); see *Howitt v. Street & Smith Publications, Inc.*, 276 N.Y. 345, 12 N.E.2d 435, 436 (1938).

8. *Cogen v. Glander*, 156 Ohio St. 263, 102 N.E.2d 1 (1951).

When the transfer of tangible personal property takes place in connection with a service, a problem immediately arises. Most of the sales tax statutes tax transfers of possession as well as transfers of title. It may be reasonably argued that the tax statutes should be applied literally, and that the transfer of tangible personal property for a consideration is a taxable event, regardless of the fundamental purpose of the transaction.<sup>9</sup> This position has not been followed, however, so that it is desirable to discover some criterion which will classify a given transaction as taxable or non-taxable. Some courts have resorted to a questionable definition of "possession" to avoid the application of a tax to a transaction which the court deemed to be outside the taxing intent of the legislature.<sup>10</sup> Others have considered the necessity of the transfer to be significant—was the transfer necessary to the effectuation of the purpose of the transaction, or was it merely convenient?<sup>11</sup> If the purpose of the transaction could be accomplished without transfer of the tangible personal property, it is reasonable to conclude that the transfer of the property is not the motivating purpose of the transaction, and the transfer should not be taxable, at least in the absence of transfer of title to the property.<sup>12</sup>

### 1. Professional or Information Services.

In one of the leading cases involving services, *Dun & Bradstreet, Inc. v. City of New York*,<sup>13</sup> the New York court ruled that the financial information service rendered by Dun & Bradstreet to their subscribers was a non-taxable service, despite the fact that reference books containing financial information were delivered to the subscribers.<sup>14</sup> These books could not be obtained without subscribing to the service, and no separate charge was made for them.<sup>15</sup> Four significant fact elements appear in the case: (a) the subscriber could make no proper use of the

9. See dissenting opinion of O'Brien, J., in *Howitt v. Street & Smith Publications, Inc.*, 276 N.Y. 345, 12 N.E.2d 435, 437 (1938).

10. *U-Drive-'Em Serv. v. Hardin*, 205 Ark. 501, 169 S.W.2d 584 (1943) (delivery of rental automobiles to customers for temporary use is a transfer of "custody" only); *Watson Industries v. Shaw*, 235 N.C. 203, 69 S.E.2d 505 (1952) (delivery of transcription tapes to broadcasting station is transfer of "custody" only).

11. *Howitt v. Street & Smith Publications, Inc.*, 276 N.Y. 345, 12 N.E.2d 435 (1938); *Dun & Bradstreet, Inc. v. City of New York*, 276 N.Y. 198, 11 N.E.2d 728 (1937).

12. See *Anderson v. City of New York*, 295 N.Y. 782, 66 N.E.2d 298 (1946). See also 68 HARV. L. REV. 727 (1955).

13. 276 N.Y. 198, 11 N.E.2d 728 (1937).

14. The New York City local law defined a sale as follows: "The word 'sale' or 'selling' means any transfer of title or possession or both, exchange or barter, license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration. . . ." N.Y. City Local Law No. 24, published as No. 25 § 1(e), p. 165 (effective Dec. 28, 1934).

15. Dun's information service was available without the reference books at a subscription price of \$125 per annum; with the books the charge was \$500. This information did not appear in the pleadings but was developed in the evidence. *Dun & Bradstreet, Inc. v. City of New York*, 168 Misc. 215, 5 N.Y.S.2d 597 (Sup. Ct. 1938).

books except to extract information therefrom for his own use; under the contract he could not exhibit the books to anyone else, nor sell the information he extracted from them; (b) title to the books was not transferred; (c) the service could have been rendered, albeit at much greater expense and effort, without transferring the books at all; and (d) no separate charge was made for the use of the books as distinguished from the service.

Other New York decisions have supported, clarified and sometimes confused the rule of *Dun & Bradstreet*.<sup>16</sup> An organization which compiles and furnishes to subscribers written reports containing information as to arrivals of buyers and where they may be interviewed is rendering a non-taxable service.<sup>17</sup> This seems to be *Dun & Bradstreet* without reference books, and is therefore more clearly recognizable as a pure service transaction.

