MEANING OF RETAIL SALE AND STORAGE, USE OR OTHER CONSUMPTION

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Since sales taxes apply only with respect to retail sales of tangible personal property or apply at different rates with respect to retail sales and sales for resale, the principal problem of statutory construction confronting the tax administrator is that of ascertaining the factors distinguishing a retail sale from a sale for resale. The magnitude of this problem may be visualized to some extent by calling to mind the thousands of commodities sold in our markets and the great variety of uses which in innumerable instances are made of a single commodity. A determination obviously cannot be made and announced with respect to the character of the sale of each commodity for each use or purpose to which that commodity is devoted. The administrator must, therefore, consistently with the definitions appearing in his tax act, prescribe such general principles as will be determinative of the character of all sales, and implement his statements of those principles with regulations governing sales of particular commodities for particular purposes. In some cases, the character of a sale will be clearly apparent from the statement of the general principles; in others, regulations will be required as illustrations or elaborations of those principles. Ascertaining the meaning of the term "retail sale" and its use tax counterpart, "storage, use or other consumption," involves, accordingly, an examination of the general principles and their application.

RETAIL SALE

Aside from specific exclusions[1] or inclusions[2] effected through definition, the term "retail sale" has generally been defined along the lines of a sale of tangible personal property to a consumer or to any person for any purpose other than resale in the form of tangible personal property.[3] It is at once apparent that under this

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[1] Definitional exclusion of sales to manufacturers, made by some states, is treated *infra*. Exclusions generally, whether effected by definition of retail sale or by specific exemption from the taxable class, are analyzed by Frampton and Smith, *Commodities and Transactions Exempt From Consumption Taxes;* Conlon, *Express or Implied Exclusions From Consumption Excises—Types of Consumers,* both *infra* this issue.

[2] *E.g.,* S. D. CODE (1939) §57.3101 defines retail sale as including "the sale of tickets or admissions to places of amusement or athletic contests." Many states, on the other hand, employ a selective tax on admissions rather than include such sales in their general acts.

[3] The term is defined substantially in this manner in, for example, Calif. Stats. 1941, c. 247, §2(c); Wyo. Laws 1937, c. 102, §2(e). It is defined substantially as a sale for any purpose other than for resale in, for example, Ariz. Laws 1st Sp. Sess. 1937, c. 2, §1, art. 2; N. Y. C. ADMINISTRATIVE CODE N41—1.0;

definition the controlling factor in the classification of a sale is the disposition made of the property by the purchaser and not the character of the business of the seller or the buyer[4] or the quantities in which or prices at which the property is sold.[5]

Two entirely distinct types of problems are presented by such a definition of retail sale. One arises with respect to sales to a purchaser who is engaged in the business of selling tangible personal property and involves a determination whether the property in question is purchased for use or for resale; the other involves a determination whether the purchaser is engaged in the business of selling tangible personal property within the meaning of the act. Not only are the problems wholly dissimilar, but the consequences of the rulings made in the two situations are entirely different. In problems of the former type, the ruling determines, so far at least as a retail sales tax is concerned, whether there is any tax liability with respect to the sale of the property for the purpose or use for which it is acquired. In the case of problems of the latter type, the ruling ordinarily determines, not whether any tax liability arises, but by whom the property is sold at retail within the meaning of the act and, accordingly, upon whom liability rests for the payment of the tax.

Sales to Those Engaged in Selling Tangible Personal Property

It is generally agreed that under the definition of a retail sale as one for use or consumption or for any purpose other than resale, an ingredient or component-part test should be employed in distinguishing a retail sale from a sale for resale in the case of sales of property to a firm engaged in the business of selling tangible personal property.[6] The adoption of the ingredient or component-part test is by no means, however, a final solution of the problem, for while the test appears easy to describe, it is frequently extremely difficult to apply. As the words suggest, it means nothing more than that property is not sold for resale unless it becomes a constituent part of other tangible personal property which is to be sold. It is not necessary that the property retain its separate identity in the article into which it is incorporated; it is sold for resale if the materials or elements of which it is composed actually become, in a physical sense, a part of the article to be sold. It may be clearly identifiable in that article, as in the case of buttons sold to a clothing manufacturer; it may be completely changed in form, as in the case of pulpwood sold to a manufacturer of paper; or it may be completely changed through chemical reaction, as in the case of coke sold to a manufacturer of lucite, a transparent plastic. Sales of tools, equipment, fuel and lubricants to manufacturers,[7] and sales of such equipment as showcases and cash

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and as a sale for use and consumption and not for resale in, for example, ILL. REV. STATS. (Jones, 1937) c. 120, §440; KAN. GEN. STAT. ANN. (Corrick, Supp. 1939) §79-3602(e).

[4] Bedford v. Colorado Fuel and Iron Corp., 102 Colo. 538, 81 P. (2d) 752 (1938); Dep't of Treasury v. J. P. Michael Co., 105 Ind. App. 255, 11 N. E. (2d) 512 (1937).

[5] Wiseman v. Arkansas Wholesale Grocers' Ass'n, 192 Ark. 313, 90 S. W. (2d) 987 (1936); Franklin County Coal Co. v. Ames, 359 Ill. 178, 194 N. E. 268 (1934).

[6] While the ingredient or component part test first appeared as a matter of administrative construction, it is now set forth in the tax acts of several states, *e.g.*, Utah Laws 1939, c. 103, §2(f); Wyo. Laws 1937, c. 102, §2(f).

[7] Boyer-Campbell Co. v. Fry, 271 Mich. 282, 260 N. W. 165 (1935).

registers to retailers would clearly be retail sales in a state employing the ingredient or component-part test. It is wholly immaterial under that test that the cost of such property is an element entering into the sales price of the property sold by the manufacturers or retailers. Sales of ice for refrigeration purposes would likewise be retail sales.[8]

It is not, however, such a simple matter to apply the test to sales of feeds, seeds and fertilizer to persons engaged in the commercial production of livestock or agricultural products. In the majority of states, such sales have not been taxed as retail sales, in some cases by reason of statutory definitions or exemptions[9] and in others by reason of administrative regulations under which they are regarded as sales for resale, although in a few instances the sales have been held by regulations to be retail sales.[10] The courts, however, have generally concluded that such sales are retail sales. The Illinois supreme court has recently upheld the ruling of the administrative agency that sales of seeds to farmers were sales for use or consumption and, therefore, retail sales rather than sales for resale.[11] The reasoning of the court, from the standpoint of an application of the ingredient or component-part test, is none too clear. Its rejection of the contention that the seeds were sold for resale "because the growing plant is but a continuation of the life of the seed" and its references to the "processes of nature" as the factor responsible for the growth of the plants furnish some basis for asserting, however, that it believed that plant life was too complex a matter to warrant a determination that the elements comprising the seed entered into the growing plant to an extent which, as a matter of law, would justify regarding the seed as having been sold for resale.

