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SALES TAXATION COLLECTION PROBLEMS

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This treatment is designed to gather together a number of legal problems concerning collection of taxes in the field of sales taxation, which may confront attorneys who represent either the taxing authority or the taxpayer. Some of the problems taken up are not related to each other. They are, nevertheless, troublesome and ofttimes recurring problems. For convenience of discussion, they are grouped under the two main categories of procedural problems that arise in sales taxation collections, and the problems of the substantive liability of various parties for the tax.

PROCEDURAL COLLECTION PROBLEMS[1]

1. *Procedural Due Process as Applied to Tax Collections*

While the United States Supreme Court has been strict in its interpretation of the procedural requirements of the due process clause of the fourteenth amendment[2] when applying it to ordinary judicial proceedings, it has imposed considerably less stringent requirements in the collection and assessment of taxes. In the ordinary judicial controversy due process requires that the party to be affected shall have notice and opportunity to be heard at the outset of the judicial proceedings,[3] whereas due process is satisfied in tax matters by notice and an opportunity for a hearing after a tax has been assessed. Moreover, a less formal procedure will satisfy the requirements of due process in tax matters than in ordinary judicial

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1. For a discussion of the legal problems in collecting use taxes, see Hartman, *Sales Taxation in Interstate Commerce,* subhead "E. The Use Tax Collecting Device and the Constitutional Questions," *supra.*

2. "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. CONST. amend. XIV, § 1.

3. For a full discussion of the requirements of procedural due process see Pennoyer v. Neff, 95 U.S. 714 (1878), which is the leading case on the requirement of notice and opportunity to be heard in the field of ordinary judicial proceedings. For a more recent case see International Shoe Co. v. Washington, 326 U.S. 310 (1945).

proceedings. The right to notice and hearing may depend upon the type of tax being collected and the method by which it is to be determined.[4] The general customs employed throughout the country by tax collecting entities, however, are within the scope of due process protection.[5]

The basis for this distinction between due process strictness in ordinary judicial proceedings and the less strict due process requirements in tax collection matters is found in the legislative aspects of tax collection,[6] the necessity for prompt payment of tax monies in order to allow the government to continue its functions unhampered by long delayed suits for collection,[7] and the additional fact that a state is acting in its "sovereign" capacity in the collection of taxes.[8]

The United States Supreme Court has taken the position that the right to notice and hearing need not be extended to every tax case, but only to those where a hearing is necessary to determine such matters as the amount of tax to be assessed, as in the case of a real property tax which requires an evaluation of the property to be taxed.[9] Moreover, consistent with due process, notice of the taxes assessed may be transmitted to the taxpayer after the assessment becomes final, but before the taxpayer is actually deprived of his property through the enforcement of a tax "judgment."[10] In cases where the tax may be computed by a simple formula, no notice or hearing is required to satisfy the requirements of due process.[11] Other ready examples of such taxes are poll and license taxes.[12] In some respects sales taxes based on gross proceeds from sales fall in this latter category, as the tax statutes simply call for a computation

4. See Hagar v. Reclamation Dist. No. 108, 111 U.S. 701 (1884).

5. The courts lay great stress upon the fact that for centuries the collection of taxes has been connected with sovereign power and the customs that have evolved are to some extent free from the rigid requirements of procedural due process. See Kelly v. Pittsburgh, 104 U.S. 78 (1881).

6. Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272 (1856).

7. Springer v. United States, 102 U.S. 586 (1881).

8. See Bull v. United States, 295 U.S. 247 (1935).

9. See, *e.g.*, Carson v. Brocton Sewerage Comm'n, 182 U.S. 398 (1901), and compare Turner v. Wade, 254 U.S. 64 (1920) (holding assessment of real estate tax without notice violates due process and does not fall within the exception).

10. While this is more fully discussed *infra*, see, *e.g.*, Lander v. Mercantile Bank, 186 U.S. 458 (1902).

11. See, *e.g.*, Carson v. Brocton Sewerage Comm'n, 182 U.S. 398 (1901) (tax imposed for the use of a sewer, the tax was to be computed at an annual rate of eight dollars for unmetered service or for metered service thirty cents per 1,000 gallons of sewage delivered to the sewer; *held:* no notice required as taxpayer can easily compute the tax due under the ordinances fixing the charges).

12. See, *e.g.*, Hodge v. Muscatine County, 196 U.S. 276 (1905) (business license tax; no notice required, if the person carried on the business—selling cigarettes—the tax followed as a matter of course). See also HELLERSTEIN, STATE AND LOCAL TAXATION 788, Note *E* (1952).

of the tax by the retailer at a certain percentage of his gross sales.[13] Frequently, therefore, there is no need for a judicial determination of the rights of the parties under the initial sales tax levy. However, the requirement of notice often does become significant where the sales tax statutes call for a recomputation of the sales tax by the state tax board[14] as to items that have been omitted from the return,[15] where the taxpayer has made a mistake in the computation of his tax as to the final amount due,[16] and in cases where the taxpayer has failed to file a return altogether.[17] Thus in many situations it is extremely difficult to file a correct return in the first instance. Also, notice may become important in considering whether certain sales transactions are exempt from the tax. Thus, a typical sales tax may reach only "sales at retail." Under such a statute a controversy may arise as to the exemption of a particular item, whereupon the tax board might assess a deficiency against the retailer for the additional amount of tax due on the ground that the retailer improperly gave an exemption on particular items.[18]

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13. In reality such a tax is really an income tax based on gross sales, see, *e.g.*, the Indiana Gross Income Tax which is "imposed upon the receipt of gross income, measured by the amount or volume of gross income." IND. ANN. STAT. §§ 64-2601—64-2631 (Burns repl. 1951). A further example of a sales tax so computed is illustrated by the California Retail Sales Act of 1933 which provides, "For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 2½ percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this State. . . . CAL. REV. & TAX. CODE ANN. § 6051 (Deering 1952).

14. See, *e.g.*, the California Retail Sales Act, CAL. REV. & TAX. CODE ANN. § 6481 (Deering 1952), which provides, "If the board is not satisfied with the return or returns of the tax or the amount of tax required to be paid to the State by any person, it may compute and determine the amount required to be paid upon the basis of . . . any information within its possession or that may come into its possession. One or more deficiency determinations may be made of the amount due for one or for more than one period. . . ." For similar statutory provisions note the applicable sections of the sales tax acts listed in note 18 *infra.*

15. See, *e.g.*, The Alabama Retail Sales Act, ALA. CODE ANN. tit. 51, § 763 (Cum. Supp. 1953), which reads in part, "if the amount paid is less than the amount due, as shown by the return, the department shall immediately notify the taxpayer of such deficiency and shall add thereto a penalty of ten percent of the amount due. . . ." For comparative legislation see applicable section of the sales tax acts listed in note 18 *infra.*

16. See, *e.g.*, Tennessee Sales Tax Act, TENN. CODE ANN. § 67-3029 (1955): "in case any dealer makes a grossly incorrect report, or a report that is false or fraudulent it shall be the duty of the commissioner to make an estimate for the taxable period of retail sales. . . ." For comparative legislation see applicable section of sales tax acts as listed in note 18 *infra.*

17. See, *e.g.*, California Retail Sales Act, CAL. REV. & TAX. CODE ANN. § 6511 (Deering 1952) which reads in part, "if any person fails to make a return, the board shall make an estimate of the amount of the gross receipts of the person, or, as the case may be, of the amount of the total sales price of tangible personal property sold. . . . Upon the basis of the estimate the board shall compute and determine the amount required to be paid to the State. . . ." For comparative legislation see applicable section of sales tax acts as listed in note 18 *infra.*

18. While the sales tax statutes for the main part tax "sales at retail" or

In sales tax statutes the need for notice and a right to be heard are also essential where the statute provides, as they frequently do, that the additional tax so computed by the board, plus a penalty for underpayment, becomes a lien against the property of the taxpayer.[19] Often such sections further provide that the board may take "judgment" for the additional tax and penalty[20] or declare a distress warrant

just "sales" it is frequently difficult to determine just what constitutes such a sale. Many items under the statute are exempted or included; accurate descriptions of all such articles and items to be excluded or included in the sales tax return is impossible because of varied forms taken in the modern retail businesses. For example, difficulty has arisen in the following cases: City Paper Co. v. Long, 235 Ala. 652, 180 So. 324 (1938) (is wrapping paper sold to retailer for consumption sold at retail?); Lone Star Cement Corp. v. State Tax Comm'n, 234 Ala. 465, 175 So. 399 (1937) (is cement a building material and thus taxable?); Doby v. State Taxing Comm'n, 234 Ala. 150, 174 So. 233 (1937) (are automobile parts used to repair used cars bought by automobile repair shop for resale used in "wholesale or retail" trade?); Cusick v. Commonwealth, 260 Ky. 204, 84 S.W.2d 14 (1935) (are photographs subject to sales tax?); Atlas Supply Co. v. Maxwell, 212 N.C. 624, 194 S.E. 117 (1937) (do sales of building materials to contractors to be used in a lump sum contract constitute "sales at retail"?).

The cases on this point are voluminous in number. Many of them are collected in a series of annotations. See Annots., 98 A.L.R. 837 (1935), 111 A.L.R. 943 (1937), 115 A.L.R. 491 (1938), 139 A.L.R. 372 (1942), 11 A.L.R.2d 926 (1950).