If an information service is not confidential, so that the subscriber may assign or exhibit for his own profit the reports which he receives from the service, then it apparently loses its character as essentially a service and becomes taxable.<sup>18</sup> The subscriber is held to have purchased the product of the research and not the services which went into the publication. The significance of this confidential, non-assignable characteristic of the information reports is further emphasized in a case involving Babson's Business Reports. In *Business Statistics Organization, Inc. v. Joseph*,<sup>19</sup> the publisher contended that the reports were exempt from taxation under a provision of the New York City law exempting periodicals. The city contended that because the reports were designated by the publisher as "confidential" they could not be classed as periodicals. The New York court ruled that the reports were not confidential in any true sense, and that, therefore, they could qualify as periodicals, other conditions being satisfied. Furthermore, the court stated that if the reports were truly confidential so as not to be within the periodical exemption, they would probably then be classed as a service under the rule of *Dun & Bradstreet*.<sup>20</sup> The *Business Statistics* case thus supplies dictum to support the proposition that a transfer of possession of the confidential product of a service organization will not convert the services into a sale, and it further is authority for the proposition that the service organization's label of "confidential" is not controlling. This would seem to place such "con-

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16. The New York cases are analyzed in Glauberman, *The New York City Retail Sales Tax: What Constitutes a Sale of Tangible Personal Property?* 7 *Tax L. Rev.* 94 (1951).

17. *Stampers Arrival of Buyers, Inc. v. City of New York*, 296 N.Y. 574, 68 N.E.2d 871 (1946).

18. Thus *Moody's Reports*, which are integrated in a bound reference manual at the end of the year and are freely transferable, are taxable. *Moody's Investors Serv. v. McGoldrick*, 254 App. Div. 726, 5 N.Y.S.2d 765 (1st Dep't 1938).

19. 299 N.Y. 443, 87 N.E.2d 505 (1949).

20. 87 N.E.2d at 509.

fidential" publications as law directories and the like in the class of products which are transferred by sale as distinguished from service.

Absent the confidential factor, what are the characteristics of a document which determine whether the recipient has bought the document or the services which went into its preparation? If a report is prepared at the special request of the client, to fit his particular requirements, and is not of significant intrinsic value apart from this special situation, it is an incident of a service and should not be taxable as a sale, no matter in what form it may be transmitted—printed, typewritten, or on tape, for example. Thus the fee paid to an official court stenographer for a transcript of the minutes of a court is paid for the services of the stenographer, and not for the paper pages on which the report is transmitted.<sup>21</sup> The same result would seem reasonable in the case of an attorney who prepares a will or other legal document for a client, or physician who writes out a prescription<sup>22</sup> or renders a medical report in writing, or an investigator who prepares reports for a client.

The fact that skilled professional work and knowledge go into the preparation of an article does not mean that the article is always transferred as an incident to a service transaction. For example, the lawyer who prepares and delivers to a client a printed will as a part of his professional service to the client might also prepare and publish a form book on wills which would be available to any person who might choose to buy it; such buyer would obtain the benefit of any professional skill of the draftsman in a general way, but the professional attorney-client relationship would be absent. The book, and not the services, is the subject of the transaction, which is an ordinary sale.<sup>23</sup>

The true test then is one of basic purpose of the buyer. When the product of the service is not of value to anyone other than the purchaser, either because of the confidential character of the product, or because it is prepared to fit the purchaser's special need—a contract or will prepared by the lawyer, or the accident investigation report prepared for an insurance company—this fact is evidence tending to show that the service is the real purpose of the contract. When the purpose of a contract is to produce an article which is the true object of the agreement, the final transfer of the product should be a sale, regardless of the fact that special skills and knowledge go into its production. Under this analysis, printing work, done on special order, and of significant value only to the particular customer, is still a sale. The

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21. *Booth v. City of New York*, 268 App. Div. 502, 52 N.Y.S.2d 135 (1st Dep't 1944).

22. The same result does not necessarily follow where an optometrist sells glasses to a patient, or a pharmacist fills a prescription. See Annot., 157 A.L.R. 578 (1945).

23. Cf. *Moody's Investors Serv. v. McGoldrick*, 254 App. Div. 726, 5 N.Y.S.2d 765 (1st Dep't 1938).

purchaser is interested in the product of the services of the printer, not in the services per se.<sup>24</sup> Similarly, it would seem that contracts for custom-produced articles, be they intrinsically valuable or not, should be classified as sales when the product of the contract is transferred.

