

# THE FUTURE OF USE TAXES

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The use tax has taken an important place in the revenue systems of the states. Sustained by the Federal Supreme Court as an excise rather than a property tax,<sup>1</sup> it has been adopted in a somewhat general scope by about twenty states.<sup>2</sup> As it is still a comparatively recent development, it gives every prospect of much wider adoption, unless developments to be discussed hereafter in this paper should cause it to be regarded as unnecessary or undesirable. Even the very few state courts which have expressed disagreement with the Federal Supreme Court as to the nature of the tax, and regard it as a property tax, have nevertheless sustained it as a necessary supplement to the state sales tax, and as a proper protection to local merchants.<sup>3</sup>

## THE DOCTRINE OF THE *Helson* CASE

Apart from possible indirect effects of the use tax upon interstate commerce, which will be hereafter considered, the most serious judicial limitation of the use tax is embodied in the decision of the Federal Supreme Court in *Helson v. Kentucky*.<sup>4</sup> Here a Kentucky sales tax had been construed by the courts of that state as a use tax where the purchase was made outside the state. The *Helson* case held the tax unconstitutional as a direct burden on interstate commerce when applied to gasoline purchased in Illinois and used for the operation of an interstate ferry (from Illinois to Kentucky), though concededly 75 per cent of the gasoline was actually used in Kentucky.

This decision, twelve years old and consequently rather ancient as such matters go, is on principle perhaps justifiable on the ground of lack of proper apportionment,<sup>5</sup> though the opinion of the Court, written by Mr. Justice Sutherland, does not make any point of this. It was substantially a five to four decision, since Mr. Justice Stone (Justices Holmes and Brandeis concurring with him) agreed

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<sup>1</sup> *Henneford v. Silas Mason Co.*, 300 U. S. 577 (1937).

<sup>2</sup> A number of other states impose taxes of the same nature as to gasoline, and a few as to other commodities such as oleomargarine and tobacco. While this paper is primarily concerned with the general use tax, it will consider these special taxes for purposes of analogy and contrast.

<sup>3</sup> See *Nat. Linen Service Corp. v. State Tax Comm.*, 237 Ala. 360, 186 So. 478 (1939); *Mann v. McCarroll*, 198 Ark. 628, 130 S. W. (2d) 721 (1939).

<sup>4</sup> 279 U. S. 245 (1929).

<sup>5</sup> See *McCarroll v. Dixie Greyhound Lines*, 309 U. S. 176 (1940).

under protest, and only because of prior decisions of the Court. Curiously enough, the one complete dissenter was Mr. Justice McReynolds, who, however, wrote no opinion.

The *Helson* case, if still a binding authority, is a rather serious check upon use taxes with respect to actual facilities of interstate commerce. Its doctrine is still followed to the extent that a strict use tax with respect to gasoline or other commodity actually used as a facility of interstate commerce must be reasonably apportioned to the actual use in the state.<sup>6</sup> But otherwise the authority of the *Helson* case is today very doubtful. It is clear, for instance, that the doctrine of the case does not apply where the article taxed is used wholly within the state, even though imported from outside.<sup>7</sup> Neither does it apply where gasoline is purchased in the state even though it is used wholly in operating airplanes in interstate commerce,<sup>8</sup> and this despite the fact that here there is no use of the roads to justify the tax on that basis.

The loophole opened by the last-cited case was soon enlarged by two other decisions. In the first of these,<sup>9</sup> a Tennessee tax on the storage of gasoline within the state was upheld, even though the taxpayer was an interstate railroad and so would not use the roads on which this revenue was applied, and even though substantially all the gasoline would be used in interstate commerce. The Court distinguished the *Helson* case on its facts, but showed obvious disapproval of it. A similar doctrine was applied in the other case,<sup>10</sup> which involved air transportation, the state tax on the storage of gasoline being upheld even though the gasoline was bought outside the state. The *Helson* case was distinguished in that here the tax was on storage within the state and not on interstate flying. It seems that this distinction, while perhaps technically justifiable, is practicably unsubstantial.<sup>11</sup>

