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The State Retail Sales Tax: A Critical Re-Examination of Underlying Policy

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NOTES

THE STATE RETAIL SALES TAX: A CRITICAL RE-EXAMINATION OF UNDERLYING POLICY

When compared with the broad attention given the federal tax laws, the increasingly important area of state and local taxation has been virtually ignored by the legal profession. This neglect is particularly evident in regard to the various sales taxes, which have now assumed an economic importance in state revenue schemes as great or greater than the property tax. A partial reason for this lack of general interest probably lies in the belief that the legislative schemes are peculiarly local in nature. Perhaps, also, the recent rapid growth of the sales tax has caught the profession unaware.

The origin of the retail sales tax,[1] as well as other consumption taxes, lies in the commodity excise taxes on such items as tobacco, alcohol, and gasoline,[2] the consumption of which was thought to produce a reasonably predictable amount of revenue. With this precedent set, the first sales tax scheme was enacted by West Virginia in 1921, followed by Georgia in 1929.[3] The popularity and widespread adoption of the sales tax, however, have been said to be products of the emergency measures taken in the Great Depression.[4] By 1937, such schemes had been enacted by one half the states.[5] By 1960 thirty-four states had a sales tax in effect;[6] and by 1964, three more states had been added to the growing list.[7] At the time of this writing at least forty states have some form of sales tax. These taxes produce

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1 The classification and labelling of the various types of taxes on consumption has been a source of confusion and ambiguity, which is primarily due to the many hybrid combinations of characteristics represented by the various enactments. Inappropriate legislative titling compounds the confusion. For purposes of clarity, it should be stated that the type of tax meant by the term "retail sales tax" as used in this Note is that tax which is levied on sales of tangible personal property at retail. A "retail sales tax," however, is intended herein to be distinct from use taxes, gross receipts taxes, multi-stage gross sales taxes, "valued-added" taxes, occupation or privilege taxes and all of the various gross income taxes. The term may embrace the rendering of services, but is generally not intended to include sales for resale at retail. See generally HELLERSTEIN, STATE AND LOCAL TAXATION 341 (2d ed. 1961); SHULTZ & HARRISS, AMERICAN PUBLIC FINANCE 318-20 (8th ed. 1965).

2 See SHULTZ & HARRISS, *op. cit. supra* note 1, at 316; Note, 65 HARV. L. REV. 301 (1951).

3 See MORGAN, RETAIL SALES TAX 3 (1964).

4 SCHULTZ & HARRISS, *op. cit. supra* note 1, at 317. For a chart showing the increased financial significance of the state sales tax during this period, see Smart & Hart, *The Distribution of Revenues From State-Collected Consumer Taxes*, 8 LAW & CONTEMP. PROB. 463 (1941).

5 SHULTZ & HARRISS, *op. cit. supra* note 1, at 317.

6 HELLERSTEIN, *op. cit. supra* note 1, at 342.

7 MORGAN, *op. cit. supra* note 3, at 3; SHULTZ & HARRISS, *op. cit. supra* note 1, at 317.

roughly one-third to one-half of the total revenue income in those states in which they are levied.[8]

The increasing number of adopting states suggests that all states will eventually be forced to enact sales tax legislation in order to be able to cope with the rising costs of state and local government. Unfortunately, possibly because of the haste with which so many of the tax schemes were adopted during the Depression, many of the acts are the result of piecemeal legislation, in which legislative intent or policy is nowhere clearly delineated. This has led to judicial misunderstanding and confusion in interpretation and construction.[9] Yet, despite the various differences reflecting regional attitudes or needs, most of the retail tax schemes bear a surprising resemblance to each other,[10] suggesting mutual reliance in the formulation of their respective provisions.[11] Although aiding the dissemination of many adequate provisions, this "borrowing" has also tended to perpetuate fiscal schemes in which the underlying legal consequences have not been clearly evaluated.[12] It is the purpose of this Note to indicate what are believed to be deficiencies in the retail sales tax, and to suggest appropriate legislative cures.

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8 SHULTZ & HARRISS, *op. cit. supra* note 1, at 317. In 1960, state sales and gross receipts taxes produced $4.3 billion, or 23.9% of total state tax levies; the total of all commodity revenues in that year constituted 58.3% of state tax revenues. HELLERSTEIN, *op. cit. supra* note 1, at 342. For the most recent percentage ratios between sales tax revenues and total income, and the dollar amounts represented thereby on a state-to-state basis, see CCH STATE TAX GUIDE 451-640 (2d ed. 1959) (1967 loose-leaf listings).

9 See, *e.g.*, notes 41-66 *infra* and accompanying text.

10 The retail sales tax statutes normally follow a pattern. First the general definitional sections, followed by provisions concerning the tax rate. Next are the sections emphasizing exemptions and other special limitations upon the operation of the tax. Finally, most statutes contain a rather detailed set of provisions governing the payment of the tax by the vendor to the state, with penalty provisions for failure to do so; whatever miscellaneous provisions the statute includes usually precede these administrative provisions. *Compare, e.g.*, GA. CODE ANN. §§ 92-3401a–92-3451a (1961 rev.) (including use tax provisions), *with* CONN. GEN STAT. ANN. §§ 12-406–12-432 (1960).

11 *Compare, e.g.*, CAL. REV. & TAX CODE § 6095, *with* GA. CODE ANN. § 92-3411a (1961 rev.) (concerning sale of commingled fungible goods, part purchased wholesale). *Compare* GA. CODE ANN. § 92-3422a (1961 rev.), *with* CONN. GEN. STAT. ANN. § 12-424(2) (1960) (sale of retail business).

12 It is not within the scope of this Note to rehash the numerous arguments concerning the social and economic effects of the sales tax. These economic aspects will, however, be dealt with to a limited degree in conclusion. For a brief discussion of these matters, see MORGAN, *op. cit. supra* note 3 and SHULTZ & HARRISS, *op. cit. supra* note 1. The bibliographies of these volumes provide comprehensive listings of treatises and articles for more extensive study. Also, a series of short, though somewhat outdated, articles on particular economic facets of commodity taxes can be found in 8 LAW & CONTEMP. PROB. 415 (1941).

I. Derivation of the Taxable Event

Retaining the essential character of its predecessor, the commodity tax, the retail sales tax is an excise tax[13] as distinguished from a property tax.[14] Thus, although the measure of the tax is the retail price of the article sold,[15] the sale itself is the event which gives rise to the tax. Theoretically, any sale in the marketing chain, from the manufacturer's original transaction with a wholesaler or supplier to the final transaction between the retailer and the consumer, could be the taxable event, with either of the two parties to a given sale being denominated as the taxpayer. But for purposes of uniform enforcement and simplicity, an effective statute would require that at whichever stage of the manufacturer-to-consumer chain the tax would attach, the event be sufficiently designated to be easily recognized in all cases.

It would seem that the closer a transaction denominated the taxable event is to the manufacturer's original sale, the easier the tax would be to assess and collect. Also, evasion would be more difficult since the group of persons from whom the tax would be collected would be smaller. For example, if M is a manufacturer who sells to a wholesaler, W, who in turn sells to a retailer, R, then the sale from M to W would be generically easier to tax than the sale from W to R, or from R to C, the consumer. Therefore, the state might in theory wish to tax "every sale by a manufacturer."

As an alternative to the taxation of sales by the manufacturer, the state might desire to tax the sale from W to R, *i.e.*, "every sale to a merchant in the business of retail selling."[16] Conceivably, though it would be awkward, a similar result could be reached by taxing, for example, "every sale by a manufacturer, wholesaler, or distributor to any other wholesaler or distributor who subsequently sells to a merchant in the business of retail selling; or if three sales or less are involved in the marketing chain, then the taxable event is the sale by the manufacturer." This latter alternative simply attempts to tax a sale one step removed in the marketing chain from the sale

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13 Aryan v. Akers, 12 Cal. 2d 781, 87 P.2d 695 (1939); *cf.* Gaulden v. Kirk, 47 So. 2d 567 (Fla. 1950); St. Paul & Tacoma Lumber Co. v. State, 40 Wash. 2d 347, 243 P.2d 474 (1952).