## 2. Trade Services.

Another type of service transaction involves the transfer of tangible personal property by rental or license to use, the transferor performing some significant service with respect to the thing transferred. Linen services to hotels, restaurants and barber shops, and diaper services to housewives are common examples. The housewife who subscribes to a diaper service accomplishes two ends: she does not have to buy diapers, and she does not have to launder them. If inquiry were made, she would in all probability unhesitatingly announce that the service—the laundering—is the more significant motivating factor in her decision to subscribe to the service. Nevertheless, such a service has been held taxable on its gross proceeds under a statute taxing the rental of tangible personal property.<sup>25</sup> So, in Philadelphia, a linen service was taxed on gross proceeds, despite a showing that only about twenty percent of its charges was for replacement of the linens which it used.<sup>26</sup> New York City, from whom Philadelphia borrowed its sales tax law, had declared by administrative regulation that linen services were not taxable. The Pennsylvania court considered the New York regulation to be inconsistent with the New York cases holding that rentals of motion picture film for the purpose of exhibiting it to audiences are taxable.<sup>27</sup>

It is not necessarily inconsistent to treat film rentals and linen services differently under a tax statute; there is a difference between the two types of transactions. The linen service customer purchases a service which must be performed with each delivery—the linens must be laundered. The customer may or may not receive the same linens repeatedly, the supplier performing a laundry service to make the linens usable. The film renter expects film delivered to him to be in a serviceable condition, but after each exhibition it is not necessarily

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24. *Long v. Roberts & Son*, 234 Ala. 520, 176 So. 213 (1937); *Bigsby v. Johnson*, 18 Cal. 2d 860, 99 P.2d 268 (1940). *Contra*, *Adair Printing Co. v. Ames*, 364 Ill. 342, 4 N.E.2d 635 (1936). See Cohen, *The Taxable Transaction in Consumers' Taxes*, 8 LAW & CONTEMP. PROB. 530, 534 (1941).

25. *Saverio v. Carson*, 186 Tenn. 166, 208 S.W.2d 1018 (1948).

26. *Philadelphia Ass'n of Linen Suppliers v. Philadelphia*, 139 Pa. Super. 560, 12 A.2d 789 (1940).

27. *United Artists Corp. v. Taylor*, 273 N.Y. 334, 7 N.E.2d 254 (1937). This result has been reached in a number of jurisdictions. *Saenger Realty Corp. v. Grosjean*, 194 La. 470, 193 So. 710, *appeal dismissed*, 310 U.S. 613 (1940); *Crescent Amusement Co. v. Carson*, 187 Tenn. 112, 213 S.W.2d 27 (1947); cf. *Paramount-Richards Theatres v. State*, 256 Ala. 515, 55 So. 2d 812 (1951) (rentals of motion pictures not subject to use tax where sales tax paid on gross receipts of theatre).

returned to the distributor for servicing. Repair or cleaning of film is not what the customer is primarily buying.

If he is buying any service at all, the film customer may be purchasing the services which went into the making of the film. In *Washington Times-Herald, Inc. v. District of Columbia*<sup>28</sup> the court ruled that a newspaper which purchased comic strip mats from a syndicate under contracts granting the right to reproduce the strips in one issue of the paper had purchased the services of the artist who drew the strip,<sup>29</sup> and that lack of privity between artist and newspaper constituted no obstacle. Under this decision, the syndicate had apparently purchased the services of the artist, stored these services in the form of the mats, and resold the services to the newspaper. By analogy, the motion picture producer buys the services of his performers, stores them on film, and by successive assignments they come into the hands of the film exhibitor.

The linen service customer is not buying the services which went into producing the linens. If the service is to be exempt from taxation it must be under the theory that it is the laundering service of the distributor which is being purchased. This appears to be the view expressed in the New York City regulations. It should be noted, however, that in two cases arising in a different context, it has been held that a linen service company, not laundering any articles except those which it owns and rents to its customers, is not a "laundry" and is not subject to an excise<sup>30</sup> or franchise<sup>31</sup> tax on laundries.