The Supreme Court itself has recognized that there is little left of the *Helson* case; that the distinctions which it has thus made are so narrow as to be almost nonexistent.<sup>12</sup> It thus seems that the opinion expressed by a number of commentators,<sup>13</sup> that the *Helson* case is substantially overruled, is correct. At least it is no longer a substantial restriction upon the taxing power of the states. Furthermore, the old doctrine, or whatever is left of it, has no effect whatsoever upon the much more important application of the use tax to goods within the state for other purposes than as a facility of commerce. Obviously such use has no direct effect upon interstate commerce, though, as will presently appear, there may be indirect effects which have to be considered. The point is that the *Helson* doctrine is substantially out, and needs no further consideration.

<sup>6</sup> *Bingaman v. Golden Eagle Western Lines*, 297 U. S. 626 (1936); *McCarroll v. Dixie Greyhound Lines*, *supra* note 5. Both of these cases involved the use of roads in the taxing state.

<sup>7</sup> *Monamotor Oil Co. v. Johnson*, 292 U. S. 86 (1934).

<sup>8</sup> *Eastern Air Transport v. South Carolina Tax Comm.*, 285 U. S. 147 (1932).

<sup>9</sup> *Nashville, C. & St. L. Ry. v. Wallace*, 288 U. S. 249 (1933).

<sup>10</sup> *Edelman v. Boeing Air Transport*, 289 U. S. 249 (1933).

<sup>11</sup> See the comment on this case in the lower court in (1931) 45 HARV. L. REV. 385.

<sup>12</sup> See *Coverdale v. Arkansas-Louisiana Co.*, 303 U. S. 604 (1938).

<sup>13</sup> See, e.g., Lockhart, *The Sales Tax in Interstate Commerce* (1939) 52 HARV. L. REV. 553.

## COLLECTION BY OUT-OF-STATE SELLERS

Because the use tax does not ordinarily involve commerce at all, it can properly be imposed on use within the state irrespective of how the goods can be or have been procured. It is clear that the tax can be collected from a distributor within the state, even though he has brought the goods from outside the state;<sup>14</sup> though in these circumstances a sales tax would seem to be just as effective.

A more serious problem arises when the purchase is made in interstate commerce. Here there is no possible objection to the imposition of a use tax upon the purchaser, but obviously the collection of the tax from these numerous people would impose an impossible burden of investigation and litigation. Much more practical, if otherwise possible, is it to collect the tax from the out-of-state seller.

The Federal Supreme Court has sustained such collection from a seller who had an office in the state, and this notwithstanding the fact that the sale was wholly in interstate commerce.<sup>15</sup> The actual burden thus imposed upon the seller was held to be within the power of the state even though the seller was not doing business within the state except in connection with interstate commerce. The same rule would seem to apply even more clearly if the seller is doing business in the state. The Iowa supreme court thought otherwise in the case of a mail-order house which had retail stores in the state.<sup>16</sup> That court held that such intrastate business did not authorize the state to compel the seller to collect the use tax on interstate sales, on the ground that this would be an improper burden on interstate commerce. The Federal Supreme Court refused, however, to follow the distinction and reversed the Iowa court, holding that the state may properly compel the seller to collect the tax.<sup>17</sup>

All this helps the states; but their troubles in collecting use taxes are not over. In the first place there is the problem of the interstate sale where the seller does no business in the state at all.<sup>18</sup> It seems clear that under such conditions the state is helpless so far as the seller is concerned.<sup>19</sup> One state (California) has partially solved the difficulty by threatening to ruin the local business of mail-order houses in this category through prosecution of a few of their customers for nonpayment of the use tax. Under this extra-legal pressure, mail-order houses have to a considerable extent been persuaded to pay the California use tax; and this expedient is no doubt open to other states.<sup>20</sup> However, it is imperfect, and is hardly applicable

<sup>14</sup> *Monamotor Oil Co. v. Johnson*, *supra* note 7.

<sup>15</sup> *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62 (1939).

<sup>16</sup> *Sears, Roebuck & Co. v. Roddewig*, 292 N. W. 130 (Iowa 1940); *Montgomery Ward & Co. v. Roddewig*, 292 N. W. 142 (Iowa 1940).