The Illinois supreme court would undoubtedly regard sales of fertilizer to farmers as retail sales since it stated in the course of its rejection of the seed dealer's position in the *Sluis* case that "By the same reasoning, fertilizer placed upon the soil could be said to be used for resale because, by the chemistry of nature, it increased the crop."[12] Sales of fertilizer to farmers were held to be retail sales within the meaning of the Iowa definition of a retail sale as a "sale to a consumer or to any person for any purpose, other than for processing or for resale, of tangible personal property . . ."[13] So far as the opinion indicates, it was not contended that the fertilizer was sold for resale, but the taxpayer was unsuccessful in contending that the sale of the fertilizer was a sale for the purpose of processing.

Sales of feeds have also been held taxable as retail sales although the decisions are not clear-cut applications of the ingredient or component-part test. The tax imposed by the Oklahoma Consumers and Users Tax Act was held applicable with respect to

[8] National Ice and Cold Storage Co. v. Pacific Fruit Express Co., 11 Cal. (2d) 283, 79 P. (2d) 380 (1938); People v. Monterey County Ice and Development Co., 29 Cal. App. (2d) 421, 84 P. (2d) 1069 (1938); Warren v. Fink, 146 Kan. 716, 72 P. (2d) 968 (1937). Sales to a soda fountain of crushed ice to be placed in beverages served to customers might, however, be regarded as sales for resale.

[9] *E.g.*, Fla. Laws 1935, c. 16848, §2(f); KAN. GEN. STAT. ANN. (Corrick, Supp. 1939) §79-3602(1); OHIO GEN. CODE ANN. (Page, 1937) §5546-2.

[10] C. C. H., Interstate Sales Tax Serv., ¶4-125.

[11] Sluis v. Nudelman, 34 N. E. (2d) 391 (Ill. 1941).

[12] *Id.* at 392.

[13] Kennedy v. State Board of Assessment and Review, 224 Iowa 405, 276 N. W. 205 (1937).

sales of feeds used for fattening cattle for market or slaughter. The state court found[14] that the sales of feeds fell within the provision of the act taxing sales "to consumers or users, for use or consumption"[15] and did not come within the provision exempting sales of property "for use in . . . processing . . . or preparing for sale" so as to become a "recognizable, integral part" of a product to be sold.[16] The Utah sales tax has also been held applicable to sales of feeds to be fed to cattle which were shortly thereafter to be slaughtered.[17] The decision lacks force from the standpoint of an application of the ingredient or component-part test, however, since a wholesale, *i.e.*, sale for resale, was defined as a sale to a person engaged in the business of manufacturing or compounding for sale, of any commodity which enters into and becomes an ingredient or component part of the property manufactured or compounded. The court stated that the words "business of manufacturing or compounding for sale" did not cover the business of farming, dairying or stock raising.

Sales of fruit trees to orchardists should clearly be regarded as retail sales under the ingredient or component-part test even in a state which by administrative regulation regards sales of seeds to farmers as sales for resale. Even though it be assumed that the seed becomes a part of the plant and is, therefore, sold for resale, the tree does not become a constituent part of the fruit but continues to exist after the fruit is picked. Sales of dairy cattle to a dairyman for use as milk producers were quite properly held to be retail sales under the California Retail Sales Tax Act,[18] and on the basis of that determination a trial court held that sales of animals for breeding purposes were retail sales under the act.[19]

If the tax act defined a retail sale as any sale except a sale for resale and defined a sale for resale as a sale of any property becoming an ingredient or component part of other tangible personal property which is to be sold, it would probably be necessary to ascertain only whether the property in question becomes a constituent part of the property to be sold. It is to be observed, however, that a retail sale is usually defined, in part, as a sale for any purpose other than resale. It would appear entirely proper under such a definition to regard as sales for resale, only sales of property purchased for the purpose of becoming and actually becoming an ingredient or component part of tangible personal property to be sold. Sales to a bakery, for example, of oil for use on the divider knives which separate the dough into individual loaves should be regarded as retail sales, even though the oil is wiped off the blades by the action of the dough and becomes a part of the bread, since it is used to keep the dough from sticking to the knives.

It is generally agreed that sales of containers such as chemical carboys and milk

[14] Colbert Mill & Feed Co. v. Okla. Tax Comm., 109 P. (2d) 504 (Okla. 1941).

[15] Okla. Laws 1937, art. 10, c. 66, §5. [16] *Id.* §14.

[17] Salt Lake Union Stock Yards v. State Tax Comm., 93 Utah 166, 71 P. (2d) 538 (1937); Union Stock Yards v. State Tax Comm., 93 Utah 174, 71 P. (2d) 542 (1937).

[18] Kirk v. Johnson, 37 Cal. App. (2d) 224, 99 P. (2d) 279 (1940). The act, however, as amended by Cal. Stat. 1940, c. 50, exempts ". . . sales of live stock and poultry of a kind the products of which ordinarily constitute food for human consumption."

[19] Chapman Chinchilla Sales Co. v. Johnson, Prentice-Hall, Cal. State and Local Tax Serv., ¶23,029 (Sacramento County Super. Ct., 1940).

bottles to firms which retain title to and use them repeatedly in delivering tangible personal property sold to their customers are retail sales;[20] and the same is true of sales of wrapping materials sold to laundries and like firms, which are not engaged in the business of selling tangible personal property. There is a difference of opinion, however, as respects sales of containers and wrapping materials to firms which pass title to such articles on to the purchasers of the products packed in them. Sales of this character have been judicially determined to be retail sales in Alabama and Kansas,[21] principally on the grounds that the containers are purchased for use in the course of the purchaser's business, that their cost is figured as a part of the overhead of the business, and that the use of a container as a packing material destroys its economic value and is tantamount to its consumption. The sales have been held to be sales for resale, however, under the tax acts of Michigan, Florida and New York City[22] for the reason that title to the containers as well as to the property packed in them passes to the purchaser as a part of the sale.

The sale-for-resale view is believed to be correct, for the containers are a constituent part of that which is sold by the manufacturer, wholesaler or retailer and are purchased for the purpose of transfer to the customer in connection with a sale. It should be observed, however, that the resale theory breaks down in the case of sales to manufacturers of large packing cases used in shipping cartons of goods when the wholesaler purchasing from the manufacturer breaks up the cases and sells the cartons. The manufacturer can justifiably claim that he purchased both the packing cases and the smaller cartons for resale since he transferred title to both to the wholesaler. Since the wholesaler, however, sells only the cartons of goods and destroys the packing case, it would be logical to conclude that the cartons and the goods so packed are sold by the manufacturer for resale and that the packing case is sold by him at retail, but the administrative difficulties in so applying the tax would be

[20] C. C. H., Interstate Sales Tax Serv., ¶5-175.

[21] City Paper Co. v. Long, 235 Ala. 652, 180 So. 324 (1938); Durr Drug Co. v. Long, 237 Ala. 689, 188 So. 873 (1939); Birmingham Paper Co. v. Curry, 238 Ala. 138, 190 So. 86 (1939); J. R. Raible Co. v. State Tax Comm., 239 Ala. 41, 194 So. 560 (1939); Warren v. Fink, *supra* note 8.