14 City of Claremore v. Oklahoma Tax Comm'n, 197 Okla. 223, 169 P.2d 299 (1946); Montgomery Ward & Co. v. Fry, 277 Mich. 260, 269 N.W. 166 (1936); J. W. Meadows & Co. v. State, 89 Ga. App. 583, 80 S.E.2d 86 (1954).

15 *E.g.*, GA. CODE ANN. § 92-3402a(a) (1961 rev.). The measure will also often include accompanying service charges. See Ferguson v. Cook, 215 Ark. 373, 220 S.W.2d 808 (1949).

16 In reality, sales by wholesalers or distributors to retail merchants, usually licensed as such by the state, are generally exempt under a "sale-for-sale" exemption. See, *e.g.*, ARIZ. REV. STAT. ANN. § 42-1301(12) (1956); REV. LAWS OF HAWAII § 117-5 (Supp. 1963); IDAHO CODE § 63-3609 (Supp. 1965). However, under a gross receipts tax scheme, where the tax is usually deemed to be on the seller, a wholesaler is normally taxed as well. *E.g.*, BURNS IND. STAT. ANN. § 64-2603 (1961); *cf.* General Motors Corp. v. Washington, 377 U.S. 436 (1964).

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by W to R. Similar schemes could be devised to tax sales by intermediaries even further removed from the final transaction.

Although any scheme that would tax sales by intermediaries in the marketing chain necessarily involves constitutional questions and practical problems of a prohibitive nature, the attempted taxation of sales further removed than the sale by the wholesaler to the retailer faces two other difficulties as well. The first of these is an insufficient designation of the taxable event. From a practical standpoint, how could the parties to a potentially taxable transaction know at the time of that transaction what later buyers in the chain will do? For example, if W, a wholesaler, sells to D, a distributor, and W, as seller, is potentially responsible for the tax, it would be impossible for W to know whether D will in turn sell to D_2, another distributor, or directly to a retailer. Moreover, though D's business practice normally involves sales to other distributors (thus relieving W of tax liability), the latter distributors in turn might again sell to other intermediaries or to retailers; hence, D would face the same dilemma as W. Even if by "certificates of intent" or similar documents W were able to ascertain what would be done with merchandise sold in a particular instance, to require D and other intermediaries to commit themselves in advance to positions regarding future sales of the merchandise would deprive them of a needed flexibility to respond to changes in the commercial market. Furthermore, query what W's position would be if D or a later distributor changed his mind subsequent to the sale.[17]

The second problem is derived from the first problem. D, in the above example, stands conceptually in the same position as W regarding his potential tax liability. Thus, both W and D might feel constrained to remit the tax on the same merchandise. To prevent such double taxation, a complicated system of refunds would have to be established. This would invariably involve a burdensome administrative scheme and a great deal of litigation, with resultant uncertainty on the part of W and D concerning their financial status.

To return, then, to the only intermediate transaction feasibly taxable as an alternative to taxation of sales by manufacturers, *i.e.*, the sale between the wholesaler or distributor and the retail merchant, it is clear that whenever the sale by W to R is the taxable event, provisions would also have to be made for sales by a manufacturer (or a wholesaler) directly to the consumer, since a direct sale avoids the taxable event. In a long marketing chain, wherein the movement of goods from the manufacturer to the consumer involves numerous sales transactions, a comprehensive sales tax act would necessarily have to provide for a sale directly to a consumer by anyone in the chain. Also, since a sale by a manufacturer directly to the retailer would

[17] For discussion of analogous difficulties in regard to the sale-for-resale exemption, see notes 90-99 *infra* and accompanying text.

otherwise avoid the taxable event, the manufacturer must be included within the term "wholesaler" for this purpose.

Although this system would not be impossible, the group of persons from whom the tax would be collected might be unnecessarily large if the seller in all such transactions was responsible to the state for the tax. Nor would the number of taxpayers necessarily be smaller if the retailer, the buyer here, were to remit the tax to the state. Morover, if the retailer were normally responsible for the tax, to enforce the tax upon sales by a manufacturer or intermediary in the chain directly to a consumer would be almost impossible. Whereas those connected with the basic sale taxable under the statute might be obliged to keep records, to require everyone to keep records who might bypass by direct sale the taxable event would result in the loss of any advantage sought in simplicity of enforcement and a limited number of taxpayers. The same would be true of any scheme whereby the tax would be levied on sales by intermediaries in the marketing chain. Some alleviation of potential tax evasion might be derived, however, from a provision requiring that a merchant be licensed to sell at retail.[18]

Assuming, then, that any conceptually practical advantage which the taxation of sales by intermediaries might share with taxation of sales by manufacturers has been refuted, it is necessary to consider difficulties which militate strongly against the use of either the sale by M to W or by W to R as the taxable event. For simplicity, the discussion will be in terms of the taxation of sales by manufacturers. As stated above, the sale by the manufacturer would be the event more easily taxable from an administrative point of view than the sale by the retailer to the ultimate consumer (though, of course, the two will in some cases be identical). However, as a practical matter, a large number of products consumed in a given state are manufactured out-of-state, and a sizable number of sales by manufacturers (the taxable event in the hypothetical scheme) will be by out-of-state producers.

If the foreign manufacturer-seller is responsible under the statute for remission of the tax to the state, two major problems emerge: (1) enforcement of the tax through litigation in the courts of other states; and (2) the risk that the application of the tax would violate the constitutional prohibition against state taxation of interstate commerce. From a practical standpoint, the larger the number of interstate taxable sales in proportion to the total number of transactions subject to the tax, the higher the costs of administration and enforcement would be, and, inversely, the less de-

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18 See, *e.g.*, COLO. REV. STAT. ANN. c. 138-5-3 (1963) (requiring all retailers to be licensed); OKLA. STAT. ANN. tit. 1309 (1966).

To prevent the difficulties that might occur if a sale was made at retail by a person without a license and not ordinarily in the business of retail selling, some states exempt "occasional sales." *E.g.*, N.J. STAT. ANN. § 54:32B-2(u) (Supp. 1966) ("casual sale" exempted); VA. CODE § 58-441.6(m) (Supp. 1966).

pendable the supply of tax revenue. The "full faith and credit clause"[19] notwithstanding, the courts of foreign states are still apt to advance the interests of their own citizens to the detriment of a sister state. Moreover, even were that not the case, and even in those instances where suit is removable to the federal courts, the cost of litigation and the relative uncertainty of tax income do not commend such a taxing scheme.

On the other hand, it is doubtful, with the present indefiniteness of the Supreme Court's position on a state's ability to tax transactions in interstate commerce, whether it would be prudent for a state to pass any revenue statute which relied so heavily on sales in interstate commerce.[20] The Court has stated that interstate commerce "must pay its way;"[21] but its articulation of the balance between the legitimate revenue interest of the states and the constitutionally granted dominion over interstate commerce in the federal government rests only upon a series of *ad hoc* decisions.[22]

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19 U.S. CONST. art. IV, § 1.

20 For a short general historical treatment of the vacillating approach of the Court to this problem, see HELLERSTEIN, *op. cit. supra* note 1, at 157-78.

21 Postal Tel.-Cable Co. v. City of Richmond, 249 U.S. 252, 259 (1919); see Galveston, H. & S.A. Ry. v. Texas, 210 U.S. 217, 225-27 (1908).

22 Although what constitutes unconstitutional taxation of sales in interstate commerce by the states is only incidental to the position taken in this Note, a brief treatment to illustrate the premises in the text is appropriate.