<sup>17</sup> *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359 (1941); *Nelson v. Montgomery Ward & Co.*, 312 U. S. 373 (1941). The majority opinion was written by Mr. Justice Douglas. Mr. Chief Justice Hughes and Mr. Justice Roberts dissented.

<sup>18</sup> See Lowndes, *State Taxation of Interstate Sales* (1935) 7 *Miss. L. J.* 223.

<sup>19</sup> The supreme court of Iowa pointed this out in *Sears, Roebuck & Co. v. Roddewig*, *supra* note 16. The Federal Supreme Court, in reversing this decision, did not dispute the point, but did say that possible difficulties of the state in collecting the tax do not affect its jurisdiction to impose the tax.

<sup>20</sup> Another rather effective expedient for discouraging mail-order purchases is sometimes used, especially by New York City. Auditors are sent by the city to Chicago, or wherever the mail-order

except to a concern which has a sufficient number of such transactions to have built up valuable goodwill within the state. Otherwise the state is remitted to the unsatisfactory expedient of proceeding against the individual buyers.

Still more serious is the situation where the buyer goes outside the state and there purchases the goods. There being here no problem of interstate commerce at all, no possible objection could be urged to the imposition of the use tax. But it is obviously impossible to collect it from the seller, even though the seller does business in the state imposing the tax, since the seller cannot know where the buyer lives, and therefore to what use tax he may be about to subject himself.<sup>21</sup> Here, too, there is no expedient except to proceed against the buyer. It has been suggested that the growing tendency of the courts to enforce tax claims of other states might be helpful in this connection. While the Federal Supreme Court has abandoned the old and absurd doctrine that taxes are wholly unenforceable in other states, placing judgments for taxes within the protection of the full faith and credit clause,<sup>22</sup> it is by no means certain that this doctrine is applicable when no judgment has been obtained.<sup>23</sup> The states are generally disinclined to permit suits by other states for taxes, at least in the absence of reciprocity statutes, which are not common. It is therefore not clear how much help this doctrine would be for collecting use taxes.

Furthermore, such a suit would usually be unnecessary in the case of a claim against the purchaser-user of goods, since he is presumably a resident of the state imposing the tax. It might be useful where it is possible to hold the seller for the collection of the tax, but for most such cases there are more effective sanctions. The result seems to be that there are sufficiently broad powers of collection of the use tax from out-of-state sellers to assist greatly in its effective administration, but by no means to solve the practical problem of a reasonably complete enforcement of the tax.

#### NECESSITY OF THE COMPENSATORY FEATURE IN USE TAXES

Since, as will hereafter appear, the use tax was first devised as a supplement to the sales tax, it is ordinarily provided that the payment of the sales tax exempts the goods from the local use tax. But a multiple burden still exists, if a use tax must be paid over and above a sales or similar tax imposed by another state. To avoid this, a number of states employing use taxation have provided for a credit on the use tax of the amount of any sales or other similar taxes paid to other states. Such a provision is in the true sense compensating. But more than half of the use tax

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house has its principal office, to audit the books as respects New York purchasers; and the unfortunate mail-order houses are compelled to pay the very liberal expenses of such auditors. Such burdens upon sellers have prompted the observation that even compensatory use taxes may in fact constitute substantial trade barriers. See Note (1940) 16 *IND. L. J.* 260. But see, in Gaubard, *Special Problems in the Levy of Municipal Excise Taxes*, *infra* this issue, a denial that such tactics are employed by New York City.

<sup>21</sup> This, too, is clearly pointed out by the Iowa court in *Sears Roebuck & Co. v. Roddewig*, *supra* note 16.

<sup>22</sup> *Milwaukee County v. M. E. White Co.*, 296 U. S. 268 (1935).

<sup>23</sup> See *Moore v. Mitchell*, 281 U. S. 18 (1930).

states do not have any such compensating feature, and in at least one state the courts have explicitly declined to read such a provision into the law even where, as the court admitted, the burden thus imposed seemed rather unfair.<sup>24</sup>

Where a purchase is made outside the state, and is not in interstate commerce, there seems to be no federal question.<sup>25</sup> Indeed, a possible multiple burden in this case is at least arguably desirable as a protection to local merchants by discouraging purchases outside the state. In any event, the use tax is likely to be generally evaded, for reasons already pointed out.