[22] American Box Board Co. v. Stark, Prentice-Hall, Gen. State and Local Tax Serv., ¶93,008 (Kent County Circ. Ct., 1934), *appeal dismissed,* Mich. Sup. Ct., Oct. 31, 1934; Lee v. Hector Supply Co., 133 Fla. 849, 183 So. 489 (1938); American Molasses Co. v. McGoldrick, 281 N. Y. 269, 22 N. E. (2d) 369 (1939).

After holding, in Wiseman v. Arkansas Wholesale Grocers' Ass'n, *supra* note 5, that sales of wrapping materials to retailers were retail sales, the Arkansas supreme court held that sales of pasteboard boxes to a biscuit company which packed its products therein and sold the packaged products at a higher price than similar products sold in bulk were sales for resale. McCarroll v. Scott Paper Box Co., 195 Ark. 1105, 115 S. W. (2d) 839 (1938). The first decision was distinguished in the second on the ground that the company was selling a package of its products and the cost of the containers, which represented 12 to 14 per cent of the selling price of the packaged products, was added to the selling price of the biscuits, whereas in the first case it was not shown that the price of the goods sold was influenced by the cost of the materials in which they were wrapped. This distinction is believed unsound, for in both situations the cost of the packing or wrapping materials was an element in the determination of the price at which property was to be sold and it would seem immaterial whether the cost of those materials is considered separately in fixing the selling price of the property or lumped together with other expenses and the aggregate amount of the expenses considered in fixing the selling price.

insuperable. The problem is easily solved, however, as it has been in several states,[23] by defining the term "retail sale" so as to exclude sales of containers and packing or wrapping materials for use in connection with sales of tangible personal property.

The purpose factor has received judicial as well as administrative recognition. Sales of core oil to firms engaged in the business of making and selling iron castings, the function of the oil being to bind together grains of sand to form the core used to make voids or cavities in the castings, have been held to be retail sales under the Illinois Retailers' Occupation Tax Act, despite the fact it appeared that under the high temperatures at which the castings were made some of the core oil decomposed and that a portion of the carbon formed by the decomposition might have been absorbed by and become a part of the iron castings.[24] In support of its conclusion the court pointed out that the function of the core oil was to form a part of the core, that it was not purchased for the purpose of adding carbon to the castings, that if any of the carbon from the core oil was absorbed it was largely coincidental and that "Before a commodity can be said to have been resold as an ingredient of the finished product, it must be shown to have been used with the intention that it should become a part of it, and not solely for some other and distinct purpose."[25]

The foregoing discussion suggests that property may be purchased for a dual purpose, that is, for both use and resale. A manufacturer of cement, for example, purchases iron balls for use as grinding media in the milling of calcium carbonate, the balls gradually wearing away in the milling process and the iron particles entering into the cement. It is contended that a certain amount of iron is an essential constituent of cement of certain specifications, that the iron particles from the balls supply this essential element and that if sufficient iron does not enter into the cement in this manner some must be added to supply the deficiency. A statutory definition of a retail sale as a sale for use or consumption or for any purpose other than resale would not seem to warrant the view that the iron balls are necessarily sold for resale because one phase of the dual purpose for which they were acquired was their resale as an ingredient or component part of other property. It seems more reasonable to conclude that such property is sold at retail, or that the character of the sale should be determined on the basis of a finding as to the predominant purpose for which the property was acquired.

As a matter of fact, an administrator will frequently be guided by the test of predominant purpose, whether or not he adopts it as a rule of construction, since there are many instances in which the use of property is so slight as to constitute merely an incident to a subsequent resale. The mere display for advertising purposes of goods in the show windows of a retailer with no appreciable loss of value resulting from such display, or the use, in a state which regards containers as resold with their contents, of barrels for the sorting and grading of commodities that are shortly thereafter to be packed and sold in them, are illustrations of uses which the administrator

[23] *E.g.*, Colo. Laws 1937, c. 230, §2(n); Wyo. Laws 1937, c. 102, §2(f).
[24] Smith Oil & Refining Co. v. Dep't of Finance, 371 Ill. 405, 21 N. E. (2d) 292 (1939).
[25] *Id.* at 408, 21 N. E. (2d) at 294.

may deem of insufficient consequence to characterize the sales of the property in question as retail sales.

A somewhat different situation involving a dual use is presented by sales of coke to a steel foundry for use in the manufacture of castings by the cupola process, the coke being inserted in the molten metal in the course of the manufacturing process not only for the purpose of maintaining a high temperature but also for the purpose of adding carbon to the steel. One administrative agency provided by regulation that 45 per cent of the coke purchased by a foundry for use in the process would be deemed purchased for resale and the remaining 55 per cent at retail[26] on the basis of a determination that 55 per cent of the coke was consumed in maintaining the temperature of the molten metal while the rest actually entered into the metal. Assuming the correctness of the percentages employed, it cannot be denied that the ruling is fair to both the foundry and the state, much more so than would be the case if a predominant-purpose test, under which the entire amount of the coke would be regarded as sold to the foundry at retail, were applied.

It is clear from the foregoing illustrations that all sales of tangible personal property are not readily classifiable as retail sales or sales for resale within the meaning of an act defining a retail sale as a sale for use or consumption or for any purpose other than resale. These illustrations involved situations in which sales were regarded as retail sales despite the fact that the property in question became to some extent an ingredient or component part of other property. There are also, however, situations in which sales of property are regarded as sales for resale even though not all the property becomes an ingredient or component part of that which is sold. A simple illustration is the sale to a furniture manufacturer of wood to be used in the construction of furniture. A portion of the wood is destroyed or discarded and does not actually become a part of the furniture. Since the wood was purchased for the purpose of being incorporated into the furniture and, so far as possible, is used for that purpose, the fact that a small portion does not become a part of the furniture can quite justifiably be disregarded in a state employing the ingredient or component-part test.

The ingredient or component-part test as qualified by the factor of purpose appears to be consistent with the legislative intent expressed in the definition of a retail sale as a sale for use or consumption or for any purpose other than resale, and, despite the difficulties encountered in its application, seems a workable principle for distinguishing retail sales from sales for resale. While there are comparatively few judicial decisions on the matter at the present time the principle has been upheld[27] and, in all

[26] Cal. State Board of Equalization, Rule No. 9.1 (adopted June 27, 1939), Prentice-Hall, Cal. State and Local Tax Serv., ¶21,295.

[27] 4 COLO. STAT. ANN. (1935) c. 144, §2(c)(g) defined retail sale and wholesale sale, *i.e.*, sale for resale, in the usual manner; but provided that sales to manufacturers of tangible personal property which "enters into the processing of or becomes an ingredient or component part of" the product manufactured should be deemed to be wholesale sales. The Colorado supreme court held, however, that the act prescribed an ingredient or component-part test for ascertaining a retail sale, the phrase "enters into the processing of" being rather restrictively construed as meaning merely "became a constituent part of. . . ." Bedford v. Colorado Fuel and Iron Corp., *supra* note 4.

probability, will continue to obtain the approval of both the administrators and the courts.