For the sales tax acts now in force in the various states listing the various items that constitute sales at retail and further listing exemptions, see:
Alabama: ALA. CODE ANN. tit. 51, §§ 752-786 (Cum. Supp. 1953).
California: CAL. REV. & TAX. CODE ANN. §§ 6051-6095 (Deering 1952).
Colorado: COLO. REV. STAT. ANN. §§ 138-6-1 to 138-6-42 (1953).
Connecticut: CONN. GEN. STAT. §§ 940c-956c (Supp. 1953).
D.C.: D.C. CODE ANN. §§ 47-2601 to 47-2629 (Supp. 1954).
Illinois: ILL. ANN. STAT. c. 120, §§ 440-453 (Smith-Hurd Cum. Supp. 1955).
Iowa: IOWA CODE ANN. §§ 422.42-422.59 (Cum. Supp. 1955).
Kansas: KAN. GEN. STAT. ANN. §§ 79-3601 to 79-3623 (Supp. 1955).
Louisiana: LA. REV. STAT. 47:301—47:318 (Supp. 1954).
Maine: ME. REV. STAT. ANN. c. 17 (Supp. 1955).
Michigan: MICH. STAT. ANN. § 7.521 (Cum. Supp. 1953).
Mississippi: MISS. ANN. CODE §§ 10103—10140 (Cum. Supp. 1954).
Missouri: MO. REV. STAT. §§ 144.010—.590 (Cum. Supp. 1955).
North Carolina: N.C. GEN. STAT. §§ 105-164 to 105-187 (Cum. Supp. 1955).
North Dakota: N.D. REV. CODE §§ 57-3901 to 57-3925 (Supp. 1953).
Ohio: OHIO REV. CODE ANN. §§ 5739.01-.99 (Baldwin Cum. Supp. 1954).
Oklahoma: OKLA. STAT. §§ 68-1251 to 68-1251m (Supp. 1955).
Rhode Island: R.I. Laws 1947, c. 1887, act 2.
South Carolina: S.C. CODE §§ 65-1351 to 65-1480 (Cum. Supp. 1955).
South Dakota: S.D. CODE §§ 57.31-.33 (Supp. 1952).
Tennessee: TENN. CODE ANN. §§ 67-3001 to 67-3048 (1955).
Utah: UTAH CODE ANN. §§ 59-15-1 to 59-15-22 (Supp. 1955).
Washington: WASH. REV. CODE §§ 82.08.010-82.08.170 (Supp. 1955).
West Virginia: W. VA. CODE ANN. §§ 999(1) to 999(30) (1955).
Wyoming: WYO. COMP. STAT. ANN. §§ 32-2501 to 32-2523 (Cum. Supp. 1955).

19. See, *e.g.*, the Alabama Retail Sales Act, ALA. CODE ANN. tit. 51, § 769 (1941), which provides, "The tax together with interest and penalties imposed by this article shall be a lien upon the property of any person subject to the provisions of this article. . . ." For comparative legislation see note 18 *supra*.

20. See, *e.g.*, the California Retail Sales Tax Act, CAL. REV. & TAX. CODE ANN. § 6736 (Deering 1952), which provides in part, "If any amount required to be paid to the State under this part is not paid when due, the board may within three years . . . [make] a request that judgment be entered against the

for its collection.[21] While such a "judgment" is not a term of art requiring all the antecedent steps necessary for an ordinary civil judgment, the net effect is much the same, as all that the taxing authorities must do to have it become fully operative is to take the "judgment" to the county court clerk of the residence of the taxpayer and have the clerk swear out a warrant for its collection.[22] Thereupon the sheriff of the county is vested with full authority to proceed against the property of the taxpayer for payment of the "judgment" in the manner that he sees fit under the existing local law. In such situations the sales tax statutes call for "notice" to be given to the taxpayer, but such notice need not be in the form of personal service of process necessary in private litigation.[23]

In relation to the ancient field of taxation in general, the retail sales tax acts are a comparatively new income raising device. Thus, in no small degree, the type of notice required in tax matters necessary to satisfy due process really developed in the realm of the much older real property taxation. Here it has been established that when a statute fixes the time and place the tax board is to meet, in order to authorize and equalize assessments, the statute itself gives notice to the taxpayer, and no further notice is required in order to satisfy due process.[24] However, where the statute provides that notice of some type is necessary, compliance with the statutory provisions for notice is a necessary element of due process, and the state cannot successfully contend that, consistent with due process, the statute fixing the time and place of the board meeting is of itself sufficient notice.[25]

person in the amount required to be paid. . . ." Section 6737 adds: "The county clerk immediately upon filing of the certificate shall enter a judgment for the people of the State of California against the person in the amount required to be paid. . . ."

21. See, *e.g.*, the Tennessee Sales Tax Act, TENN. CODE ANN. § 67-3033 (Cum. Supp. 1955), which provides in part, "The commissioner of finance and taxation is empowered and it shall be his duty when any tax becomes delinquent under this chapter to issue a distress warrant for the collection of the tax, interest, and penalty from each delinquent taxpayer. . . ." The statute further authorizes the sheriff to levy on the taxpayer's personal property to satisfy the "warrant" or upon his real estate if sufficient personality cannot be located.

22. For a case upholding the validity of this procedure and construing the provisions of the California "judgment" collection statute (outlined in note 20 *supra*), see People v. Skinner, 18 Cal. 2d 349, 115 P.2d 488 (1941).

23. For a listing of notice provisions see the applicable section of the appropriate retail sales acts as listed in note 18 *supra*. A typical notice provision is outlined in ALA. CODE ANN. tit. 51 § 767 (Cum. Supp. 1953), which provides in part, "the department shall notify the taxpayer by registered mail of the amount of such assessment, and shall notify the taxpayer to appear before the department not less than twenty days from date of such notice and show cause why such assessment should not be made final." If the taxpayer fails to appear the assessment becomes final and "judgment" is entered.

24. See, *e.g.*, Kentucky Railroad Tax Cases, 115 U.S. 321 (1885); Holly Sugar Corp. v. Board of Comm'rs, 10 F.2d 506, 507 (D. Colo. 1926) (dictum); Yuma County v. Arizona & S.R. Co., 30 Ariz. 27, 243 Pac. 907 (1926).

25. Turner v. Wade, 254 U.S. 64 (1920); *cf.* Central of Ga. Ry. v. Wright, 207 U.S. 127 (1907).

Where statutory notice is required with respect to making assessments, as distinguished from notice effected by a statute fixing the time and place of meeting of the assessing board, due process may be satisfied through newspaper publication of the increased assessments if the statute so provides.[26] Notice by post card duly mailed and received has also been held to constitute effective legal notice.[27] Moreover, when statutory notice is required, the provision is generally that such notice may legally be accomplished by mail. Sometimes the use of registered mail is required, but more frequently any letter properly addressed to the last known address of the taxpayer is sufficient. The courts generally hold that written notice mailed pursuant to a statutory provision authorizing notice by mail satisfies due process of law.[28]

Required mailed notice in order to be effective must, however, meet the requirements of giving the taxpayer sufficient opportunity to receive the letter and a chance to be heard. Thus, where a statute requires notice to be mailed to the taxpayer, and the notice is mailed by the tax board an "unreasonably short time" before the taxpayer is to appear before the board, such notice has not satisfied the requirements of due process.[29]

Where the notice mailed to the taxpayer by the board states no fixed time or date when the taxpayer is to appear to protest the additional assessment, it has been held that there was no denial of due process, since the lack of a fixed time and date to appear did not prevent the taxpayer from having an opportunity for making a "timely" appearance before the board.[30]

While all these rules are not applicable to sales taxation, the courts do borrow from this history in determining the validity of notice under the sales tax statutes. To show the application of the mentioned doctrines to sales tax controversies, it is necessary to turn to a few sales tax cases in point. In *People v. Skinner*,[31] the California sales tax statute required a recomputation by the Board of Equalization in cases where the taxpayer had underpaid his tax. The taxpayer,

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26. Winona & St. Peter Land Co. v. Minnesota, 159 U.S. 526 (1895); State *ex rel.* Foreman v. Wheatley, 113 Miss. 555, 74 So. 427 (1917).

27. Graham v. Lasater, 26 S.W. 472 (Tex. Civ. App. 1894).

28. For a general discussion and excellent case coverage on real property assessment and collector actions see: Annots., 84 A.L.R. 197 (1933), 24 A.L.R. 331 (1923); 1 MERRILL, NOTICE § 521 (1952).

29. Weyerhaeuser Timber Co. v. Pierce County, 133 Wash. 355, 233 Pac. 922 (1925) (seven days before taxpayer was to appear is an "unreasonably short time"). Generally the statutes require notice from twenty to ninety days in advance. Note applicable provisions of sales tax states as listed in note 18 *supra.* The requirement seemingly reduced itself to a "reasonable time" before the taxpayer's appearance is necessary. See, *e.g.*, Turner v. Wade, 254 U.S. 64 (1920).

30. Graham v. County Comm'rs, 99 Pa. Super. 245 (1930).

31. 18 Cal. 2d 349, 115 P.2d 488, 149 A.L.R. 299 (1941).

under the provisions of the sales tax statute, computed his own tax and filed his return. After an audit by the taxing authorities the tax was recomputed by the Board at a substantially higher figure. Notice of the additional assessment was mailed to the taxpayer as provided for in the California statute. Later the taxpayer was adjudged a bankrupt and the instant action was brought to have the state's tax "judgment" set aside and dissolved on the grounds that the "judgment" as obtained violated the taxpayer's rights under the due process clause. Over taxpayer's objection that the lack of personal service was a denial of due process, the court held that notice by mail was not such a denial. Thus, the state's "judgment" for the amount of the sales tax due was valid and binding on the taxpayer, constituting a statutory lien against his real property.

A later case, *Pacific Gas and Electric Co. v. State Board of Equalization*,[32] arising under the same California statute, serves to show how far the requirement of notice may be relaxed without constituting a denial of due process. The taxpaying corporation filed a suit for a refund for sales taxes paid in the amount of $324,953.94, plus interest. When the taxpayer had filed his original sales tax return, certain items were in dispute. The Board recomputed the original assessment, disallowing various items, and assessed the additional amount in controversy. Notice of the additional assessment was mailed to the taxpaying corporation's home office where it was received by the comptroller. However, the notice was never transmitted to the attorneys of the corporation who had charge of the entire matter and who had been handling all the details of the transaction between the corporation and the Board of Equalization prior to the mailing of the notice. A relevant statute required that any application for refund must be brought by the claimant within ninety days after the receipt of such mailed notice. Before the suit for refund was instituted, the ninety-day period had expired. Taxpayer claimed that since proper officials had not, in fact, received the notice, due process had not been satisfied. The court rejected taxpayer's argument. In holding the notice sufficient to satisfy due process requirements, the court stated, in part: "We hold that the statutory method of service of a notice of disallowance of claim by mailing addressed to the party, as here applied to the Company, is just and reasonable and satisfies due process and that, although addressing a notice to counsel contrary to or in excess of the statutory requirements might in this case have prevented the injury, due process did not require respondent to take such a measure, the less so because the manner in which the injury occurred was not readily foreseeable, and was caused by the lack of care of appellant's [tax payer's] employees."[33]

32. 285 P.2d 305 (Cal. Dist. App. 1955).
33. *Id.*, 285 P.2d at 309.

Since taxpayer had not filed his claim within the ninety-day statutory period allowed for a refund, he had waived his claim against the state. Having chosen to rest his case solely on the alleged due process invalidity of the statutory procedure, without following the steps provided for in the statute for refund, taxpayer lost everything when the court decided against him on the due process issue of validity. The writer is aware of no reason why taxpayer could not have pursued both avenues of seeking relief. By making a timely claim for a refund, as provided for in the statute, taxpayer would then have been able to press for a refund after the court decided against him in his due process attack on the validity of the whole collection scheme.