In Welton v. Missouri, 91 U.S. 275 (1875), the Court struck down as unconstitutionally discriminatory a state statute levying a license tax on persons (defined as "peddlers" in the statute) who, by going from place to place, sold goods or produce not produced in the taxing state. As the domestic merchants had no such tax expense, the cost to foreign producers was clearly higher. This position was reaffirmed and amplified in Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887). In that case the Court invalidated a Tennessee statute requiring an occupation license on any merchant or salesman, domestic or foreign, who did not have a licensed place of business in the taxing district. The Court went on to say that the states could not tax interstate commerce at all, although regulations affecting such commerce were permitted when derived from a legitimate exercise of the state's police power. Again, in Best & Co. v. Maxwell, 311 U.S. 454 (1940), an annual privilege tax of $250 on persons or corporations, not regular retail merchants, who displayed samples or solicited orders in a place temporarily rented for that purpose was invalidated as discriminating against interstate commerce, since local merchants were charged a privilege tax of only one dollar per annum.

Thus, the rule announced in *Robbins* apparently remains in force, and license or privilege taxes levied even uniformly as a prerequisite to doing business are a direct burden on interstate commerce. See West Point Wholesale Grocery Co. v. City of Opelika, 354 U.S. 390 (1957); Nippert v. City of Richmond, 327 U.S. 416 (1946).

However, the *Robbins* doctrine seems to be limited by a line of cases culminating in General Motors Corp. v. Washington, 377 U.S. 436 (1964), wherein the Court upheld a state privilege tax levied on the receipts from wholesale sales of a Delaware corporation operating in the taxing state. The Court felt that the activities of the taxpayer-dealers within the state constituted a sufficient "nexus" to permit the tax. *Id.* at 448. In the earlier cases of Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959) and Norton Co. v. Department of Revenue, 340 U.S. 534 (1951), the Court had upheld an income tax and gross receipts tax, respectively, levied on that portion of the

Despite certain recent decisions that may indicate a more liberal attitude toward the states' interest,[23] definitive guidelines for the exercise of a state's power to tax sales between citizens of different states have not been announced.[24]

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respective foreign corporation's interstate business reasonably attributable to its business activities within the taxing state, when each of the corporations maintained a business office through which it operated in the taxing state. The Court in *Northwestern* believed that the state's formula was a reasonable one to determine the proportion of the corporation's business attributable to the state, so that multiple taxation, a source of concern in several of the cases, was unlikely. Northwestern States Portland Cement Co. v. Minnesota, *supra* at 462-63; *cf.* Eli Lilly & Co. v. Sav-On-Drugs, Inc., 366 U.S. 276 (1961).

But exactly what contact with the taxing state constitutes a sufficient "nexus" remains in question. In McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944), a sales tax levied by Arkansas on sales solicited by representatives of a corporation located exclusively in Tennessee, the orders solicited being subject to approval by the corporation and no collections being made in Arkansas, was held invalid as an unconstitutional burden on interstate commerce. *Cf.* Freeman v. Hewit, 329 U.S. 249 (1946).

But the problem becomes even more complicated. In Western Live Stock Co. v. Bureau of Revenue, 303 U.S. 250 (1938), the Court upheld a state privilege tax levied on the gross receipts of a domestic corporation derived from sales of advertising and magazine circulation in interstate commerce. However, in J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938), an income tax levied on the gross receipts received by a domestic corporation from interstate sales, which constituted eighty per cent of its business, was held to be an unconstitutional burden on interstate commerce. *Accord*, Gwin, White & Price, Inc. v. Henneford, 305 U.S. 434 (1939). It is difficult to see, however, how the *Adams* factual situation is materially different from that in *Western Live Stock*. See J. D. Adams Mfg. Co. v. Storen, *supra* at 319-21 (Black, J., dissenting). Moreover, although the majority in *Adams* expressed concern over the possibilities of double taxation, considering the ruling in *Dilworth*, it is doubtful whether similar concern would be well-placed in an analogous situation today, since the Adams Company apparently did not have branch offices in other states. See J. D. Adams Mfg. Co. v. Storen, *supra* at 308-09.

However, it should be noted that when the tax levied is in the nature of a use tax, which is charged against the consumer, the tax has been held to be upon the privilege of consumption within the taxing jurisdiction, rather than upon interstate commerce. Henneford v. Silas Mason Co., 300 U.S. 577 (1937); see Minneapolis Iron Store v. State Tax Comm'n, 322 U.S. 335 (1944); McGoldrich v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940). It might be noted for comparison that the factual situation in *Minneapolis Iron Store* was closely analogous to that in *Dilworth*. See also notes 26-31 *infra* and accompanying text. See generally Hartman, *State Taxation of Interstate Commerce: A Survey and an Appraisal*, 46 VA. L. REV. 1051 (1960); Kust & Sale, *State Taxation of Interstate Sales*, 46 VA. L. REV. 1290 (1960). For purposes of comparison, Beck, *Constitutional Law—Sales Tax on Interprovincial Transactions—Collection from Non-resident Retailers—Reciprocal Enforcement of Tax Claims*, 42 CAN. B. REV. 490 (1964), presents a survey of the problems of sales taxation of inter-provincial commerce in Canada.

23 See General Motors Corp. v. Washington, 377 U.S. 436 (1964); Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).

24 Because of the confusion regarding state taxation of commerce, the need for Congressional guidelines is evident. In Note, *A Federal Act to Establish Use Tax Collection Standards*, 2 HARV. J. OF LEGIS. 167 (1965), a simple set of guidelines is proposed. In 1959, Congress itself recognized the need for legislation in this area by designating the House Judiciary Committee and Senate Finance Committee to make full studies of state taxation

If the buyer in the sale by the manufacturer is made responsible to the state for remission of the tax, some of the constitutional questions and enforcement problems suggested may be avoided, since the buyer may be within the taxing jurisdiction. However, if both parties to a sale are citizens of a foreign state, the taxing state would have no jurisdiction over the transaction. Thus, special provisions would have to be made to cover sales by any foreign business in the marketing chain to any domestic business in the chain. For example, in the hypothetical stated above, both the manufacturer and the first intermediate buyer concluded the transaction outside the taxing state. Conceivably, then, the first buyer could sell to another middleman in the same state, or to an intermediary, or directly to the consumer, in the taxing state. If the first buyer sells to a second who is also out-of-state, then the same sale alternatives present themselves as regards him. In other words, the taxing state must provide for the taxation of every potential sale, originating out-of-state, over which it could have jurisdiction. Obviously, the longer the potential marketing chain, the more complicated the statute becomes. As should be apparent, every advantage of taxing the original sale by the manufacturer has been lost, and the application of the hypothetical statute is encumbered with the many problems of administration and collection involved in taxing sales by intermediaries.

By a process of elimination, then, the sale at the termination of the marketing process—between retailer and ultimate consumer—becomes the most advantageous taxable event. Although taxation of the sale to the consumer does not allow for the ease of administration potentially available under a scheme taxing sales by manufacturers, it avoids most of the problems of a practical and constitutional nature involved in the taxation of sales either by manufacturers or intermediaries.[25] Of course, not all the problems suggested above are avoided when the sale by R to C is the taxable event. The foreign manufacturer or wholesaler can still sell directly to a domestic consumer, although the number of such sales should be comparatively minimal. However, most states have enacted use tax legislation to deal with precisely this problem.[26] Under such a tax, the purchaser of products from

of income derived from interstate commerce. Pub. L. No. 86-272, tit. II, §§ 201-02, 73 Stat. 556 (1959); see Hartman, *supra* note 22, at 1115. (Title I of the act prohibits the imposition of state *net* income taxes on a foreign corporation if its only business activity in the state is the solicitation of orders for the sale of tangible personal property.) Finally, in 1965 "The Interstate Taxation Act" was introduced in Congress, which provided a system for taxation of interstate commerce. H.R. REP. No. 11798, 89th Cong., 2d Sess. (1966). At the time of this writing, however, neither house of Congress has passed the measure. For a comprehensive treatment of the derivation of the act, as well as provisions of the act itself, see Note, 19 VAND. L. REV. 523, 544 (1966).