When interstate commerce is involved, the collection of sales and use taxes by two states may possibly result in a substantial discrimination against such commerce. It is still the opinion of the Supreme Court that a flat discrimination against interstate commerce through the operation of state tax or other laws is unconstitutional,<sup>26</sup> though it must be admitted that some discrimination in fact is actually permitted.<sup>27</sup> The question is whether a use tax without compensatory features will result in such an unconstitutional discrimination against interstate transactions. While it remained the law, as was generally held until very recently, that no state sales taxes could be imposed on interstate transactions, this question was of hardly more than academic interest; but the Supreme Court decision in *McGoldrick v. Berwind-White Coal Mining Co.*<sup>28</sup> has changed the supposed rule to allow a sales tax in this situation.

The *Berwind-White* case permitted the sales tax to be imposed by the state of the buyer. The Court naturally did not pass upon the problem whether the state of the seller could likewise impose such a tax, though there is some authority which would tend to show that this tax would not be permitted.<sup>29</sup> If sales taxes in interstate commerce are restricted to the buyer's state, there appears to be no improper burden on interstate commerce, since the buyer will pay but one tax, either use or sales.<sup>30</sup>

But in this connection the New York case of *O'Kane v. State*<sup>31</sup> must be considered. Here the New York stock transfer tax, in effect a sales tax on stock, was sustained as respects a transaction where the seller was in New York but the buyer outside the state. This decision came after the *Berwind-White* case, and in fact definitely relied upon it. To the argument that the state of the buyer might impose a similar tax, thus doubly burdening the transaction, the court answered that

<sup>24</sup> *State v. Fields*, 27 Ohio L. Abs. 662 (1938). See also *State v. Honaker*, 25 Ohio L. Abs. 634 (1938).

<sup>25</sup> But cf. Note (1940) 16 IND. L. J. 260.

<sup>26</sup> *Best & Co. v. Maxwell*, 311 U. S. 454 (1940), a unanimous decision.

<sup>27</sup> See *Federal Trade Comm. v. Bunte Bros.*, 312 U. S. 349 (1941).

<sup>28</sup> 309 U. S. 33 (1940). See also the companion case, *McGoldrick v. Felt & Tarrant Mfg. Co.*, 309 U. S. 70 (1940).

<sup>29</sup> *Robbins v. Shelby County*, 120 U. S. 489 (1887); *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434 (1939). For discussion of this and other present constitutional problems in state taxation of sales, see McNamara, *Jurisdictional and Interstate Commerce Problems in Imposition of Excises on Sales*, *supra* this issue.

<sup>30</sup> See Lockhart, *supra* note 13.

<sup>31</sup> 283 N. Y. 439, 28 N. E. (2d) 905 (1940).

there was no multiple burden, since the two taxes would be upon different events. But this is merely a verbal distinction. The fact remains that there is a single transaction in interstate commerce subject (at least potentially) to two taxes, whereas an intrastate transaction is subject to only one. It would appear that if the *O'Kane* case is followed, and the state of the seller may thus impose a sales tax in an interstate transaction, there is an unconstitutional burden upon interstate commerce,<sup>32</sup> at least if the state of the buyer actually imposes a sales tax, as it clearly has power to do.<sup>33</sup>

With the use tax the situation may be somewhat different. Clearly there is no substantial burden upon interstate commerce if the use tax law includes a compensating feature, for in that case the transaction will bear a burden (however divided) only equal to the amount of the state use tax, to which intrastate transactions are likewise subject.<sup>34</sup> Furthermore, while a state use tax applicable only to interstate transactions would clearly be unconstitutional, it is not necessarily so if balanced by other taxes, whatever their names, imposing a like burden with respect to intrastate transactions.<sup>35</sup> Nor are taxes on transportation objectionable even when applied to interstate commerce since here "it is length of line, not interstate commerce, which makes another tax possible."<sup>36</sup> This is undoubtedly the justification for the clear rule that use taxes with respect to gasoline need not have any compensatory feature, since the tax must be proportioned to the actual use for transportation in the state.<sup>37</sup>