The elasticity of the due process requirement with respect to notice in sales tax collection proceedings is further shown by the case of *Campbell v. State*.[34] There the statute required that notice of sales tax deficiency should be mailed to the taxpayer by registered letter twenty days before "judgment" was to be entered. The taxpayer, an out-of-state resident, duly filed his return. However, the Board recomputed the tax due, disallowing certain exemptions claimed by the taxpayer and assessed a sales tax deficiency. The Board mailed a letter of this action to the taxpayer. Ignoring the letter, the taxpayer continued to sell at retail within the state, and the state brought a suit in equity to enjoin the taxpayer from doing further business in the state until he paid the assessment. The taxpayer defended the injunction suit on the ground that the state's sales tax judgment was invalid for want of proper service of process; therefore, he argued, there were no grounds for the issuance of an injunction. The court overruled the taxpayer's defense and granted the injunction. In holding that the former tax judgment against the taxpayer was valid the court was careful to state that a personal judgment cannot be entered against an out-of-state resident who has been served by mail alone, but the court added that there is a distinction between substituted service of process after the proceeding is begun and constructive process in the first instance, and concluded, "The principle is fully established that when a person is personally before the court in the proceeding either because he himself instituted it, or because he had personal service of the original process in the forum, all action taken thereafter in that proceeding or supplementary to it, may be begun by substituted service. . . .[T]he taxpayer instituted this proceeding [referring to the original action of the state in taking out a tax "judgment"] by making his returns to the State Department of Revenue, and thereby submitted himself personally and generally to its jurisdiction. . . . Notice and hearings and other matters

34. 242 Ala. 215, 5 So. 2d 466 (1941).

after acquiring such jurisdiction could be given by substituted service, if sufficient to afford procedural due process. . . . We find here no violation of due process as a consequence of the nature of service on the taxpayer in a proceeding begun by him."[35] Such a holding that the mere filing of the return gives the state personal jurisdiction over the taxpayer so that the state may maintain all subsequent proceedings by mailed notice is certainly a dangerous element when it is considered that the sale of property located within the state to satisfy the judgment so obtained is the first the taxpayer may actually know of the proceedings.

Not all courts have been so ready to go along with the taxing authorities as to the requirements of due process in tax matters under various taxing statutes. In *Morrison-Knudson Co. v. State Board of Equalization of Wyoming*,[36] the plaintiff taxpayers sought relief from an alleged illegal assessment of the Wyoming sales tax. The state levied an original sales tax assessment against the taxpayer including an assessment on property that was exempt from such taxation under the statute. The Wyoming Retail Sales Tax Act was for the main part a direct copy of the California statute dealing with the same subject. However, certain important safeguards had been omitted from the Wyoming statute. The Wyoming statute required that any amount of sales tax assessed by the Board became thereafter, irrevocably fixed. The taxpayer was allowed no hearing at all until after the amount of tax so assessed by the Board had been paid into the state treasury. There was no provision in the statute to compel a refund in cases where the tax was erroneously assessed and paid under protest. There were no requirements that notice be given to the taxpayer at any stage of the proceedings. In holding such a statute invalid as arbitrarily depriving the taxpayer of his property without due process of law, the court stated in part: "It is apparent that in the California Act the entire tax fund is appropriated and earmarked for the purpose of payment of refunds and therefore any judgment for the recovery of illegal taxes would be enforceable against the official by whom they are collected. Just why this seemingly logical and just provision was not carried into the Wyoming legislation is not apparent. . . . I take it to be the law that there is a lack of due process and the inherent right of the taxpayer has been invaded when he is required to pay the tax before a hearing is had and before the tax becomes irrevocably fixed, unless there is some provision legal and enforceable in its effect by which he is entitled to be restored to his former position."[37] Thus in *Morrison-Knudson* it is seen that the legislature, while well within its rights in providing

35. *Id.*, 5 So. 2d at 471.
36. 35 F. Supp. 553 (D. Wyo. 1940).
37. *Id.* at 557.

for a summary method of collecting sales taxes, may not deprive the taxpayer of his property with an arbitrary denial of notice and hearing leaving him no method whatsoever for protesting the assessment of the illegal tax or recovering the taxes so paid.

It is evident that the legislature must leave at least some safeguards for the protection of the taxpayer. This premise is again seen in *Johnson v. Diefendorf*,[38] where the plaintiff taxpayer was successful in his suit to enjoin the commissioner of taxation from collecting an assessment under the Idaho sales tax act, as a violation of the due process clause. Many reasons were advanced by the court as a basis for the due process infirmities of the Idaho statute. In essence, however, the collective provisions of the statute were thought to be a denial of due process because of their arbitrary methods. The act provided for a recomputation and reassessment by the commission of the sales tax for fraud, omissions, or mistaken computation by the taxpayer-retailer. Such reassessments of additional taxes were to "be immediately due and payable." The taxpayer was given no notice of this recomputation and additional assessment, which became a lien against the real and personal property of the taxpayer. The commissioner was then authorized to sell any and all of taxpayer's property at public auction to satisfy the sales tax lien anytime within the two years after the date it was determined that the additional tax was due and owing. The statute further prohibited suits at law or equity to prevent or enjoin collection of the tax; and taxpayer's only remedy was a protest payment followed by a suit for a refund. The court held, "When a retailer has in his possession taxes which he has collected from the purchasers, and fails to account for and pay over the money due from him, it may be collected by legal proceedings provided for like cases, but to place in the hands of the agent [tax authority] of his creditor [taxing state] such arbitrary powers as are attempted to be conferred by . . . [the Idaho Sales Tax Act] is to deny to the debtor [complaining taxpayer] due process of law, in violation of Idaho Constitution art. 1, § 13, and the Fourteenth Amendment of the Constitution of the United States."[39] Interesting to note is that the decision also stated as a ground of unconstitutionality the additional fact that the statute conferred judicial powers on the executive branch of the government that was contrary to the constitutional principle of separation of powers.

While the *Johnson* decision may appear somewhat contrary to the weight of authority in sales tax constitutional questions, it is easily distinguishable from most of the other cases in that the *Johnson* tax collection procedure was completely arbitrary. As the court construed the taxing statute the taxpayer was afforded no notice or

38. 56 Idaho 620, 57 P.2d 1068 (1936).
39. *Id.*, 57 P.2d at 1072-73.

opportunity to resist the additional assessment, and the first notice the taxpayer would receive would be when the commissioner sold his property in payment of the tax lien. The statutory provision for a protest payment followed by a suit for refund was rendered completely void as the taxpayer under the statute received no notice as to the proper time to institute such a suit. Indeed, the statute provided such arbitrary methods of collection that title to the taxpayer's property might pass under a tax sale while he remained completely unaware that any proceeding had been instituted against him. However, the court expressly pointed out that the unconstitutionality of the collection procedure did not render the tax act void in its entirety. The court stated that the other sections of the sales tax act were valid and entitled to full force and effect and indicated that the defect in the collection procedure could be cured by passing an ammendment to the act providing for notice, thus giving the Idaho Sales Tax Act the same safeguards present in other sales tax measures in sister states. This case, as well as others, seem to indicate that at least some form of notice is necessary in order that protest payment followed by suit for refund be an adequate remedy. However, such notice need not be in the form of personal service of process.

It has long been held that if the taxpayer is afforded an opportunity for a hearing at some stage of the tax collection proceedings, due process is satisfied.[40] The hearing apparently does not have to be judicial in nature and due process is satisfied by a hearing before an administrative tribunal.[41] Again, the requirement of a hearing is not necessary before the tax becomes due or judgment is entered thereon where the tax is self assessing, requiring no evaluation to be made by a judicial tribunal.[42] Even where the assessments are irregular in nature, the courts will endeavor to give them full force and effect by not letting a technical error on the part of the administrative board defeat the collection of the tax.[43] Frequently the taxpayer is denied judicial review of the entire action, where such review might otherwise have been available, if he fails to avail himself of the statutory

40. See, *e.g.*, Hodge v. Muscatine County, 196 U.S. 276 (1905); Powell v. Gleason, 50 Ariz. 542, 74 P.2d 47 (1937); People v. Skinner, 18 Cal. 2d 349, 115 P.2d 488 (1941); Hardin v. Reynolds, 189 Ga. 534, 6 S.E.2d 328 (1939); State v. Standard Oil Co., 188 La. 978, 178 So. 601 (1938); Henry v. Manzella, 356 Mo. 305, 201 S.W.2d 457 (1947); Douglas County v. State Bd. of Equalization and Assessment, 158 Neb. 325, 63 N.W.2d 449 (1954); Obion County v. Coulter, 153 Tenn. 469, 284 S.W. 372 (1924); Texas Pipe Line Co. v. Anderson, 100 S.W.2d 754 (Tex. Civ. App), *cert. denied*, 302 U.S. 724 (1937); see also Note, *Administrative Law—Notice and Opportunity For Hearing—Tax Assessment Statute*, 29 N.C.L. REV. 169 (1951).

41. Hodge v. Muscatine County, 196 U.S. 276 (1905).

42. Nickey v. Mississippi, 292 U.S. 393 (1934); *In re* 801-815 East New York Avenue Borough, 290 N.Y. 236, 48 N.E.2d 502 (1943).

43. Security Trust & Savings Bank v. Mitts, 220 Iowa 271, 261 N.W. 625 (1935).

administrative remedies. This is seemingly but another application of the doctrine that administrative remedies must be exhausted first, where they are available, before the taxpayer can resort to judicial action concerning the controversy. The courts hold that the taxpayer is "estopped" to demand judicial review by not complying with the statute providing for proper administrative determination at the first instance.[44] As one author has stated the issue: "The interests of the taxpayer are sacrificed to the administrative conveniences of the tax district."[45]

In the absence of such estoppel by failure properly to follow the remedies outlined in the taxing statute, the general rule is that even though the taxpayer may be thought by the court to be entitled to judicial review, so long as he is granted judicial review at some stage of the proceedings before he is actually deprived of his property, whether such review comes by way of direct or collateral attack, the requirement of judicial review is satisfied.[46] As a general rule the sales tax acts provide for judicial review by way of a protest payment of the tax followed by a suit for refund against the taxing authority [*i.e.*, board] which must be prosecuted within a certain period.[47]

2. *Limitations on the Use of the Injunction in Tax Collections*

A. Scope of Injunctive Relief Available to Taxpayer. Frequently the taxpayer may protest the payment of the sales tax by a collateral attack upon the taxing authorities by way of injunctive proceedings or an action for declaratory judgment. The scope of injunctive relief, however, is generally limited, and it is difficult to determine the conditions under which the taxpayer will be allowed to seek injunctive relief.