Several states have, as a matter of policy, veered away somewhat from the ingredient or component-part test by defining retail sale so as to exclude, or wholesale sale or sale for resale to include, certain sales to manufacturers, farmers or retailers of property used in their respective operations. Other states have reached the same result by defining a retail sale in the usual manner but exempting sales to manufacturers, farmers or retailers from the application of the tax or providing that they should be taxed as sales for resale.

Shortly after the decision in the *Boyer-Campbell Co.* case[28] settled the question of the application of the Michigan General Sales Tax Act as adopted in 1933 with respect to sales of tools and machinery to manufacturers, the legislature excluded such sales from the meaning of sale at retail. The term was defined as a transaction wherein a transfer of tangible personal property is made ". . . for consumption or use other than for consumption or use in industrial processing or agricultural producing, or for any other purpose than for resale in the form of tangible personal property."[29] The Ohio Retail Sales Tax Act makes an even greater inroad on the ingredient or component-part test by providing that retail sales do not include sales in which the purchaser's purpose is ". . . to use or consume the thing transferred directly in the production of tangible personal property for sale by manufacturing, processing, refining, mining, production of crude oil and natural gas, farming, horticulture, or floriculture, or directly in making retail sales . . ."[30] Under the Indiana Gross Income Tax Act, wholesale sales include:[31]

> Sales of any tangible personal property as a material which is to be directly consumed in direct production by the purchaser in the business of producing tangible personal property by manufacturing, processing, refining, repairing, mining, agriculture, or horticulture . . . Provided . . . That the term "consumed" as used herein shall refer only to the immediate dissipation or expenditure by combustion, use, or application, and shall not mean or include, the obsolescence, discarding, disuse, depreciation, damage, wear, or breakage, of tools, dies, equipment, rolling stock or its accessories, machinery, or furnishings.

In a few states, the ingredient or component-part test is definitionally repudiated with respect to sales of certain designated commodities. Thus, the Wyoming Selective Sales Tax Act of 1937 provides that "Each purchase of power and/or fuel or any substitute for the same made by a person engaged in the business of manufacturing or agriculture and consumed directly in manufacturing . . . shall be deemed a wholesale sale . . ."[32] Iowa similarly excludes fuels used in manufacturing from the meaning of retail sale,[33] and North Carolina classifies sales to manufacturers of mill machinery and parts and accessories therefor as wholesale sales.[34] A statutory exemption exists in Alabama with respect to sales of machines, and the parts, attachments

[28] Boyer-Campbell Co. v. Fry, *supra* note 7.
[29] Mich. Pub. Acts 1935, act 77; Mich. Pub. Acts 1939, act 313.
[30] OHIO GEN. CODE ANN. (Page, 1937) §5546-1.
[31] Ind. Laws 1937, c. 117, §3.
[32] Wyo. Laws 1937, c. 102, §2(f).
[33] IOWA CODE (Reichmann, 1939) §6943.074(3).
[34] N. C. CODE (1939) §7880 (156)f.

and replacements therefor, used in mining, quarrying, compounding, processing and manufacturing tangible personal property.[35]

There are, as yet, few judicial decisions relating to the scope of these provisions. A restrictive construction has quite properly been given to the definition appearing in the Indiana act. Within the year a federal circuit court of appeals has held to be at retail, sales to a steel manufacturer of steel rolls which had a useful life, even with frequent reconditioning, of from two weeks to 12 months, and annealing boxes with an average life of 240 to 280 different heating periods of from 17 to 50 hours each in duration.[36] Sales to steel manufacturers, for lining blast furnaces, of fire brick having an average life of from 60 to 90 days had, however, been previously held to be wholesale sales.[37] The lower court so holding was of the opinion that while "the Legislature intended to limit the class of 'immediately consumed' articles to those which have a relatively short life in the manufacturing process," it did not limit such articles to those completely destroyed by combustion.

The Michigan and Ohio definitions of retail sale have been the subject of extensive regulations and supplemental rulings. In construing the Michigan definition, which excludes from the meaning of the term, sales of tangible personal property "for consumption or use in industrial processing," the administrative agency has regarded as retail sales not only sales of property for use in the various departments of a manufacturer which are considered as the "office," *e.g.*, the administrative, sales, service, advertising, accounting, traffic and purchasing departments, but also sales of property used in the "factory" other than that actually consumed in the manufacturing process or exclusively designed and made for and used in the manufacturing of a product to be sold at retail.[38] The Ohio regulation relating to property consumed in manufacturing, processing and refining divides those activities into three parts, administration, production and distribution, sales of all items to be used in administration and distribution being regarded as retail sales.[39] It is presumed that all items

[35] Ala. Gen. Acts 1939, act No. 18, §5(r).

[36] Continental Roll & Steel Foundry Co. v. Dep't of Treasury, 117 F. (2d) 196 (C. C. A. 7th, 1941).

[37] Harbison-Walker Refractories Co. v. Jackson, Prentice-Hall, Ind. State and Local Tax Serv., ¶23,027 (Marion County Super. Ct., 1939).

[38] Mich. State Board of Tax Adm'n, Rule 40 (effective February 1, 1941), Prentice-Hall, Mich. State and Local Tax Serv. ¶21,378. Sales of tools, dies, patterns and machinery used in the manufacturing process, lubricating materials, machine wiping cloths and cleaning compounds used in connection with such tools and machinery, substances used to create chemical reactions in the manufacturing process and portable heating or ventilating units, cranes, overhead hoists, hand-trucks and light globes used in the factory are not regarded as retail sales. Sales of tangible personal property to be incorporated into the factory building and which form a part of the real estate [MICH. COMP. LAWS (Mason, Supp. 1940) §3663-1(b), in defining "retail sale" provides "That tangible personal property permanently affixed and becoming a structural part of real estate shall not be considered as consumed or used in industrial processing or agricultural producing"], tools, supplies and materials used in repairing or improving the factory buildings or grounds, fire extinguishers, first aid equipment and janitor's supplies are, however, held to be retail sales.

[39] Ohio Tax Dep't, Rule 39 (adopted July 11, 1939), Prentice-Hall, Ohio State and Local Tax Serv., ¶21,255. Administration, production and distribution are defined as follows:

" 'Administration' shall include all administrative work, including such work as sales promotion, general office, experimental and collection.

used exclusively in the production line and exclusively in the shop are used directly in production,[40] though sales of items deemed to be used only incidentally in production, such as time and ordinary clocks, medicine chests, janitor's supplies, fire extinguishers and drinking fountains, are regarded as retail sales.[41] As in Michigan, sales to manufacturers, processors and refiners of tangible personal property to be affixed to real property are regarded as retail sales.[42] Distinctions somewhat similar to those made in connection with manufacturing are made with respect to farming operations, articles used directly in producing or stimulating production being distinguished from articles used in storing, distributing or selling products after they have been harvested.[43] Ohio goes beyond practically all the other states that have broken away from the ingredient or component-part test by excluding from the meaning of retail sale all sales of tangible personal property used or consumed directly in making retail sales. While it is presumed that all articles used exclusively in salesrooms are used directly in the operation of making retail sales, here, again, those items used only incidentally, such as fans, clocks, fire extinguishers, and safes, and articles used in the offices, warehouses or delivery rooms of the retailer are regarded as purchased at retail.[44]

Sales to oil producers of bushings, mazda lamps, dies and other property used in the production of crude oil were judicially held[45] to be wholesale sales within the meaning of the Wyoming Emergency Sales Tax Act of 1935 which provided that[46]

> Each purchase of tangible personal property or service made by a person engaged in the business of producing, furnishing, manufacturing . . . any . . . service or commodity which is actually used in the production of, or enters into the processing of, or becomes an ingredient or component part of the . . . service, or commodity which he manufactures or . . . furnishes . . . shall be deemed a wholesale sale. . . .