The *Times-Herald* decision raises problems of considerable difficulty. It could be argued that anytime one transfers an article which is the product of the special art, skill, or learning of its creator, he is really selling services. The difference between a very valuable painting and a calendar cover is one of artistic quality, not of canvas and paint.<sup>32</sup>

In the opinion of this writer, the key to the *Times-Herald* case is that it is an intangible right which is being purchased—the right to reproduce the artist's work.<sup>33</sup> The same is true in the case of the film service, and of the radio transcription service. If such transfers are to be exempted from a sales tax, the exemption should be not on the grounds of a "service" exemption, or of a "custody only" concept,<sup>34</sup> but because a transfer under these circumstances of tangible personality is a mere incident to the purchase and exercise of an intangible right which is the purpose of the transaction.

28. 213 F.2d 23 (D.C. Cir. 1954), 68 HARV. L. REV. 727 (1955).

29. Cf. *Associated Newspapers v. Phillips*, 294 Fed. 845 (2d Cir. 1923) (newspaper feature stories).

30. *Independent Linen Serv. Co. v. Stone*, 192 Miss. 832, 6 So. 2d 110 (1942).

31. *Commonwealth v. Pearl Laundry Co.*, 105 Ky. 259, 49 S.W. 26 (1899).

32. See *Bigsby v. Johnson*, 18 Cal. 2d 860, 99 P.2d 268 (1940).

33. This is the view of the concurring opinion in the case. 213 F.2d 23, 24 (D.C. Cir. 1954); accord, *Howitt v. Street & Smith Publications, Inc.*, 276 N.Y. 345, 12 N.E.2d 435 (1938).

34. *Watson Industries v. Shaw*, 235 N.C. 203, 69 S.E.2d 505 (1952).

If transfers incident to a service or the exercise of an intangible right are not to be taxed, there must be a standard to determine such incidence. Regulations under the District of Columbia Code established such a standard for the *Times-Herald* case. Under the regulations a sale is deemed to be an inconsequential element of a service transaction if the price of the tangible personal property is less than ten percent of the cost of the service.<sup>35</sup> In jurisdictions where there is no express statutory provision, no such easily applicable statutory standard exists. In *Dun & Bradstreet, Inc. v. City of New York*,<sup>36</sup> the cost of the service with reference books was four times as great as the cost of the service without the books, yet the transfer of the books was deemed to be a non-taxable incident of the service. On the other hand, a photoengraver who sold completed engravings was taxable on the whole contract price, despite the fact that the cost of the metal plates transferred was only two percent of the total amount paid.<sup>37</sup> Georgia, which has the express statutory exception of sales which are inconsequential elements of a service transaction,<sup>38</sup> has ruled that the relative value of the article transferred and the services performed is not a proper measure of what is inconsequential:

We do not think that the actual cost or monetary value of the materials used is determinative. On such a basis, in the present case, it would follow that the price of the materials . . . being 50% of the total price, would be a consequential element of the transaction, making it a retail sale. However, we think that the main consideration should be the purpose of the customer. . . .<sup>39</sup>

The Georgia court has apparently held that the "inconsequential element" exception is the equivalent of an exception where the principal purpose of the customer is service. Thus both Georgia and New York hold that the transaction is to be classified as either essentially a service or a sale, without respect to relative values of goods and services, and that the classification determines taxability of the whole transaction. The District of Columbia does not use relative values as a means of classification, but having found that service is the principal purpose in a transaction, uses the ten percent factor to determine whether a sale incident to the service shall be taxed.

### 3. Repair Services.

When a service man repairs tangible personal property for a customer, and in the process adds new material thereto, has a taxable

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35. Regulations Pertaining to Sales and Use Taxes § 202(b) (July 12, 1949), cited at 213 F.2d 24.

36. 276 N.Y. 198, 11 N.E.2d 728 (1937).

37. *People ex rel. Walker Engraving Corp. v. Graves*, 268 N.Y. 648, 198 N.E. 539 (1935).

38. GA. CODE ANN. § 92-3403a(C) (2) (a) (Supp. 1954).

39. *Craig-Tourial Leather Co. v. Reynolds*, 87 Ga. App. 360, 73 S.E.2d 749, 752 (1952).

sale occurred? Clearly title to the new material passes to the customer. The problem of classification for tax purposes is inextricably bound up with the determination of whether the sale of the repair materials to the serviceman is a sale at retail or a sale at wholesale. The premise of the decisions seems to be that the legislature intends to apply the excise tax only once in the chain of transactions which transfer the article from the producer to the consumer. Therefore, if the repairman-customer transaction is held to be a service transaction with no taxable sale, then the transaction by which the repairman obtained the materials is taxed as a sale at retail. Conversely, if it is ruled that the repairman acquired the materials at wholesale, then the transfer to the customer must be held to be a taxable sale, or the materials will be consumed without ever having been subjected to the excise tax.<sup>40</sup>