At one time it was the rule in the United States that the courts of equity under no circumstances would entertain an action to enjoin

44. First Nat'l Bank v. Board of County Comm'rs, 264 U.S. 450 (1924); Stanley v. Supervisors, 121 U.S. 535 (1887); Security-First Nat'l Bank v. Los Angeles, 35 Cal. 2d 319, 217 P.2d 946 (1950).

45. Stason, *Judicial Review of Tax Errors—Effect of Failure to Resort to Administrative Remedies,* 28 MICH. L. REV. 637, 638 (1930).

46. *Cf.* People *ex rel.* Wangelin v. Wiggins Ferry Co., 357 Ill. 173, 191 N.E. 296 (1934); see also, Faught, *Procedure for the Assessment of Real Estate for Taxation Purposes and the Review of such Assessments,* 6 U. PITT. L. REV. 231 (1940); Note, *Extent of Judicial Review of Administrative Tax Determinations in West Virginia,* 50 W. VA. L. REV. 75 (1947).

47. See, *e.g.,* the Tennessee Sales Tax Statute which provides [from TENN. CODE ANN. § 67-3033 (Cum. Supp. 1955) by cross reference]: "The person paying said revenue . . . [under protest may] at anytime within thirty (30) days after making said payment, and not longer thereafter, sue the said officer having collected said sum, for the recovery thereof." TENN. CODE ANN. § 67-2305 (1955). For similar provision see applicable section of sales tax statutes listed in note 18 *supra.*

or to interfere with the collection of taxes.[48] However, this is no longer the rule and courts of equity will now enjoin the collection of a tax not authorized by law,[49] but as the present day rule is the summation of the exceptions that the courts of equity made to the old rule from time to time, there seemingly still persists an idea that injunctive suits presumptively will not lie. As the very nature of equitable relief is generally said to be based on "equity between the parties in the particular circumstances of the case at bar" concrete rules are difficult to formulate. Some propositions of law can be deduced from the authorities, however. It is axiomatic that equity will not enjoin the collection of a tax where there is a plain, speedy and efficient remedy at law.[50] This limitation, of course, includes the situation where the taxing statute itself provides for an adequate remedy in its own terms.[51] An adequate remedy is generally to be found if the statute provides for a payment of taxes under protest followed by a suit for refund,[52] or even in a separate law action for money had and received.[53]

In *Fox v. Standard Oil Co.*,[54] the Supreme Court of the United States has made it clear that not every payment of a tax under protest with a suit for refund will constitute an adequate remedy at law. There the statute provided for the payment of the tax and subsequent refund suit against the tax commissioners, but the statute failed to make clear that the judgment if so obtained against the commissioners could be collected by any means except by legislative appropriation. The Court affirmed that the equitable relief sought by the taxpayer was justified. The Court made it clear that if payment under protest followed by a suit for refund was to bar equitable relief, final payment to the taxpayer must not rest on the whim and caprice of the legislature but must be on a concrete and irrevocable

48. First Nat'l Bank v. Albright, 208 U.S. 548 (1908) (discussion of the rule); Wagner v. Leenhouts, 208 Wis. 292, 242 N.W. 144, *appeal dismissed*, 287 U.S. 571 (1932) (leading case); DeWitt v. Hayes, 2 Cal. 463, 56 Am. Dec. 352 (1852); Youngblood v. Sexton, 32 Mich. 406, 20 Am. Rep. 654 (1875).

49. See Bristor v. Board of Assessors, 346 Ill. 362, 179 N.E. 120, 78 A.L.R. 686 (1931).

50. Stratton v. St. Louis S.W. Ry., 284 U.S. 530 (1932); Skagit County v. Northern Pac. Ry., 61 F.2d 638, 86 A.L.R. 1012 (9th Cir. 1932); Casco Co. v. Thurston County, 163 Wash. 666, 2 P.2d 677 (1931); Boyd v. City of Selma, 96 Ala. 144, 11 So. 393 (1892). Presently we will see that the power of the federal district courts to grant injunctive relief is now limited by statute to those situations where the taxing authority does not afford taxpayer a plain, speedy and efficient remedy at law. See note 72 *infra*.

51. Keokuk & H. Bridge Co. v. Salm, 258 U.S. 122 (1922); see also Indiana Mfg. Co. v. Koehne, 188 U.S. 681 (1903) (payment of taxes under protest followed by a suit for a refund held to be an "adequate" remedy so as to preclude equitable relief). The Court also stated that multiplicity of suits which would result if taxpayer followed his remedies under the statutes afforded no ground for equitable relief.

52. Henrietta Mills v. Rutherford County, 281 U.S. 121 (1930).

53. Atchison, T. & S.F. Ry. v. O'Connor, 223 U.S. 280 (1912).

54. 294 U.S. 87 (1935).

basis. Again if the tax statute providing a "vague" remedy for refund of taxes wrongfully collected has not been construed by the highest court of the state in such manner that a clear and uninhibited path lies open to the taxpayer for the return of the taxes paid under protest, the United States Supreme Court will not hold that such an untried remedy is adequate so as to preclude equitable relief.[55] Too, if the legal remedy is not exclusive, equitable relief may also be had. However, there are no grounds for equitable relief merely because the taxpayer had an adequate remedy at law and lost it by failure to prosecute it during a prescribed statutory period.[56]

Equitable relief may also be obtained in some cases where the attempted collection of taxes will cause the taxpayer irreparable injury regardless of the adequacy of his remedy under the statute or at law.[57] However, irreparable injury is extremely hard to prove and limited somewhat to the attempted collection of taxes against property that is peculiarly valuable and where its seizure cannot adequately be compensated for by damages.[58] Nevertheless, where the only alleged illegality of the tax lies in over-assessment, equitable relief will not lie and the taxpayer must pursue his remedies under the statute.[59]

Where the statute is within itself so arbitrary and so clearly a denial of due process that an attempt to follow the provisions laid out within it would clearly afford no relief to the taxpayer,[60] equitable relief may constitute a proper remedy, but in every instance the courts will lean heavily upon a strong presumption in favor of the statute and the taxpayer may be forced to pursue the remedy called for by the statute, and as a result the equitable relief will be denied.

Nor do there appear to be grounds for injunctive relief for the reason that the statutory requirements compelling a vendor to collect the sales tax are too burdensome financially to the vendor. In *Fox v. Frank*[61] the plaintiff vendor brought suit to enjoin the state from re-

55. Atlantic Coast Line R.R. v. Daughton, 262 U.S. 413 (1923).
56. Bismark Water Supply Co. v. Barnes, 30 N.D. 555, 153 N.W. 454 (1915).
57. See Shelton v. Platt, 139 U.S. 591 (1891).
58. See, *e.g.*, H. W. Metcalf Co. v. Martin, 54 Fla. 531, 45 So. 463 (1907), in which the court held not sufficient a mere general allegation that to deprive taxpayer of his pool table for failure to pay a license tax would constitute irreparable injury since the pool table could be replaced.
59. City of Gadsden v. American Nat'l Bank, 225 Ala. 490, 144 So. 93 (1932). For an interesting discussion of this point showing the limits to which courts will go to interpret the wrong alleged by the taxpayer to be merely "over assessment" or "irregularity," as well as for a complete listing of cases on the subject, see, Stason, *Judicial Review of Tax Errors—Effect of Failure to Resort to Administrative Remedies*, 28 MICH. L. REV. 637 (1930).
60. Miller v. Standard Nut Margarine Co., 284 U.S. 498 (1932); Inland Milling Co. v. Huston, 11 F. Supp. 813 (S.D. Iowa 1935); Grand Island & W.C.R.R. v. Dawes County, 62 Neb. 44, 86 N.W. 934 (1901); Graves v. Moore County Comm'rs, 135 N.C. 49, 47 S.E. 134 (1904); Mercur Gold Mining & Milling Co. v. Spry, 16 Utah 222, 52 Pac. 382 (1898); see also Annot., 108 A.L.R. 184 (1937).
61. 52 Ohio App. 483, 3 N.E.2d 996 (1935).

quiring plaintiff to collect a tax on his sales of farm produce, on the ground that the collection machinery forced him to incur the almost prohibitive cost of a bookkeeper, thus violating the due process clause of the fourteenth amendment, as well as depriving plaintiff of his right under the Ohio Constitution to acquire and sell property. Plaintiff was a small farmer who sold his product at a consumer's market. Rejecting taxpayer's argument because of the state's broad power to tax and to prescribe the rules for tax collection, the court refused the injunction. While complainant based his objection on constitutional grounds, nevertheless the court, in rather sweeping language, declared, "One who is required by law to collect a tax may not refuse to do so on the ground that the provisions of the law requiring the payment of the tax to the collector [plaintiff-vendor] are invalid."[62]

B. Use of the Injunction by the Taxing Authority. It seems that only rarely are the courts asked by the state to use the injunctive process to force the vendor to collect a sales tax. The rarity of this occurrence may be partly explained by the fact that the vendor is normally reimbursed by the state, out of his collections, for expenses incurred in the collection of the tax. An obstinate vendor was before the court in *State ex rel. Rice v. Allen*,[63] however, defending against a petition for a mandatory injunction to require him to collect the sales tax from his purchasers. The court granted the injunction, very detailed in its instructions regarding compliance with the statute. One ground for resisting the injunction was that criminal sanctions were provided to enforce collection of the tax, thus rendering it unnecessary to resort to the equitable processes to enforce collections. Rejecting that defense, the court adopted the view of a text writer that the "fact that conduct is punishable criminally does not constitute an adequate remedy so as to bar equitable relief."[64] It also based its decision, in part, on the fact that the efficiency of the state taxing authority was being impaired by the defendant's action, *i.e.*, extra audits of defendant's books were required, etc.

3. *The Use of the Declaratory Judgment in Tax Collection Matters*

A procedural device that is coming more to the forefront in obtaining relief against the enforcement of an illegal tax is an action for a declaratory judgment. But here, as in equity suits, the availability of such a remedy is somewhat limited by restrictions imposed upon its use both by statute and by the courts themselves. Nevertheless, the field of declaratory relief is growing steadily in connection with tax matters. Even states that deny the use of an injunctive proceeding

62. *Id.*, 3 N.E.2d at 997 (syllabus by the court).
63. 180 Miss. 659, 177 So. 763 (1938).
64. 2 Lawrence, Equity Jurisprudence § 1099 (1929).

to curtail the collection of taxes will in some instances grant declaratory relief. It is easy to see the reasons for such growth, because a declaratory judgment action ordinarily offers a swift and inexpensive remedy for a final determination of the legality of a tax statute, expedient to collector and taxpayer alike. It will be recalled that one of the major objections presented to bar relief sought by taxpayers against the taxing authorities was that the government needed the tax monies to continue the functions of its business unhampered and unimpeded by long and involved tax suits. This objection generally is not open to those seeking to bar declaratory relief by the taxpayer (or by the collecting authority attempting to enforce the tax) for the action offers a speedy determination of the rights of the parties in most instances, although it is to be conceded that a declaratory action might drag on at great length in cases where the court's docket is extremely crowded.