The Wyoming Selective Sales Tax Act of 1937 greatly restricted the definition of a wholesale sale. It provides an ingredient or component-part test for distinguishing retail and wholesale sales, but further decrees that "Each purchase of power and/or fuel . . . made by a person engaged in the business of manufacturing or agriculture and consumed directly in manufacturing . . . shall be deemed a wholesale sale."[47] This provision has been held to embrace sales of crude oil for use as a fuel in generating electric power for distribution;[48] sales of power to be used in an oil refinery for lighting purposes;[49] and sales of natural gas for use at a field electric plant and

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" 'Production' shall include all operations performed in the producing, processing or refining room, shop, or plant.

" 'Distribution' shall include all operations subsequent to production for sale."

[40] *Ibid.*

[41] Ohio Tax Dep't, interpretation issued June 10, 1940, *id.* ¶23,005.

[42] Note 39, *supra.*

[43] Ohio Tax Dep't, Rule 42 (adopted July 11, 1939), Prentice-Hall, Ohio State and Local Tax Serv., ¶21,261.

[44] Ohio Tax Dep't, Rule 43 (adopted July 11, 1939), *id.* ¶21,263, ¶23,005.

[45] State Board of Equalization v. Oil Wells Supply Co., 51 Wyo. 226, 65 P. (2d) 1093 (1937).

[46] Wyo. Laws 1935, c. 74, §2(f).

[47] Wyo. Laws 1937, c. 102, §2(f).

[48] State Board of Equalization v. Stanolind Oil & Gas Co., 54 Wyo. 521, 94 P. (2d) 147 (1939).

[49] *Ibid.*

for other fuel purposes in the production of petroleum products by an oil company processing natural gas to obtain casing head gasoline and a residue gas.[50]

Sales to Those Engaged in the Performance of a Service

Another phase of the problem of ascertaining the meaning of retail sale concerns sales to those engaged in activity regarded as involving the performance of a service rather than the sale of tangible personal property. The activities which have been held in some states to constitute a service fall into two classes: those in which the service is rendered in the preparation of the property furnished to the customer, as in the case of the delivery by a printer of printed materials; and those in which the service is rendered in connection with the furnishing of the property, as in the case of the furnishing of materials by a repairman in the course of his repair work. Both situations, however, present the same question of whether the activity at issue involves a sale of tangible personal property or whether the property is furnished merely as an incident to the performance of a service. The problem of differentiation is well illustrated by the conflict over the true nature of the work of the printer, photo-engraver and photographer.

It has been judicially determined under the tax acts of Illinois and Washington that a printer furnishing printed materials to the order of his customer is not engaged in the business of selling tangible personal property.[51] A similar determination has been made in Illinois with respect to the furnishing of electrotypes, stereotypes and matrices[52] and of blueprints and photostats.[53] The grounds of the holdings are that the small quantity of property furnished in these operations is destroyed and has no value to anyone other than the particular customer, that the customer really pays for skill, labor and the use of machinery and equipment, and that, in the case of printing, the business has long been recognized as a graphic art rather than as one involving the sale of property.

In Alabama and California, however, the furnishing of printed materials by a printer has been held to be a retail sale.[54] Similar determinations, moreover, have been made in New York with respect to the furnishing of photo engravings[55] and of designs to be used in the printing of fabrics,[56] and in Kentucky and North Dakota with respect to the furnishing of photographs.[57] These decisions are believed to embody the correct construction of the tax acts since the transactions unquestion-

[50] State Board of Equalization v. Argo Oil Corp., 54 Wyo. 512, 94 P. (2d) 158 (1939).

[51] H. G. Adair Printing Co. v. Ames, 364 Ill. 342, 4 N. E. (2d) 481 (1936); Washington Printing & Binding Co. v. State, 192 Wash. 448, 73 P. (2d) 1326 (1937).

[52] A. B. C. Electrotype Co. v. Ames, 364 Ill. 360, 4 N. E. (2d) 476 (1936).

[53] J. A. Burgess Co. v. Ames, 359 Ill. 427, 194 N. E. 565 (1935).

[54] Long v. Roberts & Son, 234 Ala. 570, 176 So. 213 (1937); Bigsby v. Johnson, 99 Cal. Dec. 165, 99 P. (2d) 268 (1940), rehearing granted, March 14, 1940.

[55] People *ex rel.* Walker Engraving Corp. v. Graves, 268 N. Y. 648, 198 N. E. 539 (1935). The court stated that the value of the metal in the photo engravings was not more than two per cent of what the customer pays for them.

[56] People *ex rel.* Foremost Studio, Inc. v. Graves, 246 App. Div. 130, 284 N. Y. Supp. 906 (1936).

[57] Cusick v. Commonwealth, 260 Ky. 204, 84 S. W. (2d) 14 (1935); Voss v. Gray, 298 N. W. 1 (N. D. 1941).

ably involve nongratuitous transfers of title to tangible personal property. While it may be true that the consideration charged in connection with the furnishing of the property represents largely costs of service and skill rather than costs of materials, it is nevertheless true that the customer desires not merely service, but the delivery to him of a finished product.[58]

If it is determined that a transaction is properly to be regarded as a service rather than a sale, it seems logical to conclude that there is no occasion to inquire whether the property purchased for use in the performance of that service is purchased at retail or for resale. Such a determination should be regarded as constituting in itself a finding that the sale of the property used in the performance of the service is a retail sale. The standard definition of a retail sale as a sale for use or consumption or for any purpose other than resale would appear to compel this conclusion, save where, as in a few states, sales of tangible personal property for use in the performance of a particular service are by statutory definition excluded from the meaning of the term "retail sale."[59] It would readily be conceded, for example, that sales to laundries of property used in their operations would be retail sales under the definition.