But when it comes to general use taxes, the problem is not so simple. The Supreme Court has invalidated state excise taxes of this general nature when applied to interstate transactions, on the ground that the other states might impose similar taxes with a consequent "multiple burden" upon interstate commerce.<sup>38</sup> It is not always easy to determine when the Court will find such a multiple burden,<sup>39</sup> and often the point is wholly ignored, especially in connection with use taxes.<sup>40</sup> Furthermore, the Court will sometimes sustain a state tax which in fact permits multiple economic burdens so long as the particular activity cannot be

<sup>32</sup> This point is well brought out in the elaborate discussion of the *Berwind-White* case in (1941) 6 Mo. L. Rev. 57. See also discussions of the *O'Kane* case in (1940) 25 MINN. L. REV. 107; (1941) 39 MICH. L. REV. 490.

<sup>33</sup> See (1940) 26 CORN. L. Q. 158.

<sup>34</sup> But cf. Note (1940) 16 IND. L. J. 260.

<sup>35</sup> *Hinson v. Lott*, 8 Wall. 148 (U. S. 1869); *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245 (1928); *Gregg Dying Co. v. Query*, 286 U. S. 472 (1932).

<sup>36</sup> *Coverdale v. Arkansas-Louisiana Co.*, 303 U. S. 604, 613 (1938). But cf. *Ozark Pipe Line Co. v. Monier*, 266 U. S. 555 (1924).

<sup>37</sup> See *Brown*, *The Legal Aspects of Trade Barriers* (1940) 25 BULL. NAT. TAX ASS'N 98, 102.

<sup>38</sup> *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307 (1938); *Gwin, White & Prince, Inc. v. Henneford*, *supra* note 29.

<sup>39</sup> See *Cooney v. Mountain States Tel. & Tel. Co.*, 294 U. S. 384 (1935).

<sup>40</sup> *J. Bacon & Sons v. Martin*, 305 U. S. 380 (1939); *Pacific Telephone Co. v. Gallagher*, 306 U. S. 182 (1939).

taxed in any other state.<sup>41</sup> Thus a manufacturers' tax, though measured by selling price and with most of the goods sold in interstate commerce, has been approved.<sup>42</sup>

All this suggests that the Court is giving considerable weight to the nomenclature of taxes rather than to their actual burden. Certainly some state courts have indicated their opinion that this is a correct interpretation of the position taken by the Federal Court.<sup>43</sup> It may well be, however, that this position cannot validly be taken; it is quite as likely that the Court is reaching (though not always with entire success) for a test which will as nearly as possible equalize the burden between interstate and intrastate commerce, and is only using the technicalities of tax nomenclature as a means of justifying, or appearing to justify, the otherwise apparently irrational distinctions which it draws.

However this may be, we are concerned primarily with what the Court has said as to the use tax. In the leading case sustaining state use taxes,<sup>44</sup> the opinion by Mr. Justice Cardozo discusses the compensatory feature of the Washington law there at issue and correctly points out that this avoids any possibility of multiple taxation. This would have been clear enough had he not added:<sup>45</sup>

Yet a word of caution should be added here to avoid the chance of misconception. We have not meant to imply by anything said in this opinion that allowance of a credit for other taxes paid to Washington made it mandatory that there should be a like allowance for taxes paid to other states. *A state for many purposes, is to be reckoned as a self-contained unit*, which may frame its own system of burdens and exemptions without heeding systems elsewhere. If there are limits to that power, there is no need to mark them now. It will be time enough to mark them when a taxpayer paying in the state of origin is compelled to pay again in the state of destination.

This *caveat* is made more emphatic by the later decision in *Southern Pacific Co. v. Gallagher*,<sup>46</sup> upholding the California use tax which has no compensatory feature.<sup>47</sup> Mr. Justice Reed, who wrote the majority opinion, attempted to justify a disregard of the effect of the commerce clause, on the ground that use within the state is not interstate commerce. This is obviously true, but it does not prevent the possible discriminatory burden upon interstate commerce if the use tax is put on top of a sales or similar tax imposed by another state. The Justice was finally compelled to recognize this proposition, but held that the tax would not be invalidated on account of a merely potential multiple burden; the multiple burden

<sup>41</sup> See *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250 (1938). This follows the reasoning of the *O'Kane* case, *supra* note 31.