25 See notes 16-18, 20-24 *supra* and accompanying text.

26 See, *e.g.*, ALA. CODE tit. 51, § 787, as amended (Supp. 1966); FLA. STAT. ANN. § 212.05 (1958); VA. CODE § 58-441.5 (Supp. 1966). Commerce Clearing House lists forty-two states

foreign sellers for use or consumption in the taxing state is liable for the tax. Usually, the amount of the tax levied is on a shifting scale, which is designed to bring the total tax cost to the consumer to the same level as the sales tax cost would have been if the article had been purchased in the taxing state. For example, if a citizen of Georgia, which has a three per cent sales tax,[27] purchases an automobile directly from a dealer in Alabama, which levies a one and one-half per cent sales tax on automobiles, trucks, and house trailers,[28] the consumer would be liable to the State of Georgia for an additional tax amounting to one and one-half per cent of the purchase price.[29] As a practical matter, however, the dealer in the foreign state will probably be liable to the taxing state for remission of the tax.[30] The tax itself is justified by the legitimate state interest in the encouragement and protection of local industry and commerce, which should not be damaged by unequal competition with nonresident businesses having lower consumer costs because of lower taxes.[31] Since the domestic consumer is under the jurisdiction of the taxing state, he can be discouraged from purchasing out-of-state by being required to pay the tax imbalance. Sales by domestic wholesalers directly to the consumer would be taxable in the same manner as sales by the retailer to the consumer.[32] However, the sale-for-resale exemption mentioned previously will exempt wholesalers from the tax when the sale is made to a licensed retailer in the ordinary course of business for purposes of resale.[33]

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which have some form of use or "compensating" tax. CCH STATE TAX GUIDE 6001 (2d ed. 1959) (1967 loose-leaf listings).

27 GA. CODE ANN. § 92-3402a(a) (1961 rev.).

28 ALA. CODE tit. 51, § 786(3)(d) (Supp. 1966).

29 See GA. CODE ANN. § 92-3412a (1961 rev.).

30 See, *e.g.*, GA. CODE ANN. § 92-3405a (1961 rev.); KAN. STAT. ANN. § 79-3702 (Supp. 1965); MD. ANN. CODE GEN. LAWS art. 81, §§ 376, 379 (1965). Each of these statutes require collection of the use tax by the vendor. Again, as with the sales tax, the vendor must have "sufficient contact" with the state to be liable for remission of the tax. Scripto, Inc. v. Carson, 362 U.S. 207 (1960); compare cases cited note 22 *supra*. In *Scripto*, the Comptroller for the state of Florida was attempting to collect from the appellant Georgia corporation the amount of use taxes appellant had failed to collect from Florida purchases. Appellant solicited orders from Florida through resident independent wholesalers and jobbers, though it maintained no actual place of business in that state. Under FLA. STAT. ANN. § 212.06 (1958), the out-of-state vendor was liable only if he failed to collect the tax from the Florida purchaser. In upholding the tax and the collection responsibilities, the Court noted that the tax was actually upon the purchaser. Scripto, Inc. v. Carson, *supra* at 211. See generally Note, *Sales and Use Taxes: Collection from Absentee Vendors*, 57 HARV. L. REV. 1086 (1944).

31 See *In re* Los Angeles Lumber Products Co., 45 F. Supp. 77, 81 (1942).

32 Usually, the provisions defining "retail sale" in most acts, when read with the provision exempting sales for resale, would include sales by a wholesaler unless to a retail merchant for resale, and the wholesaler would be responsible for the collection of the tax. See, *e.g.*, CONN. GEN. STAT. ANN. § 12-407(3) (1960); IDAHO CODE § 63-3609 (Supp. 1965).

33 See note 32 *supra*.

Thus, the balance between the operation of the sales and use tax acts gives the taxing state a reasonably firm control over its revenue income. Registration or license requirements[34] and penalties for failure to keep records[35] or to remit the taxes when due[36] insure reasonably adequate compliance and expedite enforcement.

II. Who Is the Taxpayer?

Having determined that the most logical transaction to which to attach the sales tax is the sale by the retailer to a consumer, a prime concern is to ascertain which of the two parties to the sale should bear the tax. This is not a mere tautological inquiry: the right to a deduction from the federal income tax,[37] the liability to the state for failure to pay the tax and the duty of care coincident thereto, the right to maintain an action for refund, and the proper interpretation by the courts under varied factual situations all depend on the resolution of this question.

It is obvious that to require every consumer to be responsible for remission of the tax directly to the state is a practical impossibility. Evasion would be extremely easy, whereas attempts at enforcement would be abortive and the administrative costs prohibitive. Thus, it devolves upon the retailer to pay the tax to the state,[38] regardless of whether he is in reality the "taxpayer." Herein lies the confusion: If the consumer is indeed intended to pay the tax *qua* taxpayer, and not just as the purchaser to whom the tax costs of the retailer are passed as part of the purchase price, the failure of the legislature to specifically so indicate can result in judicial emphasis on the rather detailed administrative procedures in most statutes regarding remission of the tax to the state by the retailer.[39] On the other hand, if the legislature intended the retailer to be the taxpayer and intended that he merely pass his tax costs to the consumer as an appendage to the price, failure to so specifically indicate can readily result in a judicial construction of the statute that makes the consumer the ultimate taxpayer. This confusion is heightened by provisions in many statutes that the retailer must also remit

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34 *E.g.*, Md. Ann. Code Gen. Laws art. 81, §§ 360, 362 (1965) (permanent license on payment of one dollar); R.I. Gen. Laws §§ 44-19-1, 44-19-2 (Supp. 1966) (five-dollar fee for permanent permit); Utah Code Ann. § 59-15-3 (1953) (license to be renewed annually, no fee). See chart, P-H State & Local Tax Serv. ¶ 92,967 (1961).

35 *E.g.*, Ga. Code Ann. § 92-3428a (1961 rev.); La. Rev. Stat. Ann. § 47:309 (1952).

36 *E.g.*, Md. Ann. Code Gen. Laws art. 81, § 344 (1965); Utah Code Ann. § 59-15-5 (1953).

37 Int. Rev. Code of 1954, §§ 164(a)(4), 164(b)(2).

38 *E.g.*, R.I. Gen. Laws §§ 44-18-22, 44-19-10 (Supp. 1966); La. Rev. Stat. Ann. § 47:306 (Supp. 1966); Utah Code Ann. § 59-15-5 (1953).

39 See notes 34-36, 38 *supra*; Ga. Code Ann. §§ 92-3424a, 92-3426a–92-3434a (1961 rev.). The Georgia sections cited are typical of the provisions for hearings when no report, or a fraudulent one, is made, penalties, record-keeping requirements, and similar administrative matters.

any amounts received from the consumer in passing on his tax costs which exceed the amount he (the retailer) originally remitted.[40]

Not atypical of this confusion-through-construction is the situation which arose in Georgia in recent years. In *Bear's Den, Inc. v. State*,[41] to a *fi. fa.* issued by the state and levied upon defendant's property, the defendant entered as a defense that the sales tax monies collected for remission to the state were stolen without fault on defendant's part.[42] The Court of Appeals of Georgia, relying on section 12(a) of the Consumers' Sales and Use Tax Act of 1951,[43] which stated that the tax was intended to be on the consumer and that the retailer was merely an agent of the state for collection,[44] held

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40 Such a provision is found in Arizona's "transaction Privileges Taxes" Act, which apparently is levied on the retailer or dealer:

> For the purpose of this article the total amount of gross income, gross receipts or gross proceeds of sales shall be deemed to be the amount received, exclusive of the tax imposed by this article, if the person upon whom the tax is imposed establishes to the satisfaction of the commission that the tax has been added to the sale price and not absorbed by him, *but in no event shall the person upon whom the tax is imposed,* when an added change is made to cover the tax levied by this article, *remit less than the amount so collected to the commission.*

ARIZ. REV. STAT. ANN. § 42-1302 (1956). (Emphasis added.) As a practical matter, since the tax rate is expressed as a percentage rather than as so many cents for each price gradient (*e.g.*, 1 cent, up to 15 cents; 2 cents, up to 40; etc.), a retailer would be inclined to remit a straight percentage of his receipts during the taxable period. But as the Arizona Supreme Court stated in construing the almost identical predecessor of the above section,

> We take judicial notice that some vendors, particularly those handling numerous small sales under one dollar, itemize on the purchaser's billing one cent as purported tax commencing at 15 cents, and two cents above fifty cents. By such practice the retailer may collect from the consumer, under the guise of a tax by the state, an amount in excess of two per cent of his gross proceeds of sale . . . . It is thus apparent that by the amendment the seller is prevented from profiting at the expense of the purchaser under the guise of a compulsory tax.