Courts, however, have not been unanimous in following the logic of the taxing pattern. The Illinois supreme court, after holding that an optometrist was not engaged in selling tangible personal property at retail within the meaning of the act when he furnished glasses to his patient,[60] ruled that the sales by an optical supply house to an optometrist of eyeglasses and other articles furnished by him to his patient were sales for resale since the optometrist did not use or consume those articles.[61] It has also held that sales of leather findings and rubber heels to a shoe repairman are not retail sales, even though it be assumed that the shoe repairman was not the retailer of those materials within the meaning of the act,[62] that sales of watch and clock repair parts to repairmen are not sales at retail,[63] and that firms manufacturing and selling medicines and pharmaceutical preparations to physicians, hospitals and sanitariums are not making retail sales.[64]

While administrators regard dentists as engaged in the performance of a service and, accordingly, as purchasing the property used in that service at retail,[65] the Mis-

[58] Judicial differentiation between sale and service is thoroughly canvassed by Cohen, *The Taxable Transaction in Consumers' Taxes, supra* this issue; for the administrative attitude see Herman, *Who Are Taxable?—Basic Problems in Definition under the Illinois Retailers' Occupation Tax Act,* also *supra* this issue.

[59] *E.g.,* " 'Retail sale' and 'sale at retail' include all sales excepting those in which the purpose of the consumer is . . . (d) to use or consume the thing [transferred] directly in industrial cleaning of tangible personal property . . ." OHIO GEN. CODE ANN. (Page, 1937) §5546-1.

[60] Babcock v. Nudelman, 367 Ill. 626, 12 N. E. (2d) 635 (1937).

[61] American Optical Co. v. Nudelman, 370 Ill. 627, 19 N. E. (2d) 582 (1939).

[62] Revzan v. Nudelman, 370 Ill. 180, 18 N. E. (2d) 219 (1938).

[63] C. & E. Marshall Co. v. Ames, 373 Ill. 381, 26 N. E. (2d) 483 (1940). Although the court stated that the owner of the watch or clock is the user or consumer of the repair parts, the administrative agency, quite consistently with the Illinois decisions, has ruled that watch repairmen are deemed to be engaged in the business of rendering service and are not liable for the tax with respect to that service. Ill. Dep't Finance, Rule No. 22 (revised May 1, 1940), Prentice-Hall, Ill. State and Local Tax Serv., ¶21,535.

[64] P. H. Mallen Co., Inc. v. Dep't of Finance, 372 Ill. 598, 25 N. E. (2d) 43 (1939).

[65] C. C. H., Interstate Sales Tax Serv., ¶9-325.

souri supreme court, following the Illinois decisions, has taken the view that a dental laboratory was not selling tangible personal property at retail in making and furnishing dentures, inlays and bridgework to dentists.[66] It stated, however, that it did not have before it the question whether the transaction between the dentist and his patient was taxable. To the contrary, on the other hand, is an earlier Pennsylvania lower court opinion[67] which reasoned that since there was no retail sale from the dentist to his patient there must, therefore, be such a sale from the dental laboratory to the dentist.

The California supreme court disagrees with the Illinois view as expressed in the cases respecting optometrists, believing that the California legislature never "intended so completely to relieve from the tax the sales of any property not specifically exempted by the act."[68] It is believed that the court was entirely correct in stating that "The broad definition of the term 'retail sale' as 'a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property' . . . leaves for construction only the question as to the person to be regarded as the retailer or as making the retail sale of the tangible personal property."[69] Nor do some other courts subscribe to the Illinois court's theory regarding the tax treatment of the repair and like trades. The Alabama supreme court first determined that while automobile repairmen were the consumers of the paint and lubricants used in their repair work, they were the retailers of the parts and accessories furnished in the course of the work;[70] and, shortly thereafter, quite consistently held[71] that sales to the repairmen of the parts of which they were regarded as retailers in the former case were sales for resale. New York's court of appeals has said that a firm engaged in the business of dyeing materials belonging to others is engaged in the performance of a service and, accordingly, purchases its dyestuffs at retail, even though the dyed materials are to be sold by its customers.[72] A similar question has been presented under the Indiana Gross Income Tax Act, with the result that a firm enameling parts sent to it by manufacturers, the enameled parts then being assembled into stoves, refrigerators and other articles by the manufacturers, was held taxable at the rate applicable to income from the performance of services, rather than at that applicable to income from wholesale sales.[73]

[66] Berry-Kofron Dental Laboratory v. Smith, 345 Mo. 922, 137 S. W. (2d) 452 (1940).

[67] Axelrod-Beacon Dental Laboratory v. City of Philadelphia, 34 D. & C. 190 (Pa. Com. Pl., 1938).

[68] Kamp v. Johnson, 15 Cal. (2d) 187, 191, 99 P. (2d) 274, 276 (1940).

[69] *Ibid.*

[70] Doby v. State Tax Comm., 234 Ala. 150, 174 So. 233 (1937).

[71] Cody v. State Tax Comm., 235 Ala. 47, 177 So. 146 (1937).

[72] Mendoza Fur Dyeing Works v. Taylor, 272 N. Y. 275, 5 N. E. (2d) 818 (1936); see *In re* H. D. Kampf, Inc., 38 F. Supp. 319 (S. D. N. Y. 1941). If it were held that the dyestuffs were sold to the dyer for resale because they entered into cloth which was to be sold, it would necessarily follow that the dyer sold the dyestuffs for resale in connection with the performance of its services. It would, then, also follow that the dyer would be selling the dyestuffs at retail if his customer intended to use rather than resell the dyed material, an obviously absurd result.

[73] Ingram-Richardson Mfg. Co. v. Dep't of Treasury, 114 F. (2d) 889 (C. C. A. 7th, 1940). While the circuit court of appeals upheld the state's position as to the question of statutory construction, it decided in favor of the taxpayer upon the ground of the invalidity of the tax under the commerce clause of the Constitution of the United States. The judgment has, however, been reversed by the Supreme Court of

Illinois maintains, on the other hand, that sales of ink to printers are retail sales.[74] This is, of course, a logical result of the holding that printers are not engaged in the business of selling tangible personal property, but it is somewhat surprising in view of the other Illinois decisions. The court reasoned that the printers are the consumers of the ink since it can never be used again. While it may be true that after ink has once been used for printing, it cannot be used again in the same sense in which leather used in repairing shoes is used thereafter for some period of time, it is difficult to understand how the two situations are distinguishable on this basis; for both the ink and the leather pass to the customers of the printer and the shoe repairman, respectively, and each serves the purpose for which it was intended so far as its use by the customer is concerned.

The question of the character of sales to contractors of the tangible personal property furnished by them in the performance of contracts for the improvement of real property warrants separate consideration, though here, too, the problem is, basically, merely one of determining whether the contractor is engaged in the business of selling tangible personal property or in the performance of a service. The problem is greatly complicated, however, both by the fact that a contractor's operations may be conducted under several different types of contracts and that in the course of such operations the tangible personal property furnished by the contractor becomes a part of real property, and by the attempts of the administrators to prescribe regulations which will not encourage avoidance of the tax but will at the same time be workable from the standpoint of ascertainment of tax liability.

The type of contract under which the contractor operated was originally regarded as determinative of the character of sales to him. If the contract required the furnishing of the specified materials and labor for a single specified sum, the contractor was regarded as engaged in the performance of a service—the improvement of real property—and the sales to him of the materials installed in the performance of that lump sum contract were held to be retail sales. If, however, the contract was written on a time and material basis, the contractor being compensated on the basis of the cost of the materials and labor furnished, the contractor was regarded as making a retail sale of the materials to the owner of the real property.