In spite of the growing tendency on the part of the courts to look with favor on declaratory action in the adjudication of tax questions, some courts impose certain limitations on this remedy and thereby prevent relief from being afforded the taxpayer suffering under the attempted collection of illegal taxes. At least one court has stated that such limitations to declaratory relief in tax matters stem from the fact that the basic nature of declaratory action finds its existence in the discretion of the court.[65] While this doctrine has been criticized as wrongfully characterizing the nature of declaratory action, the courts are still somewhat hesitant in granting declaratory judgments in tax matters. This hesitancy is indicated by the measures taken by the courts in order to deny declaratory relief.

One means of judicial avoidance of relief through the declaratory judgment has been what is perhaps an over-zealous application of the doctrine that there must be an actual or justiciable controversy before a judicial remedy can be invoked.[66] This requirement, of course, is implicit in any law suit, including a suit for a declaratory judgment, where the very nature of the action contains aspects of predetermination of rights prior to actual harm being done to one of the parties. *Doby v. State*[67] is illustrative of the principle that a justiciable controversy must exist. There plaintiff, operator of an automobile repair shop, brought a declaratory action to determine

65. Collier Advertising Serv., Inc. v. City of New York, 32 F. Supp. 870 (S.D.N.Y. 1940) (sales tax).

66. See, BORCHARD, DECLARATORY JUDGMENTS 40 (1941). For particular cases holding that there must be a justicable controversy see, Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933) (gasoline tax); Morrison-Knudson Co. v. State Bd. of Equalization, 35 F. Supp. 553 (D. Wyo. 1940) (sales tax); Reese v. Adamson, 297 Pa. 13, 146 Atl. 262 (1929) (here the court emphatically stated that they would not give a "mere" advisory opinion on points of law as to the taxpayer's liability if he followed a particular course of business).

67. 234 Ala. 150, 174 So. 233 (1937).

whether it should collect the Alabama sales tax upon certain automobile parts used and sold in plaintiff's business. The court held that the plaintiff was entitled to have adjudicated the question of tax liability as to the parts it sold to customers to repair their cars; but where the plaintiff repair shop bought certain old cars and reconditioned them for resale using in the process certain parts from its stock of new parts on hand, the court held that plaintiff raised no justiciable controversy, not being a proper party to have the tax determined in relation to the new parts so used. The court stated in part, "we deem it pertinent to say the liability for a sales tax payable by the sellers of parts, accessories, and equipment to the automobile repair shop for use in reconditioning its cars, or materials and supplies consumed, is not a justiciable issue before us. Such dealers are not represented in this suit, nor are the facts disclosed as to such business."[68]

In the *Doby* case the court also stressed that an essential element of a declaratory judgment action is that all parties whose interest are to be affected must be represented before the court. While this can be true of any law suit, again the strictness with which it is enforced, at times, may be somewhat peculiar in the field of declaratory judgments in tax matters.[69] As the sellers of the new parts to the automobile dealer were not represented before the court, the court felt justified in refusing to decide the sales tax question applicable to the unrepresented sellers. A like result was reached in *Smithberger v. Banning*,[70] where plaintiff, a corporation of gasoline marketers, brought an original action to determine the validity of sales tax questions as to certain retail sellers acting and operating under the protection of the plaintiff. The court denied relief and refused to hear the suit on the merits, holding that the corporation itself was not the dealer subject to the tax who would be harmed by illegal enforcement of the tax measures, nor did the corporation have authority to appear on behalf of its dealers.

In *Southern R.R. v. Curry*,[71] the court held that the railroad was not the proper party to contest the validity of a sales tax as applied to the seller of carload lots of slag shipped over the plaintiff railroad's lines since the judgment would not bind the seller and the state taxing authorities, the two primary persons involved. The issue involved in the case was whether slag was "a building material" and hence taxable under the Alabama Sales Tax Act.

The compass of declaratory judgment relief has been narrowed in some jurisdictions on the ground that such relief will not be

68. *Id.*, 174 So. at 236.
69. General Securities Co. v. Williams, 161 Tenn. 50, 29 S.W.2d 662 (1930).
70. 130 Neb. 354, 265 N.W. 10 (1936).
71. 239 Ala. 263, 194 So. 523 (1940).

granted in tax cases where the taxpayer has available another method of established relief. Especially has this doctrine been applied when the suit for a declaratory judgment has been instituted in the federal courts. There the impediment to such relief is found in a federal statute, commonly known as the Johnson Act, which provides: "The district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy, and efficient remedy may be had in the courts of such State."[72] The impact of this statute was felt in *Collier Advertising Services v. City of New York*[73] where a federal court was confronted with the question whether the ban of the Johnson Act includes a suit for a declaratory judgment without injunctive relief. The court held that the Johnson Act did forbid the suit, since the Act denies jurisdiction to the district court of suits to enjoin, suspend or restrain assessment and collection of state taxes. Then the court concluded that to permit the declaratory judgment suit, although not coupled with a prayer for injunctive relief, would substantially nullify the Johnson Act. The Court further observed that public officials are expected to respect the court's declaration and to follow its interpretation of the laws. Such a voluntary submission averts the need of an injunction, thought the Court, but accomplishes precisely the same result. While there is no definitive declaration by the Supreme Court of the United States on the question whether the Johnson Act proscribes a suit for a declaratory judgment where an injunction is not asked, nevertheless the Court has indicated that such a suit does fall within the ban of the Johnson Act.[74] Also, lower federal court cases, other than the *Collier* case, had assumed that the remedy of the declaratory judgment fell within the conditional prohibition of the injunctions.[75]

The state courts, unshackled by the Johnson Act, have been much more ready to grant declaratory relief to the taxpayer.[76] The leading case in the field is *Nashville, Chattanooga & St. Louis Ry. v. Wallace.*[77] While this case was a determination by the Supreme Court of the United States, it involved a suit instituted in the state court and continued through the judicial processes of the state. In that case the State of Tennessee imposed an excise tax upon the storers and dis-

72. 28 U.S.C.A. § 1341 (1950).
73. 32 F. Supp. 870 (S.D.N.Y. 1940).
74. Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 299 (1943); see also Public Service Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 253 (1952) (dissenting opinion by Mr. Justice Douglas).
75. See West Pub. Co. v. McColgan, 138 F.2d 320, 326 (9th Cir. 1943). For a discussion of the subject of federal court interference with the assessment and collection of state taxes, including the declaratory judgment suit, see Note, *Federal Court Interference with the Assessment and Collection of State Taxes*, 59 HARV. L. REV. 780 (1946).
76. See, BORCHARD, DECLARATORY JUDGMENTS 826 (1941).
77. 288 U.S. 249 (1933).

tributors of gasoline. Plaintiff railway brought a declaratory action contending that it was neither a storer nor a distributor and hence a state could not tax the gasoline held by it. Over the objection of the state that a state statute forbade any suit to enjoin or interfere with the collection of taxes within the state and the only remedy under the same statute was a protest payment and suit for refund, the court entertained the declaratory action. The Supreme Court of the United States affirmed the action of the lower courts holding that in such circumstances declaratory relief was a proper remedy as it offered a speedy and efficient method of ascertaining the rights of the parties. No injunctive relief was asked.

In *Dun & Bradstreet v. City of New York*,[78] the court rejected the argument of the state taxing authority to the effect that the taxpayer could not maintain an action for declaratory relief from the adverse effects of a sales tax because he should follow the general procedure for recovering taxes improperly assessed as outlined in the state statute. The court gave as its reasons for so holding that to follow the taxing authorities' line of argument would lead to multiplicity of suits. In addition the court stated that the state statute could be so construed that the taxpayer, who collected the tax from customers, might not have standing to sue at all in the state courts as the state might interpose a defense to the effect that taxpayer's customers were the real parties harmed, and that such a construction would deprive the taxpayer entirely of any right to be heard. The court then proceeded to hold that the taxpayer had a valid cause for his declaratory judgment action, and the remedy under the state statute did not deprive the court of its jurisdiction. Even though this retailer was only a "collector" of the tax, he was still the proper party to institute the suit.

A like result was reached in *Department of Treasury v. J. P. Michael Co.*,[79] where the court held that payment of taxes under protest as provided in the state statute followed by a suit for refund was not an "adequate remedy so as to preclude declaratory judgment action." As a broader ground for permitting the suit, the court thought that protest payment-refund procedure was an "additional and cumulative" remedy and not "exclusive."

Therefore, while the rule in the federal courts under the Johnson Act still maintains that declaratory relief, especially when an injunction also is requested, is not to be had where there are plain, speedy and efficient remedies under the laws of that state, the state courts are far less strict; in many states, even where there is

78. 276 N.Y. 198, 11 N.E.2d 728 (1937).
79. 105 Ind. App. 255, 11 N.E.2d 512 (1937).

an anti-tax injunction statute in force, the state courts will still grant declaratory relief.[80]

Perhaps the most useful application of declaratory relief to questions arising under the sales tax statutes is to be found in the growing field of statutory construction in order to determine if certain items are taxable or are exempt under the sales tax acts. As pointed out earlier, it is frequently difficult to ascertain whether many transactions constitute a "sale" or a "sale at retail" under the provisions of the sales tax acts.[81] The declaratory judgment offers a speedy and efficient method whereby both the taxing authority and the taxpayer can have adjudicated the question of the applicability of the statute as to the particular transaction in question. Thus, in questions involving the classification of the subject matter, whether certain items are exempted under the statute, or whether the taxpayer is immune from the tax, the declaratory action immediately solves the problem of construction of the statute in question, allowing a determination of the rights of the parties before the taxpayer is deprived questionably of his property. Where such questions are involved the courts are quick to look with favor upon declaratory action and will seldom force the taxpayer to fall back upon the other remedies provided in the sales tax statute even though such remedies may be adequate.[82]

4. *Summary Comment and Conclusions on Procedural Collection Problems*

By way of conclusion it may be stated that the field of due process in dealing with problems arising from sales taxation is a product of the history of the running fight between the states endeavoring to enforce tax matters by the most summary methods as opposed to affording complete protection to the taxpayer demanding relief from the assessments. It can accurately be stated that the term due process of law does not carry the abundant safeguards in the field of taxation that are available to the litigant in the ordinary judicial proceedings. Nevertheless, there is a point in the deprivation of property under arbitrary tax laws beyond which the state cannot proceed, consistent with the requirements of due process. The requirements of notice and hearing are more greatly relaxed and it is firmly established that notice by mail may be employed rather than personal service of process. Such is the power of the customs long followed by the states in tax collection matters, that all tax procedures are

80. In addition to cases listed *supra,* see also, Nachman v. State Tax Comm'n, 233 Ala. 628, 173 So. 25 (1937); Peterson v. Central Arizona Light & Power Co., 56 Ariz. 231, 107 P.2d 205 (1940); School Dist. v. Smith, 342 Mo. 21, 111 S.W.2d 167 (1937).