Arizona State Tax Comm'n v. Garrett Corp., 79 Ariz. 389, 392, 291 P.2d 208, 210 (1955). Georgia has a provision which apparently has a similar effect. See GA. CODE ANN. § 92-3416a (1961 rev.).

41 97 Ga. App. 288, 102 S.E.2d 915 (1958).

42 It has been suggested that where a retailer fails to keep the taxes collected separate from his business receipts, a loss of the tax monies through theft would probably not relieve the retailer of the burden of remitting the tax to the state. Hartman, Henry & Foster, *Sales Taxation Collection Problems*, 9 VAND. L. REV. 316, 338-39 (1956); see Spencer v. Mero, 52 So. 2d 679, 680 (Fla. 1951) (dictum). The retailer would have an almost impossible burden in proving that the funds stolen were in part actually collected tax monies.

43 Ga. Laws 1951, No. 240, p. 360.

44 Ga. Laws 1951, No. 240, p. 360, § 12(a). This section read, in part, as follows:

> The privilege tax herein levied, . . . shall be collected by the dealer from the purchaser or consumer. Notwithstanding any other provision, it is the purpose and intent of this Act that the tax imposed hereunder is, in fact, a levy on the purchaser or consumer of the tangible personal property or services described in

that the defendant-retailer was "at most an involuntary agent" of the state, and was not liable for the stolen monies except in the absence of the exercise of ordinary care and diligence.[45]

The Supreme Court of Georgia, however, took a different view.[46] Emphasizing the constructional rule that all parts of a statute must be read and construed together, the court, relying heavily on the various administrative regulations governing the remission of the tax by the retailer,[47] concluded that the tax was actually intended to be upon the retailer, notwithstanding the provision relied upon below.[48] The court reasoned that if the retailer was himself the taxpayer, the loss due to theft was a personal one and did not relieve him of individual responsibility for the tax; thus, the defense interposed was ineffective.[49]

Considering the clarity and force of section 12(a) of the act,[50] the Supreme Court's decision seems highly questionable. Nonetheless, the court perpetuated its position when, in late 1959, it was presented with the case of *Oxford v. J. D. Jewell, Inc.*[51] In that case, the State Revenue Commissioner was appealing from a superior court judgment in favor of the plaintiff-retailer for a refund of taxes paid on sales of poultry to the United States Army. The plaintiff had argued that the tax was prohibited by the United States Constitution because the levy violated federal immunity from state taxation.[52] The plaintiff further relied on a rather ambiguous provision of the Consumers' Sales and Use Tax Act[53] which excluded "sales which a state would be without power to tax under the limitations of the Constitution of the State or the United States . . . ."[54] The Georgia court, following *Bear's Den,* held that, since the tax was on the retailer, the tax was not levied against the United States and therefore was not unconstitutional.[55]

this Act, and the levy on dealers as specified is merely as agent [sic] of the State for collection of said tax . . . .

45 Bear's Den, Inc. v. State, 97 Ga. App. 288, 290, 102 S.E.2d 915, 916 (1958).

46 The case was appealed *sub nom.* Williams v. Bear's Den, Inc., 214 Ga. 240, 104 S.E.2d 230 (1958).

47 See Ga. Laws 1951, No. 240, p. 360, §§ 12(b), 16(b), 16(c), 19, 24.

48 Williams v. Bear's Den, Inc., 214 Ga. 240, 243, 104 S.E.2d 230, 233 (1958); see note 44 *supra.*

49 Williams v. Bear's Den, Inc., *supra* note 48, at 243-44, 104 S.E.2d at 233. The court construed § 12(a) as being merely descriptive of the relationship between the taxpayer, retailer and the consumer, and not as definitive of the relationship between the retailer and the state. Williams v. Bear's Den, Inc., *supra* note 48, at 243, 104 S.E.2d at 233.

50 See note 44 *supra.*

51 215 Ga. 616, 112 S.E.2d 601 (1960).

52 U.S. CONST. art. VI, clause 2; see M'Cullough v. Maryland, 4 U.S. (4 Wheat.) 415 (1819).

53 Ga. Laws 1951, No. 240, p. 360.

54 Ga. Laws 1951, No. 240, p. 360, § 3(c), 2(d).

55 Oxford v. J. D. Jewell, Inc., 215 Ga. 616, 622-23, 112 S.E.2d 601, 605 (1960). The state had conceded that it could not constitutionally levy a sales tax on the vendee, United

About one year later, the Georgia legislature sweepingly amended the sales tax act, their purpose being, in part, "to remove ambiguities which have become apparent with respect to upon whom the tax is levied and imposed, and to clarify the Act so as to make it clear that the legal imposition of the tax is upon the purchaser. . . ."[56] Section 3(c), 2(d) of the 1951 act was also amended to exempt all sales to the United States.[57]

What is patently clear from this development in Georgia is the confusion likely to develop from legislative omission, legislative non-integration of the parts of the sales tax legislation, and judicial failure to grasp the crucial policy considerations underlying the scheme. But the Georgia situation is not unique. For example, in the case of *Spencer v. Mero,*[58] the Florida Supreme Court was faced with a fact situation identical to that dealt with by the Georgia courts in *Bear's Den,* the defendant-retailer interposing the same defense. The Florida statute had been labelled a "privilege tax" by the legislature.[59] Yet, although the dealer was responsible to the state,[60] the amount of the tax was to be added to the purchase price and collected from the consumers.[61] The amount of the tax was to be a debt owed by the consumer to the retailer.[62] The court, after stating the above facts concerning the tax scheme, determined, without elucidation of its rationale, that the buyer was the taxpaper.[63] Eight years later, in *Green v. Panama City Housing Authority,*[64] the Florida court was again presented with the question of who was the taxpayer, but in a different factual situation.[65] The court expressly repudiated the *Mero* decision and held that the retailer was the taxpayer.[66] Again, although clearly overruling *Mero,* the court failed to explain its reasoning.

States. *Id.* at 617, 112 S.E.2d at 602. Had the sales tax in fact been intended to be levied on the vendor, the court's reasoning would seemingly have been correct. See Federal Reserve Bank v. Department of Revenue, 339 Mich. 587, 64 N.W.2d 639 (1954) (sales to bank not exempt, gross receipts tax on vendor).

56 Ga. Laws 1960, No. 509, p. 153. Section 12(a) of the 1951 act was stricken and replaced, and other sections relied upon by the court in *Bear's Den* were amended. *Compare ibid.,* with Ga. Laws 1951, No. 240, p. 360.

57 Ga. Laws 1960, No. 509, § 2.

58 52 So. 2d 679 (Fla. 1951).

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

60 See FLA. STAT. ANN. § 212.04(4) (1958).

61 FLA. STAT. ANN. § 212.07 (1958).

62 *Ibid.*

63 Spencer v. Mero, 52 So. 2d 679, 680 (Fla. 1951).

64 115 So. 2d 560 (Fla. 1959).