Several factors, however, indicated the desirability of a modification of this position. Contractors could easily avoid the tax through the purchase in interstate commerce of manufactured articles such as plumbing and lighting fixtures and heating and elevator equipment.[75] A manufacturer of such fixtures or equipment, by entering into lump sum rather than time and material installation contracts, could materially reduce the measure of the tax. Furthermore, as many contractors installed such fixtures and equipment under both types of contracts, a great deal of difficulty

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the United States, which agreed with the lower court on the statutory construction matter, but determined that the activity in question was not immune from taxation under the commerce clause. Dep't of Treasury v. Ingram-Richardson Mfg. Co., 61 Sup. Ct. 866 (1941).

[74] Acme Printing Ink Co. v. Nudelman, 371 Ill. 217, 20 N. E. (2d) 277 (1939).

[75] The adoption of use tax acts in 1935 and thereafter checked this type of tax avoidance.

was encountered in ascertaining their tax liability and that of their vendors. Accordingly, it is not surprising to find that the operation of the "lump sum" and "time and material" rulings was limited in some states to building materials such as cement, lumber, paint and hardware, and regulations prescribed under which contractors furnishing plumbing, heating, electrical and elevator equipment were regarded as making retail sales irrespective of the type of contract involved.

The problem is now being met in a great variety of ways. The tax acts of some states provide that sales to contractors of tangible personal property to be used in improving real property are retail sales.[76] In the absence of such statutory provisions, the type of contract under which the property is furnished by the contractor determines in many states by whom the retail sale is made. In some cases, no distinction is made between different types of property; in others, contractors furnishing plumbing, heating and other similar equipment are regarded as retailers irrespective of the type of contract. Under still another view, contractors are regarded as consumers of all materials which lose their identity to become an integral part of a building, and as retailers of property which does not lose its identity when installed.[77] In the first category would come such materials as electric wiring and connections, piping, valves and pipe fittings; in the second, lighting and heating fixtures, furnaces, air conditioning and refrigerating units and elevators. Here, too, the type of the construction contract is of no significance.

Sales to contractors of tangible personal property furnished by them in the performance of lump sum contracts for the improvement of real property have on several occasions been judicially determined to be retail sales.[78] Similar determinations have been made with respect to materials used in the performance of both lump sum and time and material contracts[79] and, in some cases, without reference to the type of contract under which the property was being furnished.[80] The principal basis of the decisions is that the contractor does not agree to transfer title to any tangible personal property, but agrees rather to improve real property or to turn over a completed structure. In other cases, however, a contractor has been regarded as the retailer of the property furnished by him in the performance of a lump sum contract.[81] The Illinois decisions respecting the liability of contractors follow the same

[76] *E.g.*, Wash. Laws 1941, c. 178; Okla. Laws 1939, c. 66, art. 11, §1(h).

[77] C. C. H., Interstate Sales Tax Serv., ¶9-025.

[78] State v. Christhilf, 170 Md. 586, 185 Atl. 456 (1936) (materials used in construction of a public road and a building); City of St. Louis v. Smith, 342 Mo. 317, 114 S. W. (2d) 1017 (1937) (materials used in construction of street pavement, a sewer and a hospital); Atlas Supply Co. v. Maxwell, 212 N. C. 624, 194 S. E. 117 (1937) (heating and plumbing equipment and supplies); Wellnitz v. Tax Comm'r, Prentice-Hall, Ohio State and Local Tax Serv., ¶23,011 (Bd. Tax Appeals, 1941) (cement building blocks).

[79] Acorn Iron Works, Inc. v. Auditor General, 295 Mich. 143, 294 N. W. 126 (1940) (structural steel).

[80] Lone Star Cement Corp. v. State Tax Comm., 234 Ala. 465, 175 So. 399 (1937) (cement); State v. J. Watts Kearney & Sons, 181 La. 554, 160 So. 77 (1934) (building materials); Albuquerque Lumber Co. v. Bureau of Revenue, 42 N. M. 58, 75 P. (2d) 334 (1937) (building materials and plumbing and heating equipment and supplies); Commonwealth v. Lutz, 284 Pa. 184, 130 Atl. 410 (1925) (plumbing equipment and supplies).

[81] Wiseman v. Gillioz, 192 Ark. 950, 96 S. W. (2d) 459 (1936) (materials used in construction of a dam, intake tower, settling basin and filtration house); Fifteenth Street Investment Corp. v. People,

pattern as the other decisions of that state respecting sales to firms engaged in the performance of a service. Although sales of plumbing and heating supplies to contractors for use in improving real property under lump sum contracts have been declared not to be retail sales,[82] it has been held that a contractor was not selling at retail the sand, gravel, concrete, steel and other materials furnished in the performance of a lump sum construction contract, the court stating that the contractors "were the persons 'using' these materials."[83] Despite this language, the circuit court of Cook County in the most recent case on the subject has held that neither the contractors nor the materialmen selling tangible personal property to them are engaged in the business of selling tangible personal property at retail within the meaning of the act.[84]

STORAGE, USE OR OTHER CONSUMPTION

Since a use tax act is adopted by a state principally for the purpose of imposing a burden equal to that of the state's sales tax with respect to property purchased outside the state or in interstate commerce, the definitions, tax levying provisions and exemptions of a use tax act are closely integrated with those of the state's sales tax act.[85] If the sales tax act provides an ingredient or component-part test for distinguishing a retail sale from a sale for resale, the use tax act will incorporate the same test in defining a taxable storage or use. If, on the other hand, the sales tax act defines retail sale so as to exclude from the meaning of the term sales of property used in industrial or agricultural production, the use tax act will by way of definition or exemption relieve property so used from the imposition of the use tax. Use tax regulations paralleling those of the state's sales tax are not necessary, as a ruling that a sale of property for a particular purpose is a retail sale also constitutes a ruling that the use of property for that purpose is a use within the meaning of the use tax act. The use tax acts do, however, present certain problems not arising with respect to sales taxes.

It is doubtful whether any purpose is now served by reference to the term "storage" in a use tax act. The term was employed in the act adopted in California in 1935 as a means of strengthening the state's position in imposing the tax with respect to property used by an instrumentality of interstate commerce, for the Supreme Court had held that while a state could not tax the use of property in inter-

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102 Colo. 571, 81 P. (2d) 764 (1938) (elevator equipment); Mason Lumber Co. v. Lee, 126 Fla. 371, 171 So. 332 (1936) (lumber and other building materials); Commonwealth v. Pennsylvania Heat & Power Co., 333 Pa. 46, 3 A. (2d) 412 (1939) (oil burners). See also Moore v. Pleasant Hasler Construction Co., 50 Ariz. 317, 72 P. (2d) 573, *rev'd*, 51 Ariz. 40, 76 P. (2d) 225 (1937) (materials used in construction of steel bridges); S. Goldstein Monument Works, Inc. v. Graves, 254 App. Div. 798, 4 N. Y. S. (2d) 241 (1938) (monuments, headstones, footstones and mausoleums).