81. See note 18 *supra.* Many of these cases are declaratory judgment proceedings.

82. See BORCHARD, DECLARATORY JUDGMENTS 839 (1941).

granted a strong presumption as to their validity and the burden of proof is on the taxpayer seeking to have the statute struck for want of due process. The old adage of the right to "a day in court" has been limited in many instances to a right before an administrative tribunal, and even this right may be lost by the taxpayer if he fails to follow the procedure granting him such rights as outlined in the taxing statutes.

While relief is open to the taxpayer in some degree in equitable suits for injunctions to restrain the taxing authorities, and in a greater degree in declaratory actions, such relief is limited by self-imposed judicial restrictions, and in many states narrowly restricted by statute. Even in the federal courts the Johnson Act strictly curtails such actions and the courts are quick to find adequate relief either at law or at equity within the state and deny the use of the federal courts for obtaining injunctions against state taxing authorities.

While it is readily apparent that the state must be allowed the use of summary methods of the collection of taxes in order to maintain a steady income with which to operate its governmental functions unhampered and undelayed by long suits for the collection of taxes, it is even more obvious that in the field of taxation the term due process of law is not the shield of protection that it is in the greater realm of the ordinary judicial proceeding.

Problems of Substantive Liability of Parties

1. *The Incidence of the Tax and Liability of Parties*

A. Collection of the Sales Tax from the Vendor and Vendee. In the collection of sales taxes, one question which needs to be decided at the outset is whether the real taxpayer is the vendor or the purchaser. It has been decided that a statute requiring the vendor to collect the sales tax from the buyer "insofar as it can be done" placed the incidence of the tax on the vendor.[83] In contrast, a statute requiring the vendor to add the sales tax to the price of the article, "so far as [is] practicable," was held to place the burden of the tax on the consumer.[84] It is thus evident that the question of whom the legislature intended to be the taxpayer may be a close one.

Some sales tax statutes and ordinances meet this problem by imposing the burden of the tax squarely on the vendor.[85] The taxes in

83. Pacific Coast Engineering Co. v. State, 111 Cal. App. 2d 31, 244 P.2d 21 (1952).

84. Spencer v. Mero, 52 So. 2d 679 (Fla. 1951).

85. See, *e.g.*, tax statutes of Illinois, discussed in connection with note 86 *infra*.

these jurisdictions are treated as taxes on the occupation of making retail sales, and are measured by a specified percentage of gross receipts from these sales. This type of exaction was involved in *People's Drug Shop, Inc. v. Moysey*,[86] where a retailer sought to recover from the purchaser the amount of such an occupation tax, in addition to the purchase price of the article sold. Recovery was denied. The court reasoned that a tax "upon persons engaged in the business of selling tangible personal property to purchasers for use or consumption" was an occupation tax, the incidence of which fell upon the retailer. The retailer therefore had no right to charge the purchaser for the tax.[87]

Under this type of statute it may logically be inferred that the taxing authority also would be precluded from collecting the tax from the purchaser, should the vendor default. The burden of the tax is on the vendor, and the vendor's tax debt ought not be shifted to the purchaser by the vendor's failure to pay.

As previously noted, some statutes and ordinances are construed to place the burden of the tax upon the consumer, with the vendor in the position of tax collector. In such situations the enactment may empower the state to collect the tax from either the vendor or the purchaser, and to make the purchaser also liable, in the alternative, to the vendor.[88]

This gives rise to a related problem. Since the burden of the tax is deemed to be upon the consumer, with the vendor acting as collector, may the state proceed against both, and thereby recover a double tax? This problem was presented to the court in *Fifth Avenue Building Co. v. Joseph*.[89] There a purchaser sought the cancellation of an assessment against him for sales taxes on his purchases of coal in New York City. The city comptroller assessed the purchaser-plaintiff with the full amount of the tax due on these sales, even though part of the tax had been previously collected from the nonresident vendor. The city claimed that unless it could force the purchaser to pay the tax, the vendor could absorb it. This absorption, the city further contended, would defeat the legislative policy of placing the incidence of the tax on the consumer, and would allow one vendor thereby to gain a price advantage over his competitors. The court rejected this position of the taxing city. Instead, it decided that the purchaser was liable only for the residue of the tax not

86. 384 Ill. 283, 51 N.E.2d 144 (1943).

87. *Cf.* Clary v. Basalt Rock Co., 99 Cal. App. 2d 458, 222 P.2d 24 (1950).

88. See Saper v. City of New York, 168 F.2d 268 (2d Cir. 1948) (dictum), *affirming in part and reversing in part In re* Spotlight Productions, Inc., 75 F. Supp. 458 (S.D.N.Y. 1947); Davis v. Ponte Vedra Club, 78 So. 2d 858 (Fla. 1955); Troup Roofing Co. v. Dealers Supply Co., 91 Ga. App. 880, 87 S.E.2d 358 (1955).

89. 297 N.Y. 278, 79 N.E.2d 22 (1948).

collected from the vendor by the city. The court thought that the ordinance authorizing the city comptroller to collect the sales tax from the vendor or the vendee contemplated only alternative methods of collection. It also felt that the cases holding that the taxing authority may collect from the vendee if he has not paid the vendor, envisage only those instances wherein the city has not previously collected them from the vendor. The court further thought that the granting to the city of a double tax recovery would not effectuate the supposed policy against allowing the vendor to gain a competitive advantage by absorbing the tax. Here the court seemed to rely on the fact that if the vendor wilfully failed to charge the purchaser for the tax, the vendor was made subject, by statute, to criminal sanctions.

B. Liability of Vendor for Stolen Sales Tax Monies. It is evident that the incidence of the tax is basic to the question of the state's authority to collect from the vendor and vendee. So, also, the answer to the question of whether the vendor is liable for the theft of sales tax monies collected from purchasers begins with a determination of whether the burden of the tax is borne by the vendor or purchaser. This in turn depends on the wording of the statute, and the court's construction thereof.[90] If the vendor is held to be the taxpayer, his liability to the state for sales taxes is commensurate with his liability for other tax obligations. This liability is therefore not affected by his collection of the amount of the tax from the consumer, where there is a subsequent theft of this money. All money received from the consumer by the taxpaying vendor is part of the purchase price, and therefore not related to the vendor's sales tax obligation to the state.

If, on the other hand, the purchaser is the taxpayer and the vendor the tax collector, the vendor may be deemed the agent of the state,[91] or the trustee for the state.[92] An example of the vendor's being treated as a trustee of the stolen tax money is found in *Spencer v. Mero.*[93] There the plaintiff vendor brought suit to enjoin defendant sheriff from enforcing the payment of sales taxes collected by plaintiff from purchasers. This money had been kept separate from vendor's other funds, and had been stolen along with vendor's own money. The court decided that the vendor was only the tax collector, and that if he could clearly prove that the money was stolen from his place of business, then he could not be held liable for the sales tax. The court felt that the vendor was not a voluntary trustee, but that the normal principles governing a trust relationship should apply.

90. See notes 83 and 84 *supra.*
91. Commonwealth v. Kaplan, 311 Pa. 539, 166 Atl. 883 (1933).
92. B. K. Sweeney Elec. Co. v. Poston, 110 Colo. 139, 132 P.2d 443 (1942).
93. 52 So. 2d 679 (Fla. 1951).

Another problem, which the court in the *Spencer* case recognized but did not answer, would have arisen had the tax monies been commingled with vendor's own personal funds. It seems probable that the vendor would have been held liable for the tax. It would be difficult to prove that the money stolen was actually that collected, especially if the vendor had cash deposited elsewhere. No "trust fund" would have existed separately from the vendor's other monies. Normally the very commingling by a trustee of trust funds with his own monies will constitute a breach of his fiduciary relationship.[94]

In the absence of a statute making the vendor tax collector an insurer to the state, the just requirement would seem to make the vendor liable for stolen taxes collected from the taxpaying purchaser only if the loss occurred through vendor's negligence. It would then be for the court to decide whether, under the circumstances, the theft resulted from the vendor's negligence, or the commingling of tax monies with the vendor's own funds amounted to negligent conduct.

2. *Effect of Collection Schedules Where Occupation and Retail Sales Taxes Are Used*

Some troublesome problems have developed in connection with the use of tax collection schedules where both the occupation tax variety of sales tax, as well as the retail sales tax are found in the same jurisdiction. When a sales tax is of the type which is imposed on the purchaser on individual sales at retail, the state tax administrator will normally promulgate collection schedules to vendors who collect. These schedules are to facilitate the calculation of the tax, and set forth the amount of tax to be collected from consumers on each purchase, avoiding fractions of one cent. An unusual and interesting problem arose in Wyoming in connection with the effect of the statutory equivalent of such a collection schedule. In *Walgreen Co. v. State Board of Equalization*,[95] the statute required the vendor to collect from the purchaser and pay to the state a two percent sales tax on all individual sales of twenty-five cents or more. The statute also required the vendor personally to pay to the state a one percent tax on all sales of twenty-four cents or less. The latter tax was to be paid by the vendor, and he was prohibited by the statute from passing the tax on to the consumer. The tax collected from purchasers by the plaintiff vendor, on sales of articles priced at twenty-five cents or more, amounted to more than two percent of the proceeds of the total sales of these articles.[96] The vendor endeavored to apply this

94. 2 SCOTT, TRUSTS § 179.1 (1939).
95. 62 Wyo. 288, 166 P.2d 960 (1946).
96. Avoiding fractions of a cent creates the excess. Suppose, for example, the vendor sold ten articles individually, each worth ninety cents. Each sale would be taxed at 2%, to the nearest penny. The vendor in this instance would collect two cents on each sale, for a total of twenty cents tax. This twenty cents is more than 2% of the total sales of nine dollars.

excess toward the amount due the state for his own one percent tax on articles selling at twenty-four cents or less. The state resisted vendor's attempts to do this, and contended that any proceeds in excess of two percent collected from purchasers must be paid to the state. The court upheld the state's view. It reasoned that the vendor could not apply to the vendor's personal tax debt the money collected from consumers. The court also thought that if the vendor were allowed so to apply the excess collected from consumers, it might negligently or designedly overcharge for tax on certain items and undercharge on others, thereby acquiring an advantage over its competitors.