65 The respondent Authority had moved for summary judgment absolving it of tax liability as lessor. This was denied, although the comptroller, who was relying on FLA. STAT. ANN. § 212.03 (1958) for respondent's liability, was temporarily enjoined. Section 212.03 provided that the lessor was to collect from the lessee a tax amounting to three percent of the total rental charge and remit it to the state.

66 Green v. Panama City Housing Authority, 115 So. 2d 560, 562 (Fla. 1959).

The responsibility for this confusion would seem to rest primarily with the legislature. If the tax was levied upon the privilege of selling at retail, to pass the tax *qua* tax on to the consumer seems inconsistent. If, however, the legislature had meant to tax the "privilege of buying," its failure to clearly indicate which "privilege" was to be taxed is inexcusable. A privilege or occupation tax would, by its being denominated as such, appear to be levied upon the retailer. The fact that retail licenses are so often required by the states would buttress this conclusion.[67] Certainly, the protection given by the state through its laws and their enforcement to the property and business activities of a retailer would merit the taxation of one who voluntarily wishes to have this protection extended to him. On the other hand, consumption is largely a necessity, and when the tax is levied upon the sale of a large variety of products, as under most retail sales tax schemes, to denominate buying as a "privilege" is highly questionable.

Indeed, the retail sales tax—in contradistinction to privilege, occupation, gross receipts and similar taxes—with its characteristic passing of the tax as such to the consumer,[68] can be justified only as a tax upon the privilege of buying. If it is not upon that privilege, as mentioned above, there seems no compelling reason to require the collection of the tax *qua* tax from the consumer. It has been suggested that if the tax was not passed to the consumer, the retailer would in fact raise his prices more than warranted by the tax cost to him.[69] However, this argument fails to consider the pressures of competition, which would serve to keep any feared excessive change in price within bounds. Moreover, the same argument could be made in regard to federal and state income tax levies, or any other tax cost; yet the legislatures have not seen fit to require that the consumer bear these taxes. This rationale as the basis for the collection of the tax from the consumer seems therefore somewhat inappropriate.[70] Thus, it would seem that the consumer must be the taxpayer under a retail sales tax scheme, and that the tax is upon the "privilege" of consumption.

III. Inter-Relationship of the State, Retailer and Consumer

Having determined the proper party to be denominated as taxpayer under the retail sales tax, it is important to determine the nature and consequences of the relationships among the state, the retailer-collector, and the taxpayer-consumer.

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[67] See note 34 *supra*.

[68] See chart, P-H State & Local Tax Serv. ¶ 92,967 (1961); see also note 40 *supra*.

[69] See Arizona State Tax Comm'n v. Garrett Corp., 79 Ariz. 389, 392, 291 P.2d 208, 210 (1955); Shultz & Harriss, American Public Finance 319-20 (8th ed. 1965).

[70] *But see* Arizona State Tax Comm'n v. Garrett Corp., *supra* note 69.

Consumer-State Relationship

The consumer's relationship to the state is the most easily defined. As the taxpayer, the consumer's liability is fixed by the purchase and the collection should be enforceable, directly or indirectly, by the state.[71] Furthermore, the consumer-taxpayer should be the proper party to maintain an action for refund.[72]

Consumer-Retailer Relationship

The consumer's relation to the retailer, despite the position of the latter with regard to the state, should be the same as his relation to the state, since the retailer would stand in the shoes of the state for purposes of collection.[73] However, the standing of the retailer to sue a remiss consumer in behalf of the state is questionable. To avoid this problem, some sales tax statutes define the consumer-retailer relation as that of a debtor to a creditor, with the tax debt being collectible at law by the retailer in the same manner as any other debt.[74] This suit, however, would apparently be brought personally by the retailer. Usually, co-ordinate with this type of statutory assignment of responsibilities, the retailer is made a debtor to the state for remission of the tax.[75] Presumably, then, an action could be maintained by a retailer to recover the unpaid sales tax from a consumer whether or not the former's liability to remit to the state has arisen at the time. The actual debt liability of the retailer would in any case arise, however, at the time of the sale.[76]

But in the absence of express statutory assignment of legal position, the

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71 See generally P-H STATE & LOCAL TAX SERV. ¶¶ 92,740–92,750 (1961) and cases cited therein.

72 Thus, in Atlanta Americana Motor Hotel Corp. v. Undercofler, 222 Ga. 295, 149 S.E.2d 691 (1966), the court held in part that plaintiff hotel owner had no standing to challenge the constitutionality of the tax since, as collector and not the taxpayer, he had not been injured. Similarly, in Cook v. Sears, Roebuck & Co., 212 Ark. 308, 206 S.W.2d 20 (1947), the court denied plaintiff company's suit for refund, since as mere collector the plaintiff would be unjustly enriched by the refund. See also Harris & Russell, *The Annual Survey of Virginia Law: Taxation*, 53 VA. L. REV. 234, 237 n.12 (1967) (discussing retailer's inability to sue for refund under Virginia act).

73 See, *e.g.*, GA. CODE ANN. § 92-3414a (1961 rev.); LA. REV. STAT. ANN. § 47:306 (1952).

74 See, *e.g.*, COLO. REV. STAT. § 138-5-6(2) (1963); CONN. GEN. STAT. ANN. § 12-408(2) (Supp. 1966); LA. REV. STAT. ANN. § 47:304, as amended (Supp. 1966); WASH. REV. CODE ANN. § 82.08.050 (Supp. 1966).

75 *E.g.*, UTAH CODE ANN. § 59-15-11 (1953); see COLO. REV. STAT. § 138-5-24(7)(a) (1963); LA. REV. STAT. ANN. § 47:304, as amended (Supp. 1966).

76 Since the occasion of the taxable event, the retail sale, gives rise to the consumer's liability to pay the tax, obviously the collection responsibilities must arise coordinately. See, *e.g.*, GA. CODE ANN. § 92-3405a (1961 rev.); R.I. GEN. LAWS § 44-18-22 (Supp. 1966). The periodic dates assigned for the remission of the tax by the retailer would seem to be mainly for reasons of convenience.

retailer's duties as collector should not give rise *per se* to a right to sue the remiss consumer. The state is the party at interest, and the attorney-general would be the proper party to represent the state.[77] However, when the retailer would be individually liable for remission of taxes which had not been collected through no fault of his own, the retailer should be entitled to sue the consumer even without express statutory authority, since without such a privilege he would not be able to protect himself from the state's claims.

Retailer-State Relationship

The retailer's degree of responsibility to the state is most complex. This issue has already been touched upon in the discussion of the *Bear's Den* problem. Though it is unequivocably clear that the retailer will pay over collected taxes to the state, few statutory schemes provide any indication of the level of that responsibility. As mentioned previously, some statutes define the retailer-state relationship, expressly or by implication, as that of a debtor-creditor.[78] Other statutes label the retailer as an "agent" for purposes of collection.[79] It will be remembered that the Georgia Court of Appeals in *Bear's Den* had stated that this label in the sales tax statute made the retailer "at most an involuntary agent."[80] This statement highlights the duty of care intimately associated with the retailer's collection duties. Obviously, the determination of the burden that attaches to the collection responsibility will ultimately determine whether the retailer is liable in any given situation, irrespective of the consumer's conduct or liability.

Since, as has been argued, the retailer is not properly the taxpayer under a retail sales act, absolute responsibility for the tax, as was imposed by the Georgia Supreme Court in *Bear's Den*, should not be predicated upon the collection burden. However, the retailer might be deemed to be holding the funds in a fiduciary capacity for the state. Indeed, the duties of accounting and periodic remission imposed suggest a trustee's reporting responsibility.[81] But the essence of the trust is the diversity of legal and equitable title,[82] both of which reside in the state in the instant context.[83] Moreover,

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77 *Cf.* GA. CODE ANN. § 92-3415a (1961 rev.) (attorney-general must be sent copy of initial pleading); WASH. REV. CODE ANN. § 82.08.050 (Supp. 1966) (attorney-general may proceed against remiss consumer for tax).