<sup>42</sup> *American Mfg. Co. v. St. Louis*, 250 U. S. 459 (1919). This doctrine has been followed even in such extreme circumstances as those present in *Utah Light & Power Co. v. Pfof*, 286 U. S. 165 (1932).

<sup>43</sup> *State v. Fields*, *supra* note 24; *O'Kane v. State*, *supra* note 31.

<sup>44</sup> *Henneford v. Silas Mason Co.*, 300 U. S. 577 (1937).

<sup>45</sup> *Id.* at 587 (ital. supplied). Apparently encouraged by this language, the Washington legislature amended the statute in 1937 so as to eliminate the credit for out-of-state taxes. The statute still purports to provide for a "compensatory" tax, because giving a credit for Washington sales taxes. See *Spokane v. State*, 198 Wash. 682, 89 P. (2d) 826 (1939). <sup>46</sup> 306 U. S. 167 (1939).

<sup>47</sup> See *Douglas Aircraft Co. v. Johnson*, 13 Cal. (2d) 545, 90 P. (2d) 572 (1939).

must actually be shown.<sup>48</sup> He indicated that perhaps it would make no difference anyway, but explicitly declined to pass on this question.

The result would seem to be that the Court will not invalidate a state use tax merely because it has no compensatory provisions. Actual rather than merely potential multiple burden must be shown, and it is not even certain that the latter will be enough. All that one can say with any confidence is that the point is not yet settled.

With this uncertainty of the authorities, it is perhaps worth while to consider the problem on principle. The question is whether a general use tax which makes no allowance for sales, use or similar taxes imposed by other jurisdictions with respect to the same property, constitutes a substantial burden upon interstate commerce, and so may be regarded as a trade barrier.

The Corporation Counsel of New York City has recently urged that its use tax is not such a burden, in spite of its lack of any compensatory feature, and the consequent possibility of multiple taxation, on the ground that the municipality's use tax is substantially equivalent to a property tax.<sup>49</sup> There is undoubtedly something in this, since no personal property taxes are imposed by the city or state of New York. But this very fact shows that the argument has no general application.

Of more general scope is the argument of Professor T. R. Powell against the necessity of the compensatory feature.<sup>50</sup> He suggests that since the use tax applies to property acquired within the jurisdiction in an intrastate transaction as well as to property purchased in interstate transactions, there is no discrimination against interstate commerce. However, it seems to be invariably provided that a use tax will be credited with the amount of sales tax paid with respect to the property to the same jurisdiction; and if a sales tax or the like paid to another jurisdiction is not similarly credited, there is at least a potential discrimination against interstate commerce.

A still more fundamental argument has been advanced against the necessity of any compensatory feature for use taxes. This is that sales taxes are not necessarily, or even generally, shifted to the consumers.<sup>51</sup> In fact it is said that "courts are unbelievably naive" in their assertion that sales taxes are so shifted, and that the weight of economic opinion is to the contrary.<sup>52</sup> If sales taxes are not shifted to the consumer, the imposition of an additional use tax upon him is of course no substantial burden upon interstate commerce, since he is not thereby discouraged from purchasing in interstate transactions.

<sup>48</sup> Cf. (1940) 26 CORN. L. Q. 158.

<sup>49</sup> See Chanler, *The Interstate Commerce Clause and Local Municipal Taxes* (1941) 6 LEGAL NOTES ON LOCAL GOV. 81.

<sup>50</sup> See Powell, *New Light on Gross Receipts Taxes* (1940) 53 HARV. L. REV. 909.

<sup>51</sup> See Warren and Schlesinger, *Sales and Use Taxes: Interstate Commerce Pays Its Way* (1938) 38 COL. L. REV. 49.

<sup>52</sup> See *id.* at 71-72. For recent economic analyses, see Carlson, *Interstate Barrier Effects of the Use Tax* (1941) 8 LAW & CONTEMP. PROB. 223; Martin, *Distribution of the Consumption Tax Load*, *supra* this issue.