It is a little difficult to understand this reasoning of the court, unless it felt that if the vendor were not accountable to the state for the excess, then it could overcharge or undercharge as market competition permitted, thereby using the excess to manipulate prices. It is submitted, however, that the vendor could be held strictly accountable to the state if he were required to keep a correct account of the sales on which he collected a tax, with the state having the right to examine these records. The records would thus supposedly show clearly the source of the excess. The actual basis of the holding, however, is simply that the excess was paid by the customer to discharge their tax obligations, and the court just could not conscientiously allow the vendor to apply it to vendor's own tax debt. The intrinsic merit of the court's reasoning seems undeniable.[97]

Another problem involved in the use of collection schedules has arisen in connection with vendors whose sales are all below the first collection bracket, where the state has a sales tax in the nature of an occupation tax on the vendor, as well as a retail sales tax to be paid by the purchasers. In *Winslow-Spacarb, Inc. v. Evatt*,[98] the owner of a large number of vending machines, sold soft drinks from these machines at five cents each. The vendor paid no tax on these sales since a relevant Ohio statute, which imposed a tax on individual retail sales, exempted from this tax each sale under nine cents. The statute required that this tax be collected by the vendor from the purchaser. There was also in force a separate emergency retailers occupation tax, measured by three percent of gross retail sales. The statute specified that the occupation tax was not to affect the vendor's duty to collect or the consumer's liability to pay the retail sales tax. The occupation tax was to be borne by the vendor. The amount of the occupation tax was to be calculated, however, by subtracting from three percent of total sales the amount of tax paid under the retail sales act. In effect, therefore, retailers had to pay the occupation tax

97. In accord with the *Walgreen* case, see Obert v. Evatt, 144 Ohio St. 492, 59 N.E.2d 931 (1945).
98. 144 Ohio St. 471, 59 N.E.2d 924 (1945).

only if three percent of their total sales was in excess of the amount collected from purchasers for the retail sales tax. The vendor thus asserted that the state's assessment against him for the retailers occupation tax, measured by three percent of his gross sales, was discriminatory, in that he received no deduction from the occupation tax since he had collected no sales tax that he could deduct. The court upheld his contention, reasoning that to require him to pay the occupation tax would discriminate against him in favor of those vendors who could deduct the sales tax collected from their customers. Those vendors who collected a sales tax could use it to offset or even cancel their liability for the occupation tax; the vendor of articles under nine cents, who collected no sales tax, obviously could not so reduce his liability. The court construed the occupation tax as designed primarily to insure the collection of the retail sales tax, and decided that since plaintiff-vendor owed no retail sales tax, his liability was not further increased by the occupation tax. To hold otherwise, the court said, would violate the equal protection clause of the fourteenth amendment to the Constitution of the United States. The equal protection feature of the decision seems open to some question, however, since every vendor of articles in the same tax bracket as plaintiff received the same kind of tax treatment.[99]

3. *The Vendor's Duty to Verify Customer's Purchase as Being Tax Exempt*

In the ordinary sales tax statute or municipal ordinance, a sale for resale is not taxable. Where such is the situation, there will arise questions concerning the vendor's duty to determine whether a particular sale is tax exempt as a sale for resale. Although there is a paucity of cases on this particular aspect of the collection of sales taxes, *Merriwether v. State*[100] furnishes an example of a rather harsh result for vendors in determining whether a purchase is for resale. The Alabama statute, typical of the statutes of many states, purported to tax retail sales, not sales at wholesale. The plaintiff, a retailer and wholesaler of automobile parts, filed a bill in equity to cancel an assessment for state sales taxes. The contested assessment had been imposed on plaintiff's sales of automobile parts to retailers thereof, which the retailers did not resell, but used instead to recondition used automobiles, also sold by them. This would not have been an exempt transaction under the statute. The plaintiff-vendor was held liable for the assessed sales taxes on these articles which had not been resold, even though the purchasers had represented to the plaintiff that these articles were to be resold. The court found that the complaining vendor had not used sufficient diligence to as-

99. See Sholley, *Equal Protection in Tax Legislation*, 24 VA. L. REV. 229, 388 (1938).
100. 252 Ala. 590, 42 So. 2d 465, 11 A.L.R.2d 918 (1949).

certain whether the articles were within the tax exempt category of articles to be resold. The court relied on *Cody v. State Tax Commission*,[101] an earlier Alabama case holding the vendor liable under a similar fact situation. The court quoted extensively from the *Cody* case that the vendor "is bound to find out the general nature of the business conducted by [the customer] in respect to resales. . . . Responsibility for what is finally done with the merchandise . . . cannot be visited upon the [vendor]. But he must exercise diligence to know the course of business of his customer. . . ."[102]

An analogous case dealing with the vendor's duty to verify a purchase as being for resale is *Steubenville White Truck Sales & Service, Inc. v. Peck*.[103] In that case the plaintiff vendor sought a sales tax refund, which it claimed was erroneously collected on the sale of eight trucks. The Ohio statute exempted from the tax articles used "directly in the production of tangible personal property for sale by . . . mining,"[104] and the trucks involved were used for this tax exempt purpose. However, the Ohio statutes also required the vendor to obtain a certificate from the vendee if the sales tax did not apply to a given sale; and further provided that if no certificate was obtained, the tax should apply. Since the plaintiff had not obtained a certificate prior to the questioned sale, he was held liable for the tax, even though the articles involved in the sale were, in fact, used for a purpose which rendered them immune from the sales tax. Therefore, the plaintiff's contention that the tax had been erroneously collected from him was without merit.

Although both cases indicate that the vendor's responsibility is great, the latter case seems to represent the more certain and reliable method of describing and enforcing a vendor's responsibility to verify a purchase as being for resale. A sufficiently clear standard of conduct is expressly set forth in the Ohio statute involved in the *Peck* case, as to what action the vendor must take to determine whether a transaction is a taxable sale. The Alabama method of handling the matter, as evidenced in the *Merriwether* case, not only is not trustworthy, but it can be unreasonably harsh, for there is no fixed standard by which the vendor can know when he has discharged his responsibility. Also, it was there evident that the vendor reasonably believed the sales of automobile parts were "wholesale sales,"[105] and therefore not taxable. The vendor, as tax collector,

101. 235 Ala. 47, 177 So. 146 (1937).

102. *Id.*, 177 So. at 148. This case also decided that a sale of automobile parts to be used in the reconditioning of used cars was a taxable sale. This reasoning is seemingly based on the fact that the Alabama Sales Tax Act exempts the sales of used automobiles from the tax.

103. 162 Ohio St. 251, 122 N.E.2d 790 (1954).

104. OHIO REV. CODE ANN. § 5739.01(E) (2) (Baldwin 1953).

105. ALA. CODE ANN. Tit. 51, § 752(i) (1940), included in wholesale sales

is treated as the agent of the state, and no more should be required of him than that he act reasonably within the scope of his agency. It would seem fairer to the vendor, therefore, for the state to prescribe in a statute a reliable guide as to the vendor's duties and responsibilities, rather than to have them judicially determined on the vague standard of reasonable diligence.

4. *Personal Liability of Officers of Corporate Vendor for the Sales Tax*

To hold a corporate officer personally liable for corporate obligations is the exception rather than the rule. However, a question as to the personal liability of officers of a corporate vendor may arise in connection with the insolvency of the corporation, particularly where statutory liability for corporate obligations is imposed on corporate officials. Such a problem was before the court in *City of New York v. Bernstein*,[106] where the city sought to hold the president of a defunct corporation personally liable for sales taxes due from the corporation for sales made in the regular course of business while the defendant was president. The city based its claim on its local ordinances, authorized by state enabling statutes,[107] which provided for the personal liability for taxes of a corporate vendor's officers.[108] At first the trial court held that the enabling statute did not authorize the city to hold officers of a corporate vendor personally liable "without regard to negligence, wrongdoing, or personal profit." The court felt that a contrary holding would be inconsistant with the theory of corporate regulation theretofore followed in New York. At the second trial the plaintiff city's motion for judgment was granted. The court there said that the first opinion seemed to rest on intent, but that it was "quite clear . . . that the enabling act conferred upon the city all the power and authority to legislate in this field that are within the competence of the state."[109]

The second holding apparently assumes that the tax ordinances of New York City make the officer of a corporate vendor a virtual insurer to the city for the tax liabilities of his corporation. It indicates that since the legislature of New York gave the city a plenary authority to effectuate its own tax legislation, the city was free to make the officers of a corporate vendor personally liable for corpo-

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the sale of tangible personal property to a compounder which enters into and becomes a component part of the product which he compounds for sale.

106. 193 Misc. 224, 84 N.Y.S.2d 139 (Sup. Ct. 1948).

107. "[A]ny city of the state having a population of one million . . . or more . . . is . . . authorized to adopt and amend local laws imposing in any such city any tax . . . which the legislature has or would have power and authority to impose . . . and make provision for the collection thereof. . . ." N.Y. Laws c. 444 (1938) as cited in 84 N.Y.S.2d at 141.

108. "[O]fficers of a corporate vendor shall be personally liable for the tax collected or required to be collected by such corporation under this title . . . ." N.Y.C. Local Law No. 21 (1938) as cited in 84 N.Y.S.2d at 140.

109. 90 N.Y.S.2d 759, 760 (Sup. Ct. 1949).

rate taxes without regard to the lack of any breach of trust or other wrongful conduct on their part. This result seems to be harsh, but not unique.[110] It makes the officer of a corporation liable for taxes without fault; and therefore is at variance with the generally recognized theory that corporate officers are liable only for negligence or malfeasance.[111]

5. *Effect of the Statute of Limitations*

The statute of limitations is an important consideration for both the taxpayer and the taxing authority, as both may have occasion to invoke it as a defense. When a taxpayer seeks to recover a tax erroneously paid, the state may resist the claim as barred by the statute of limitations. On the other hand, the taxpayer may resist the collection of unpaid taxes on the ground that the claim is barred by the statute of limitations.[112]

A. Use of the Statute of Limitations by the Taxpayer. The statute of limitations in tax matters, by its own terms, often starts to run upon the filing of a tax return by the vendor. In suits by the state to recover assessed taxes, the problem may thus arise as to what action by the taxpayer will constitute the filing of a tax return. An excellent treatment of this problem in the field of sales taxation is presented in *People v. Universal Film Exchanges, Inc.*[113] There the defendant taxpayer had filed a consolidated return for his sales and use taxes, on one form, furnished by the state. The taxpayer left blank the spaces on the use tax side of the form. When the taxpayer interposed the statute of limitations as a defense to the state's suit to recover the use tax, the state took the position that, since the taxpayer had left the spaces blank, he had not filed a tax return sufficient to start the statute running. The court held, however, that the defendant had filed a valid return, and that the statute had run. Three factors were deemed important by the court in reaching its decision: (1) the taxing state officials had long adhered to the practice of treating such a return as valid; (2) in the federal courts, blanks are usually considered a positive representation of nothing to report;[114] and (3) meticulous accuracy is not required in order to start the statute of

110. States occasionally impose personal liability on both corporate officers and stockholders. See, *e.g.*, TENN. CODE ANN. § 48-111 (1955), which makes directors of a corporation personally liable for corporate debts when the amount of capital specified in the certificate of incorporation has not been paid in before the corporation starts doing business; and § 48-710 which makes stockholders personally liable for money due laborers, servants, etc., if the corporation becomes insolvent.