78 See statutes cited note 75 *supra*.

79 *E.g.*, GA. CODE ANN. § 92-3414a (1961 rev.); LA. REV. STAT. ANN. § 47:306 (1952).

80 Bear's Den, Inc. v. State, 97 Ga. App. 288, 290, 102 S.E.2d 915, 916 (1958).

81 See generally BOGERT, TRUSTS 358-66 (4th ed. 1963).

82 See RESTATEMENT (SECOND), TRUSTS § 2 (1959); BOGERT, *op. cit. supra* note 81, at 1. Nonetheless, several states impose a trustee's obligation upon the retailer. See, *e.g.*, COLO. REV. STAT. § 138-5-24 (1963); MD. ANN. CODE GEN. LAWS art. 81, § 379 (1965); R.I. GEN. LAWS § 44-19-35 (Supp. 1966); WASH. REV. CODE ANN. § 82.08.050 (Supp. 1966).

83 Assuming that the tax paid by the consumer is not excessive, the tax money, once

the characteristics of investment of other's property for personal remuneration that have given rise to the fiduciary responsibilities of directors and majority stockholders in the corporate and banking contexts are here absent. The retailer does nothing more than involuntarily collect, hold, and pay over the funds as required by the state. Despite the great public interest in the receipt of taxes by the state, the ability of the state to oversee and enforce the collection and to penalize infractions creates such an imbalance in favor of the state that any artificial imposition of fiduciary responsibility upon the retailer seems unwarranted.[84]

Several states, as mentioned above, make the retailer liable as a debtor for payment of the sales tax.[85] This assignment of burden is consistent with the consumer-retailer, debtor-creditor relationship as described, but seems inconsistent with the basic premise that the consumer is the taxpayer. For if the retailer fails to collect the tax from the consumer—at the time of purchase, by suit, or otherwise—he will nonetheless be liable to the state for the tax due.[86] Undoubtedly, the rationale and policy underlying this theory are to assure the state of its tax revenue and to encourage, if not indirectly enforce, the conscientious collection of the tax from the consumer. And, since in reality the two-step debtor-creditor relationship facilitates for the most part the smooth flow of tax revenue from the consumer to the state, the theory in practical operation will usually not be inconsistent with the consumer-as-taxpayer concept. However, a simple example will readily illustrate the point of divergence. In many jurisdictions a contractor is considered the consumer of building materials he purchases for use in his construction,[87] and the sale-for-resale exemption, if any, would therefore be inapplicable. A supplier of such materials will often extend full credit to the contractor for such supplies. If the contractor resells the materials to a bona fide purchaser or otherwise put them beyond the reach of the retailer-supplier, the latter will suffer considerable tax expense above the bad-debt loss by virtue of his relationship to the state if the contractor is insolvent.[88] It is conceivable that the supplier could have

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paid, can no longer belong to the consumer. Nor does the retailer have title to the tax monies he collects, since his authority to so collect is derived from the state and for its benefit.

84 It is recognized, however, that an agency relationship likewise imposes fiduciary obligations in some respects. See generally SEAVEY, AGENCY 234-52 (1964).

85 See statutes cited note 75 *supra*.

86 See, *e.g.*, GA. CODE ANN. § 92-3415a (1961 rev.); LA. REV. STAT. ANN. § 47:304, as amended (Supp. 1966).

87 See, *e.g.*, CAL. REV. & TAX. CODE § 6094, as amended (Supp. 1966); PAGE'S OHIO REV. CODE ANN. § 5739.02(14) (Supp. 1966); Craftsman Painters & Decorators, Inc. v. Carpenter, 111 Colo. 1, 137 P.2d 414 (1943).

88 Obviously, in a situation like that presented in *Bear's Den* and *Spencer v. Mero*, the retailer would not be relieved of his liability to the state by virtue of the theft loss of the

used sound discretion and reasonable diligence, based on past business dealings or personal knowledge of the consumer or his reputation. But, in such a situation the retailer's liability is as fixed as if he were intended to be the taxpayer. The result is justifiable by virtue of the added consideration to be given the potential loss to the public interest over the potential loss to private interests. But such results also produce the confusing conceptual anomaly of a dual-taxpayer scheme, whereby the retailer is left at the mercy of both state and consumer merely by virtue of doing business.

More consistent with the basic concept of the consumer-as-taxpayer is the recognition that the retailer is in reality acting in an agency capacity.[89] If the consumer is the taxpayer, the retailer is simply the conduit by which the former's obligation to the state is satisfied. The retailer, then, is merely holding the money for the state to be delivered as required. Public policy in this situation would demand that the retailer be charged at least with the duty of ordinary and reasonable diligence and care. Yet, even where this lesser burden is imposed upon the retailer, a loss of tax revenue resulting from the contractor hypothetical posed earlier would be borne by the state when the seller exercises due care. Moreover, the responsibility of suit against the individual consumer for non-payment of taxes would probably also devolve upon the state, as opposed to the personal cause of action by the state against the retailer, and in turn by the latter against the consumer.

Admittedly, the retailer-as-agent approach does not place the state in the most favorable position, but the slight potential injury to the public interest does result in a more equitable and realistic treatment of the retailer. Furthermore, to generally impose a tax on the consumer, but then to hold the retailer liable in those instances in which the tax is not forthcoming from that source, suggests deprivation of property without due process. In any case, to impose such a shifting and uncertain burden upon the retailer is too much of an imposition when based essentially upon the privilege of doing business within the state.

The sale-for-resale exemption as it appears in several state acts further highlights the need for defining the retailer's burden of responsibility. Often, the sale-for-resale exemption is provided within a statute only as part of the definition of wholesale or retail sales.[90] Such statutes normally

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collections and, the consumers having already paid the tax, would similarly be without a remedy. See notes 41-66 *supra* and accompanying text.

89 It is unlikely that the retailer could be deemed a bailee. The state is the only conceivable bailor; yet the delivery of possession by the bailor to the bailee that typifies bailment relations is missing in the tax-collection context described here. See generally BROWN, PERSONAL PROPERTY 285 (2d ed. 1955); FOX, SALES & BAILMENTS 85 (1963).

90 *Compare, e.g.,* LA. REV. STAT. ANN. § 47:301(10) (1952) (exemption through definition of "retail sale"), *with* UTAH CODE ANN. §§ 59-15-2(d), 59-15-5 (1953) (exemption through

condition the exemption upon satisfaction of the general administrative provisions contained in the respective act.[91] The problem arises under a limited provision of this sort when a retailer takes part of his stock in trade for personal use. In this situation, the retailer has become the consumer of the item, and some statutes specifically so provide.[92] Thus, the sale from the wholesaler to the retailer becomes the taxable event by virtue of the retailer's later actions. When the item kept for personal use by the retailer is an automobile, boat or other expensive commodity, the sales tax to be levied is a considerable amount. Clearly, the state should not have to tolerate a loss of taxes by such evasion, and the retailer here is ultimately liable for the tax. But, as stated before, it is a practical impossibility for the state to require direct remission of the sales tax by every consumer, and of necessity the responsibility of collection has devolved on the seller.[93] In what position, then, does the retailer's personal consumption of his stock in trade leave the wholesaler? If the seller-state relationship is that of debtor-creditor, the wholesaler would be liable to the state for the amount of tax and left to pursue a similar action against the retailer.[94] This would be so even though the wholesaler had made every effort to determine whether the retailer actually intended to resell the goods. The wholesaler in such a situation is left completely at the mercy of the retailer-consumer. If the retailer in fact intends to personally consume the goods at the time of sale, it would be impossible for the wholesaler to determine this. Similarly, if the retailer actually intends to resell the goods at the time he purchases them from the wholesaler, but later decides to consume the goods, a wholesaler who was not on personal terms with his retailer-buyers would likewise have no ready means of ascertaining this change of mind. Although the retailer's conduct in the latter situation seems less reprehensible than the fraudulent, if not criminal, behavior in the former, the motive of his purchaser is of little concern to the wholesaler. In either event, his interest as a potential taxpayer in a definite and readily ascertainable taxable event, an essential criterion of a fair and properly administered tax scheme, is here defeated. Furthermore, to expect the wholesaler to follow the subsequent sales history of every item sold is commercially unreasonable and impossible in many cases. For example, a distributor of several lines of paper goods or toys to several major department stores could not be required to trace each article sold in order to protect himself.