[82] Bradley Supply Co. v. Ames, 359 Ill. 162, 194 N. E. 272 (1934).

[83] Herlihy Mid-Continent Co. v. Nudelman, 367 Ill. 600, 604, 12 N. E. (2d) 638, 640 (1937), overruling R. S. Blome Co. v. Ames, 365 Ill. 456, 6 N. E. (2d) 841 (1937), which held that a contractor was the retailer of the materials furnished in erecting and repairing buildings.

[84] Material Service Corp. v. Nudelman, Prentice-Hall, Ill. State and Local Tax Serv., ¶23,062 (Cook County Circ. Ct., 1941).

[85] Southern Pacific Co. v. Gallagher, 306 U. S. 167 (1939); Bedford v. Colorado Fuel and Iron Corp., *supra* note 4.

state commerce,[86] it might tax the storage or withdrawal from storage of property for such use.[87] Since, however, installation was regarded as a taxable use in *Pacific Telephone & Telegraph Co. v. Gallagher,*[88] the definition of use so as to include storage and installation would probably be sufficient in this regard.[89] Definition of storage as any keeping or retention in the state for any purpose except sale in the regular course of business has been modified in some states by the exclusion, as a matter of policy, of a keeping or retention in the state for subsequent use solely outside the state.[90] As between the state wherein the property is merely stored and the state of actual use, there appears to be greater justification for the imposition of the tax by the latter.

Problems arising with respect to the meaning of the term "use" generally involve the question of the circumstances under which property is purchased for use in the state within the meaning of the act. All states, by way either of statutory definition or exemption, or of administrative regulation or practice, exempt property used only temporarily in the state by a nonresident. It should logically follow that a mere temporary use of property outside the state by a resident prior to the time the property is brought to the state for use therein should not relieve the resident from the tax imposed by his state. It is difficult to generalize as to the length of time property must be used in the taxing state by the nonresident or outside the state by the resident as respects the liability of either for the tax. The Louisiana use tax was last year held applicable to the use in Louisiana of an automobile purchased in Texas by a resident of that state on March 3, 1939, and brought by the owner to Louisiana on March 15, when she came to reside there with her husband who was employed in construction operations and who expected to remain in Louisiana until the work was completed about the end of the year.[91]

There is frequently an interval of time between the date of the purchase of property and the date of its shipment to a state imposing a use tax. Whether the property was used or merely stored outside the state during that interval, the owner may claim that it was not purchased with the intent that it be used in the state to which it was shipped. In support of the tax, it may be argued that it was not the legislative intent that the owner's state of mind control the application of the tax and that his intent, so far as material, is to be inferred from the facts respecting the

[86] Helson and Randolph v. Kentucky, 279 U. S. 245 (1929).

[87] Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249 (1933); Edelman v. Boeing Air Transport, 289 U. S. 249 (1933).

[88] 306 U. S. 182 (1939).

[89] These cases are fully discussed in terms of a query as to the future employment of use taxation, by Brown, *The Future of Use Taxes, supra* this issue.

[90] *E.g.,* Cal. Stats. 1941, c. 247, §2(a). The reasons for such an exclusion are that the owner of the property would otherwise, at least so far as possible, ship directly to the state of use, a practice harmful to the state's warehouse operators and resulting in greater shipping costs to the owner, and that the purpose to be accomplished by the tax does not compel its application with respect to such property since local business does not in this instance require the protection afforded by a use tax and since, as a use tax is imposed merely as a complement to a sales tax, it should, like the sales tax, be imposed only once.

[91] State *ex rel.* Cooper v. Pape, 194 La. 890, 195 So. 346 (1940).

purchase and use of the property. A contractor, for example, doing business in several states, may purchase a large stock of materials for subsequent use without regard to, or even without any knowledge of, the place at which the materials may thereafter be used. To support the application of its use tax, a state wherein some portion of the property is subsequently used will probably argue somewhat along the line that the materials were purchased for use at such places as the business of the contractor might require and that when in the course of that business they were shipped to the state for use by the contractor therein, they were purchased for use in the state within the meaning of the act.[92]

Another difficult situation is presented when a firm doing business in several states purchases raw materials in one state, fabricates or manufactures those materials into a somewhat different article, and then ships the finished article to another state for use there by the firm. The use tax imposed by the latter state should logically apply to the cost to the firm of the raw materials purchased outside the state and incorporated into the fabricated or manufactured article. The fact that the property is not used in the state in the same form in which it was purchased outside the state does not necessarily mean that the use of the materials may not be taxed within the state, for it may be argued that this situation is but a parallel to that which exists when property is purchased for resale but resold in a wholly different form from that in which it was purchased.

Because one of the purposes of the use tax is the removal of a tax discrimination that would otherwise operate against local business, it has been contended that as a matter of policy the tax should not apply with respect to property ordinarily unobtainable in the state. While some of the use tax acts have acceded to this contention,[93] it has received little deference from the courts. Thus, in the absence of a statutory exemption of this type, the Washington court, reversing its earlier attitude, held that state's compensating tax applicable to the use of property not manufactured or available for purchase in the state.[94] And notwithstanding the Wyoming Use Tax Act's exemption of manufacturing and mining machinery and other materials when not generally stocked for sale, or not "promptly purchaseable," in the state,[95] the supreme court of the state has ruled that the tax applies when such materials, although not generally stocked locally, can be ordered by a purchaser in the state from the Wyoming branch store of an out-of-state firm and in the ordinary course of trade shipped from the firm's home office directly to the purchaser.[96]

[92] This position has been upheld by a trial court under the California Use Tax Act. Chicago Bridge & Iron Co. v. Johnson, Prentice-Hall, Cal. State and Local Tax Serv., ¶23,018 (Sacramento County Super. Ct., 1940).

[93] See Frampton and Smith, *Commodities and Transactions Exempt from Consumption Taxes, infra* this issue.

[94] City of Spokane v. State, 198 Wash. 682, 89 P. (2d) 826 (1939), *overruling* Pacific Telephone & Telegraph Co. v. Henneford, 195 Wash. 553, 81 P. (2d) 786 (1938).

[95] WYO. REV. STAT. (Supp. 1940) §115-2604(k).

[96] Continental Supply Co. v. People, 54 Wyo. 185, 88 P. (2d) 488 (1939). See also Scobell v. Bottum, Prentice-Hall, S. D. State and Local Tax Serv., ¶23,011 (Charles Mix County Circ. Ct., 1941).

Judicial decisions establishing the principles to be applied in determining the character of a sale or, through the process of inclusion and exclusion, fixing the line separating retail sales from sales for resale, together with statutory elaboration of definitions, are gradually imparting a definite meaning to the terms "retail sale" and "storage, use or other consumption." The fact that the definitions of those terms have not been modified to any appreciable extent through amendment, and that the amendments which have been adopted have for the most part involved merely the insertion in statutes of an administrative or judicial determination, indicates that the administrators and the courts are carrying out the intention of the legislatures as respects the meaning of the terms. That fact may also be regarded as an indication that, at least as a general rule, the terms will continue for some time to have the meanings which have been ascribed to them.