111. See BALLANTINE, CORPORATIONS §§ 63-65 (1946).

112. Statutes of limitations will not run against the state, however, unless authorized by statute. 34 AM. JUR., *Limitations of Actions* § 393 (1941).

113. 34 Cal. 2d 649, 213 P.2d 697 (1950).

114. *In re* Glick, 53 F.2d 951 (7th Cir. 1931); *In re* Trimble, 55 F.2d 165 (8th Cir. 1932).

limitations running, as long as there is a good faith effort to comply with the law.

In other cases involving the question of whether a consolidated return constitutes a valid return for two taxes, a guiding and primary consideration is the nature of the taxes involved. If the taxes supplement and complement each other, such as sales and use taxes, one return may satisfy both.[115] If they are distinctly separate taxes, however, for different purposes, then normally a separate return will be required for each.[116]

B. Use of Statute of Limitations by Taxing Authority as Bar to a Refund. When the taxpayer seeks to recover a tax as erroneously paid, there again will arise the problem of when the statute of limitations starts to run against the taxpayer's claim for refund. Since the property tax is much older than the sales tax, many of the doctrines concerning the statute of limitations developed in the property tax field and were carried over into the field of sales taxation. One such doctrine is that the statute of limitations will not start to run on a suit for a refund when taxes have been paid or assessed under mutual mistake, until the mistake is discovered or should have been discovered.[117] The theory of this doctrine is technically that the statute of limitations applies to cases of mutual mistake, but the running of the statute is suspended until the cause of action is known, or should have been known by the taxpayer.[118]

An instance of the application of this doctrine appears in *Phoenix Amusement Co. v. Glander*,[119] in which a taxpayer sought to recover sales taxes paid by mistake. The plaintiff taxpayer in that case was a vendor, who claimed he had erroneously paid sales taxes on articles he had sold at less than nine cents. The Ohio Supreme Court had invalidated the sales tax on certain articles below nine cents, on May 9, 1945.[120] A statute required suits for the recovery of sales taxes erroneously paid to be instituted "ninety days from the date it is ascertained that the assessment is erroneous." Taxpayer had learned of the decision invalidating the tax in September, 1945, and had brought suit within ninety days of that date. This was not within ninety days of the prior decision invalidating the tax, however. In allowing taxpayer to recover, the court held that the statute of limitations had not run. Reasoning that the earlier decision did not charge the taxpayer with notice of the invalidity of the sales tax

115. *But see* Whitmore Oxygen Co. v. Utah State Tax Comm'n, 114 Utah 1, 196 P.2d 976 (1948).
116. See Commissioner of Int. Rev. v. Lane-Wells Co., 321 U.S. 219 (1944); Hewitt v. Bates, 297 N.Y. 239, 78 N.E.2d 593 (1948).
117. Board of County Comm'rs v. Doherty, 114 Colo. 594, 168 P.2d 556 (1946).
118. 34 AM. JUR., *Limitations of Actions* § 100 (1941).
119. 148 Ohio St. 592, 76 N.E.2d 605 (1947).
120. Winslow-Spacarb, Inc. v. Evatt, 144 Ohio St. 471, 59 N.E.2d 924 (1945).

as applied to his sales, the court was of the opinion that the statute of limitations did not start to run until the taxpayer actually learned of the decision. In its opinion the court expressed the idea that statutes of limitations should be construed liberally in favor of the taxpayer, with the aim of trying to reduce his ever increasing tax burden.

Although a taxpayer's claim for a refund of taxes erroneously collected may be barred by the statute of limitations, still the taxpayer may obtain relief by way of the equitable right of recoupment. This right of recoupment is allowed, however, only if the state reopens the question of the amount owed by the taxpayer under the assessment. The taxpayer in *National Cash Register Co. v. Joseph*[121] was allowed this right of recoupment, even though his claim for a refund of sales taxes had not been filed within the time required by statute. When the taxing city reopened the matter of taxpayer's sales tax liability and assessed a tax, the taxpayer was entitled by way of recoupment to set off a claim for taxes of the same type erroneously paid, but a refund of which was otherwise barred by the statute of limitations.

Some courts, however, favor the taxing authority instead of the taxpayer under certain circumstances. It has thus been declared that the statute of limitations should be construed liberally in favor of the taxing authorities if the purpose of the statute is to expedite the collection of taxes;[122] and that, since there was no recovery of taxes, once paid, at common law, the statute of limitations should be strictly construed against the taxpayer as an unyielding condition to his right of tax refund conferred by statute.[123]

6. *Illegal Sales Taxes*

A. Disposition of Money Collected for Illegal Sales Taxes. In the event that a sales tax is declared invalid, the question may arise whether the vendor is entitled to a refund from the taxing authority of such taxes erroneously collected from the consumer and paid to the state. If the vendor remains in possession of the tax collected from the consumer, the similar question will arise whether the vendor must pay the tax to the state. If the incidence of the invalid tax is deemed to have been on the vendor, he is normally entitled to recovery of the taxes paid.[124] There is a conflict of authority on these questions where the court thinks the incidence of the tax is on the purchaser.[125] When the tax falls upon the purchaser, the majority

121. 299 N.Y. 200, 86 N.E.2d 561 (1949).
122. Collector of Revenue v. Rundell, 72 So. 2d 749 (La. App. 1953).
123. Kleban v. Morris, 363 Mo. 7, 247 S.W.2d 832 (1952) (dealing with the recovery of use taxes paid under a statute later declared unconstitutional).
124. Annot., 119 A.L.R. 542 (1939).
125. *Id.* at 543.

of courts hold that the vendor may not recover from the state an invalid tax, previously paid.[126] The principal reason for the denial of recovery seems to be that the tax is not out of the vendor's pocket, and therefore no one but the purchaser is entitled to a refund.

Analogous to the cases upholding this view is *Cook v. Sears-Roebuck & Co.*,[127] which involved the Arkansas Gross Receipts Tax. This tax was measured by two percent of retailers' sales in Arkansas, and the retailer was required to collect this tax from the purchaser. Sears had collected the tax on purchases made by Arkansas residents through mail orders to out of state stores. Sears refused to pay this tax to the state, and the tax commissioner promptly assessed Sears for the tax. Sears then brought suit to cancel this assessment, claiming that their mail order transactions were not taxable in Arkansas, and that Sears had the right to keep the tax collected. The court never reached the question of the validity of the tax. It disposed of the case by holding that regardless of the validity of the tax, Sears had no right to withhold from the state tax money collected from consumers. The court concluded, in essence, that Sears could not contest the assessment since the consumer was the actual taxpayer, and that to allow Sears (the tax collector) to retain the money would result in unjust enrichment to Sears.

Manifestly material to the court's decision was the fact that Sears had neither the means nor intention of returning the tax to the taxpayers. This same question appears decisive in other cases of the same general nature; that is, whether or not the taxpaying purchaser will ultimately recover the tax from the vendor appears to control the vendor's right to recover or withhold the illegal tax from the state. Only where there is every likelihood that the purchaser will be reimbursed do the courts depart from the general rule.[128]

B. Personal Liability of the Tax Collector for Illegal Taxes Collected. Taxes are often collected which are later found to be illegal, either in themselves, or with regard to a particular taxpayer. The question may then arise whether the official tax collector of the state or municipality is personally liable to the taxpayer for these illegal taxes which he has collected. The problem is by no means limited to the field of sales taxation, but may occur whenever the state tax collection official comes into possession of any type of illegal taxes.

Normally the tax collector is not personally liable to the taxpayer if the money has been turned over to the proper official of the state or

126. *E.g.*, Kesbec, Inc. v. McGoldrick, 278 N.Y. 293, 16 N.E.2d 288 (1938).
127. 212 Ark. 308, 206 S.W.2d 20 (1947).
128. See Indian Motorcycle Co. v. United States, 80 Ct. Cls. 594, 9 F. Supp. 608, *cert. denied*, 296 U.S. 600 (1935); Benzoline Motor Fuel Co. v. Bollinger, 353 Ill. 600, 187 N.E. 657 (1933).

municipal treasury, at least in the absence of protest from the taxpayer at the time of payment. There is authority, however, upholding the view that the tax collector may be personally liable for such illegal taxes, even though he has paid the money into the treasury, if the taxes were paid under protest.[129] The tax collector has also been held personally liable for such taxes, paid without protest, if the money collected has not been subsequently placed in the treasury of the taxing authority.[130]

A very thorough treatment of the question is rendered by the court's opinion in *Oakley Country Club v. Long*.[131] In that case the plaintiff-vendor sought to hold the tax commissioner personally liable for illegal meal taxes previously collected and paid into the state treasury. Plaintiff there went against the commissioner personally, for against the state his recovery was barred by the statute of limitations. The defendant tax collector was exonerated from any personal liability for the taxes, since he had committed no trespass, no seizure of property, and caused no loss to the plaintiff which could not have been recovered by an earlier action. The court's decision was thus based on the tax collector's good faith performance of his duty, and the need for the courts to protect him as he carries out this duty.

This is certainly the logical view, for it protects the fiscal interests of the state as well as the official. The tax official could hardly function if he were required to perform under the threat of personal liability for the possible injurious results of his every act. This is essentially the reason which has long been used to buttress the assertion that an official is not personally liable for the injurious results of purely ministerial acts.[132]

129. See cases collected in Annot., 14 A.L.R.2d 383 (1950).
130. *Ibid.*
131. 325 Mass. 109, 89 N.E.2d 260, 14 A.L.R.2d 377 (1949).
132. See 43 AM. JUR., *Public Officers* § 273 (1942).