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definition of "wholesale sale"; also, more descriptive regulation) *and* statutes cited notes 95-97 *infra*.

91 LA. REV. STAT. ANN. § 47:301(10) (1952).

92 See CAL. REV. & TAX CODE § 6094, as amended (Supp. 1966); CONN. GEN. STAT. ANN. § 12-410(4) (1960); UTAH CODE ANN. § 59-15-5 (1953).

93 See notes 73-75 *supra* and accompanying text.

94 See note 75 *supra* and accompanying text.

Several states have attempted to protect the wholesaler by statute. The usual provision relieves the wholesaler of the burden of proving that the sale was not at retail if in good faith he takes a certificate from a licensed retailer stating that the goods are purchased for resale.[95] Normally, the certificate must contain information about the retailer, *e.g.*, his name, address, license or permit number, and some description of the merchandise sold.[96] Also, many statutes require that a statement be made in the certificate to the effect that the transaction is in the ordinary course of business.[97] It is questionable, however, whether such a statute fully protects the wholesaler. Presumably, although the burden of proving that the sale was within the exemption is removed, whatever presumption is raised by the certificate could be rebutted by the state.[98] Hence, the wholesaler may be forced to litigate with the state, and in a close case might still be held liable for the tax.

If, on the other hand, the sale-for-resale exemption problem is approached with the assumption that the retail seller is merely an agent for the state, a wholesaler who exercises due care to determine that the sale is for resale should be absolved of any liability to the state for the retailer's subsequent consumption of the goods.[99] However, as a result the state is placed in the same position as regards the tracing of goods sold as is the wholesaler under the debtor-creditor theory. The great public interest in the non-evasion and certain collection of all taxes due conflicts with such

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95 *E.g.*, CAL. REV. & TAX. CODE § 6092, as amended (Supp. 1966); CONN. GEN. STAT. ANN. § 12-410(2) (1960); R.I. GEN. LAWS § 44-18-25 (1956).

96 See CONN. GEN. STAT. ANN. §§ 12-410(1), (3) (1960); R.I. GEN. LAWS § 44-18-25 (1956).

97 See, *e.g.*, CAL. REV. & TAX. CODE § 6092, as amended (Supp. 1966); CONN. GEN. STAT. ANN. § 12-407(3) (1960); R.I. GEN. LAWS § 44-18-8 (1956).

98 For example, consider the language of the Rhode Island statute:

> The burden of proving the contrary is upon the person who makes the sale and the purchaser, unless the person who makes the sale takes from the purchaser a certificate to the effect that the purchase was for resale. The certificate relieves the person making the sale from the burden of proof only if taken in good faith from a person who is engaged in the business of making sales at retail and who holds a permit as provided . . . and who, at the time of making the purchase, intends to sell what is so purchased in the regular course of business or is unable to ascertain at the time of purchase whether the same will be sold or will be used for some other purpose . . . .

R.I. GEN. LAWS § 44-18-25 (1956). Note that the wholesaler is relieved of the burden only if the sale was made in good faith, and the purchaser had a permit and intended to resell. In the absence of any provision to the contrary, it is conceivable that if a purchaser lied about his intent, or had procured his permit by fraud, the state might be able to sue the wholesaler for failure to collect the tax due. In any case, the wholesaler might well be in court regularly over the factual issues of good faith and intent.

99 What would constitute "due care" might be a problem. The easiest solution would be to require the wholesaler, by statute, to take a certificate in order to satisfy his burden. See notes 95-98 *supra*. However, even in the absence of an applicable statute, the wholesaler should not be required to investigate the purchaser.

a resultant position for the state. The unfortunate alternative, however, is to disregard the agency relationship and to require the wholesaler to have the same burden that he would have under the debtor-creditor theory, which would be patently inconsistent with the consumer-as-taxpayer concept, the essential characteristic of the retail sales tax.

IV. Conclusion

It becomes clear, then, that if a retail sales tax statute, by its terms or through court construction, imposes a level of responsibility for the collection of taxes and retention of the funds for the state greater than that of ordinary and reasonable care, the retail seller is placed in a most inequitable position. On the other hand, reformation of the seller's position will not be a panacea. A state could, with comparative ease, amend its retail sales tax statute to clearly denominate the consumer as the taxpayer, and to delineate and modify the seller's responsibility with regard to the tax as one of ordinary care, predicated upon an agency relationship to the state. But, as has been intimated throughout this Note, lessening the burden upon the retailer would result in a proportionate increase in the burden upon the state to successfully and inexpensively collect all taxes due. The difficulties involved in the collection of the sales tax by the state from a retailer who consumes part of his stock in trade, where the wholesaler need exercise only reasonable care under the sale-for-resale exemption, would be typical of this increased burden. As with the wholesaler, the state would be unable to trace the sales history of each item sold at wholesale within its boundaries, and evasion would be extremely simple.

Inherent in this greater burden would also be the problem of enforcement. The larger number of consumers who might fail to pay, as well as the remiss retailers mentioned above, would have to be sued individually. When considered as a dollar amount, the sum total of these obligations would undoubtedly be considerable; however, the sum owed by a particular individual would in most cases be so small as to make suit for collection of the tax impractical and inordinately expensive. No state should have to rely on such uncertainties for its revenue income. Nor should a tax be levied which would result in such unequal protection of the rights of citizens who have paid the tax as compared with those who have not.

There is doubt that the public interest in the collection of the tax should outweigh the private interest of the individual businessman to the extent that the private interest is virtually ignored. In fact, most of the problems arising under retail sales tax schemes as discussed herein result from this weighing of interest. It has been argued in this writing that the interest of the retailer is an important consideration, and, it is submitted, where there appears no equitable way to reconcile these interests while retaining the retail sales tax, the tax should be replaced with another form of consumption tax that provides the desired reconciliation.

It would seem that a tax imposed directly upon the seller would alleviate the situation. The gross receipts tax, the privilege or occupation tax, or the "valued-added" tax, being theoretically levied on the retailer, would serve this purpose, though the gross receipts tax would probably be preferable for constitutional reasons.[100] Where the seller is the taxpayer, there is no question of his liability to the state, and he can obtain protection by insuring himself against loss due to theft or mismanagement. Nor is the state apt to have any greater difficulty collecting or enforcing the tax than it does under the retail sales tax. Moreover, such a tax would apparently have the added political advantage of a less overt adjustment in the rate when more revenue or price controlling or other economic regulation is desired.

Few reasons appear that warrant the retention of the retail sales tax. Its major inadequacies and inequities have already been indicated. Furthermore, the supposed necessity of passing the tax to the consumer as a separate item over and above the price—when the consumer will pay for the tax cost to the retailer through the retailer's adjustment of price anyway—provides no adequate justification for the retention of the tax.[101] The inappropriateness of taxing the "privilege" of buying when the tax could be more properly levied on the privilege of retail selling has already been indicated.[102] Indeed, only one advantage in retaining the retail sales tax appears—the deduction allowed the consumer from his federal income tax for state sales taxes paid.[103] But as a practical matter few members of the population are in an economic position to purchase goods in sufficient quantity that the state sales tax becomes significant as a deduction. Thus, it is questionable whether this is an "advantage" worthy of much consideration by the state legislatures. It seems, therefore, that the state retail sales tax should be eliminated in favor of a gross receipts or similar tax levied upon the seller.

J. T. S.

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100 See note 22 *supra*.
101 See notes 69, 70 *supra* and accompanying text.
102 See textual discussion following note 69 *supra*.
103 INT. REV. CODE OF 1954 § 164.