Except for this wholesale-retail complication, repair transactions seem to fall generally within the rules applicable to other service-sale transactions. No consistent rule is deducible from the cases arising in differing jurisdictions<sup>41</sup> except that where the repairman makes a separate charge for materials and labor, the transfer of the materials is held to be a taxable sale.<sup>42</sup>

#### 4. General Rule.

Though it must be recognized that there is no definitely established rule which will fit all the cases, it may be of value to try to formulate certain guiding principles in the service-sale type of case. The Illinois court, interpreting the Illinois Retailers' Occupation Tax Act, has laid down tests which would classify these transactions into three tax categories:

If the article sold has no value to the purchaser except as a result of services rendered by the vendor, and the transfer of the article to the

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40. See Annot., *Sales Tax on Parts, Repairs, or Constituents Used in Repair of Article*, 11 A.L.R.2d 926 (1950); Cohen, *The Taxable Transaction in Consumers' Taxes*, 8 LAW & CONTEMP. PROB. 530, 532 (1941).

41. *E.g.*, a shoe repairman makes a sale of materials added to customer's shoes: *Revzan v. Nudelman*, 370 Ill. 180, 18 N.E.2d 219 (1938); *Western Leather & Finding Co. v. State Tax Comm'n*, 87 Utah 227, 48 P.2d 526 (1935). A shoe repairman does not make a sale of materials added to customer's shoes: *Craig-Tourial Leather Co. v. Reynolds*, 87 Ga. App. 360, 73 S.E.2d 749 (1952); and cf. *Sandberg Co. v. Iowa State Bd.*, 225 Iowa 103, 278 N.W. 643, *modified on rehearing*, 225 Iowa 111, 281 N.W. 197 (1938).

42. *Doby v. State Tax Comm'n*, 234 Ala. 150, 174 So. 233 (1937); *Marshall Co. v. Ames*, 373 Ill. 381, 26 N.E.2d 483 (1940); *Mahon v. Nudelman*, 377 Ill. 331, 36 N.E.2d 550 (1941); *Roberts v. Glander*, 156 Ohio St. 247, 102 N.E.2d 242 (1951), 21 U. CIN. L. REV. 316 (1952); *Wilson v. Glander*, 151 Ohio St. 479, 86 N.E.2d 761 (1949); *Western Leather & Finding Co. v. State Tax Comm'n*, 87 Utah 227, 48 P.2d 526 (1935). The dissenting judge in *Craig-Tourial Leather Co. v. Reynolds*, 87 Ga. App. 360, 73 S.E.2d 749, 754 (1952), attacks the basis for this rule on the ground that it is not proper for tax incidence to be determined by the billing practice of an individual or a trade.

purchaser is an actual and necessary<sup>43</sup> part of the services rendered, then the vendor is engaged in the business of rendering service, and not in the business of selling at retail. If the article sold is the substance of the transaction and the service rendered is merely incidental to and an inseparable part of the transfer to the purchaser of the article sold, then the vendor is engaged in the business of selling at retail, and the tax which he pays . . . [is measured by the total cost of article and services]. If the service rendered in connection with an article does not enhance its value and there is a fixed or ascertainable relation between the value of the article and the value of the service rendered in connection therewith, then the vendor is engaged in the business of selling at retail, and also engaged in the business of furnishing service, and is subject to tax as to the one business and tax-exempt as to the other.<sup>44</sup>

Although the application of these general statements to specific fact situations would not always be clear, the statement by the Illinois court does offer an acceptable basis upon which appropriate regulations could be erected, with a result that a reasonably certain and logical classification of taxable transactions could be made.

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43. This "necessary" factor is not contrary to the *Dun & Bradstreet* point that a transfer which is not necessary, but merely convenient, is not taxable. In *Dun & Bradstreet* the lack of necessity went to establish the point that no consideration was paid for the transfer. In the *Snite* case there was a transfer of title, and some part of the total price was unquestionably paid because of the transfer.

44. *Snite v. Department of Revenue*, 398 Ill. 41, 74 N.E.2d 877, 879-80 (1947).