The writer, being a lawyer and not an economist, confesses his inability properly to appraise this argument. It must be realized that the problems of the actual burdens of taxation are quite as much economic as legal, and indeed probably more so. This is at least one of the reasons for Mr. Justice McReynold's remark that "Logic and taxation are not always the best of friends."<sup>53</sup> The present writer is inclined to feel that there is some naivete on the other side in the assertion that sales taxes are not largely shifted to the consumer; but the substantial economic opinion behind this assertion cannot lightly be disregarded. The result would seem to be that there is at least some danger (though no absolute certainty) of substantial trade barriers from use taxes, unless sales taxes are either abolished or else rigidly restricted to the state of the buyer. On the other hand, the arguments against this conclusion are sufficient to give some justification to the result which will probably be reached by the courts, that no such compensatory feature is constitutionally required. Here, as in several other instances, the courts will probably feel themselves unable alone to prevent what may result in a substantial trade barrier.

#### THE PROBLEM OF MOTIVE

Whether logically or not, the courts, in passing upon trade barrier problems, particularly with respect to taxation, have given considerable weight to the apparent motive in imposing the tax or other alleged burden. A tax which is considered to have been imposed primarily for the purpose of protecting local merchants, and thus imposing in effect an internal protective tariff, is much more severely scrutinized and much more readily invalidated by the courts than a tax which is thought to have been imposed for legitimate reasons of revenue, even though it has conceivably some adverse effect upon interstate commerce.<sup>54</sup>

With respect to this aspect of the matter, the use tax has an unusually clean bill of health. Until the *Berwind-White* decision,<sup>55</sup> it was universally considered that no sales tax could be imposed by the states upon sales in interstate commerce.<sup>56</sup> This was a definite discrimination, but in favor of rather than against interstate commerce; and the use tax was intended merely to equalize the burden. This equalizing feature of the use tax was recognized and relied upon even by the few courts which treated the use tax as a tax on property rather than an excise.<sup>57</sup> While even under these circumstances the compensatory feature is necessary in order to avoid a potential double burden where the purchase occurs outside the state,<sup>58</sup> as already pointed out this probably involves no federal question.

From this standpoint there is good reason for expecting judicial liberalism in

<sup>53</sup> *Sonneborn Bros. v. Keeling*, 262 U. S. 506, 522 (1923).

<sup>54</sup> *Robbins v. Shelby County*, *supra* note 29.

<sup>55</sup> *McGoldrick v. Berwind-White Coal Mining Co.*, *supra* note 28.

<sup>56</sup> Typical state cases illustrating this proposition are *Continental Supply Co. v. People*, 54 Wyo. 185, 88 P. (2d) 488 (1939); *Head v. Cigarette Sales Co.*, 188 Ga. 452, 4 S. E. (2d) 203 (1939); and *Spokane v. State*, 198 Wash. 682, 89 P. (2) 826 (1939). See also, Perkins, *The Sales Tax and Transactions in Interstate Commerce* (1934) 12 N. C. L. REV. 99.

<sup>57</sup> Note 3, *supra*.

<sup>58</sup> Note 24, *supra*.

upholding use taxes, even though the chief original reason for their introduction has been removed by the *Berwind-White* decision, and even though that decision and its possible extensions may result in a substantial burden upon interstate commerce. Certain it is that the Supreme Court has sustained state statutes which impose actual burdens upon interstate commerce, though rarely when such a burden was definitely intended.<sup>59</sup>

On the other hand, too much weight should not be given to this consideration. Legislative motives are difficult to ascertain, and indeed are traditionally rather improper subjects for judicial review. The motives for trade barrier legislation are mixed, and in any event the real test is, or should be, results and not motive.<sup>60</sup> It is true that motive is of some evidentiary value. But the courts should not permit a substantial trade barrier, through use taxes or otherwise, merely because the state or local legislative body did not apparently intend to bring about this result.

One other point should be mentioned in this connection. It is customary to provide in the use tax statutes that newcomers to the state need not pay a tax upon goods which they bought and used outside the state before they became residents of the taxing jurisdiction. In other words, the use tax is intended, at least in part, to protect local merchants, but not to the extent of penalizing persons for not buying there as non-residents, merely because they later become residents. This, too, shows a proper motive for imposing the use tax. The state may say that it does intend to protect local merchants, but only to the extent of equalizing the burden. Such a position seems entirely legitimate, though it is doubtful whether any federal question would arise in case the state did compel newcomers to pay a use tax upon household furniture and the like which they brought into the state, since this is not a direct burden on interstate commerce. Here again the use tax has the additional support of an unquestionably proper motive, but this should not save it if and when it becomes in fact a substantial trade barrier.

#### WILL EITHER THE SALES TAX OR THE USE TAX DISAPPEAR?

Inasmuch as the use tax was devised as a supplement to the sales tax, and particularly to remove the discrimination in favor of interstate commerce by reason of the doctrine that no sales tax could be imposed upon interstate transactions, the recent decision of the Federal Supreme Court repudiating this doctrine<sup>61</sup> has removed any further necessity for such taxes. For sales taxation, thus freed of the commerce restriction, has the important advantage that it is generally collectible directly from the seller so that the number of persons to deal with and the complications of collection procedure are much less than where collection must be made

<sup>59</sup> *Sonneborn Bros. v. Keeling*, *supra* note 53. A good illustration is the very recent decision of *Fed. Trade Comm. v. Bunte Bros.*, *supra* note 27, though this is not a tax case. Here the Court sustained a state rule permitting a trade practice within the state which as respects interstate commerce had been forbidden as unfair by the Federal Trade Commission. The discrimination against interstate commerce thus permitted, is obvious and potentially ruinous, so far as that state is concerned.

<sup>60</sup> See *Brown*, *supra* note 37.

<sup>61</sup> *McGoldrick v. Berwind-White Coal Mining Co.*, *supra* note 28.

from the buyers. It has therefore been argued that the use tax may now disappear, and the sales tax alone be used.

But the sales tax of one state cannot reach sales outside the state, though made to its residents. Whether such out-of-state sales are taxed where made or not, the state of residence of the purchasers, which is where the goods are used, loses if it depends solely upon a sales tax. Furthermore, it is not always practical to collect the sales tax upon interstate transactions. If the seller does no business in the state (other than interstate commerce) he may still be compelled to collect and pay the tax if he has a place of business in the state, but if the seller has no such place of business, the state is without remedy to collect the tax except by going against the buyers.

These objections to sole reliance upon a sales tax are at least largely obviated by the imposition of a use tax. Indeed, it has been suggested that the sales tax should be given up and the use tax taken as the sole method of collecting this class of revenue. From a legal standpoint, this suggestion seems better than the converse one of giving up the use tax and relying on the sales tax. Even the use tax may be collected from the seller provided the seller does business in the state or has an office there.<sup>62</sup> If not, the use tax cannot be collected from the seller; but, as already pointed out, neither can the sales tax. If then the choice is between these two taxes, it seems more desirable to retain the use tax and do away with the sales tax. Furthermore, if all the states did away with sales taxes, the use tax would cease to be a substantial trade barrier.

The choice which has been discussed seems, however, a quite unrealistic one. Why, as between a sales and a use tax, may not a state choose both? While a sales tax has perhaps no theoretical advantage over a use tax, yet experience makes it fairly clear that it is under some circumstances practically more desirable, at least from the standpoint of collection procedure. It is submitted, therefore, that the states should retain the use tax, and furthermore that there is no necessity of their giving up the sales tax, which may at times have important advantages. The two taxes should of course be largely integrated, both in substance and in collection procedure. Furthermore, in the writer's opinion, the use tax should be credited with sales or similar taxes imposed by other states. Such a provision is unnecessary if it is finally decided that only the state of the buyer can impose a sales tax; but otherwise there is apt to be a substantial trade barrier, though one which the courts seem likely to permit. Yet, at least with this limitation, there seems no reason why the states should not have, if they desire, the advantages of both of these forms of taxation. To give up either is not necessary or desirable.

<sup>62</sup> *Nelson v. Sears, Roebuck & Co.*, *supra* note 17.