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A SEPARATE SALES TAX UPON VENDORS

In *Walgreen Company v. State Board of Equalization,* (Wyo. 1946) 166 P. (2d) 960,[1] a declaratory judgment action, the appellant company challenged the validity of an assessment levied against it under the Wyoming Selective Sales Tax Act of 1937. Various contentions of the Walgreen Company were focused upon the construction of those portions of the tax statute which impose a two per cent tax upon sales of twenty-five cents or more (to be paid by consumers), and a one per cent tax upon sales of twenty-four cents or less, to be "assumed and paid for by the vendor who shall keep a detailed segregated record of all such sales."[2] This statute enables sellers to elect to pay a tax of one per cent (rather than two per cent) on purchases of twenty-four cents or less, by maintaining a segregated record of such purchases. A further statutory provision required submission to the Board of Equalization of collections in excess of two per cent of "total taxable sales."[3] The appellant urged that this latter provision referred to all taxable purchases (made at any price), and that the maximum possible liability of vendors, when so interpreted, could equal only two per cent of the purchase price of such *total* sales. This premise supported a final and specific contention that an amount of $1,423.26, legally collected as *excess* under the two per cent tax upon vendees, could properly be applied in satisfaction of the one per cent tax upon sales of twenty-four cents or less.[4] The Board of Equalization maintained that two distinct taxes were imposed by the statute. One tax was described as a burden upon consumers for two per cent of the purchase price of sales of twenty-five cents or more. The other tax of one per cent upon sales of twenty-four cents or less was said to be the primary responsibility of vendors. *Held,* that the judgment of the District Court for the State Board of Equalization should be affirmed. Blume, C. J., dissented. The majority of the court concluded that the statute evidenced a positive legislative intent to fix upon vendors a separate tax burden equivalent to one per cent of the purchase price of sales of twenty-four cents or less. It followed that sellers could not utilize excess monies collected by them, under the tax upon vendees, to satisfy their own indebtedness arising from the one per cent tax. The contention of the appellant that no excess sum was due the state since no amount had been collected in excess of two per cent of all sales (both of twenty-five cents and over, and twenty-four cents and under), was held not to be sound.

The majority of the court was convinced that the true intent of the legislature to fasten a distinct tax upon merchants is manifest in the words of the

1. Petition for rehearing denied: (Wyo. 1946) 169 P. (2d) 76.
2. Wyoming Compiled Statutes, 1945, Vol. 2, Sec. 32-2504, (e); (Selective Sales Tax Act of 1937, S. L. Wyo., 1947, Ch. 102, Sec. 4 (e)).
3. Wyoming Compiled Statutes, 1945, Vol. 2, Sec. 32-2505; (Selective Sales Tax Act of 1937, S. L. Wyo., 1937, Ch. 102, Sec. 5): "If any vendor shall . . . collect as a tax an amount in excess of 2% of his total taxable sales, he shall remit to the Board the full amount of the tax herein imposed, and also such excess;".
4. The Walgreen Company had not collected any sum in excess of two per cent of all of their sales, both over and under twenty-five cents. In dissent, Blume, C. J., stressed the fact that, under he Wyoming Sales Tax Act, it is arithmetically possible to collect an amount *legally* in excess of the two per cent tax on purchases of twenty-five cents and more.

law. Considerable importance, however, was attached to legislative acquiescence in an interpretation of the statute in question, prepared (but never widely published) by the Attorney General eight days after its effective date, and followed by the Board of Equalization since that time.[5] (This interpretation was in harmony with the contentions of the Attorney General in the instant case.) The prevailing opinion justified its reliance upon such construction through evaluation of the well settled view that administrative interpretations, when properly performed, are entitled to weight[6] unless the construction so arrived at is clearly erroneous.[7]

A sifting of the problems contained in the instant case reveals the paramount importance of determining the legitimacy of the separate tax which is fastened directly upon vendors. Thorough, though not exhaustive, research indicates that, because of the novel character of the Wyoming sales tax, this central question must be answered largely upon academic grounds. Analysis of the varied methods of collection, utilized by states which tax the sale of goods, illustrates a fundamental lack of uniformity in administrative technique.[8] Apparently, however, the Wyoming sales tax, which combines a separate burden upon merchants with a prerogative under which they may elect to reduce the amount of such direct tax responsibility by keeping a segregated record of a portion of their sales, is unusual when compared with more common methods of administration. History of sales taxation indicates a tendency, on the part of law makers, to make the shifting of the tax to consumers mandatory.[9] Insight to the significance of the Wyoming tax may be gained through analysis of systems currently existent in other states which are, in some respects, similar.[10]

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5. On April 8, 1937, Attorney General Lee rendered an interpretation of the statute here in question: "The statute imposes two taxes. . . . The first tax is imposed upon the purchaser. The second tax is imposed upon the vendors or sellers. . . . The vendor has no right to take money paid to him by vendees in satisfaction of taxes which they are required to pay, and apply the same to the payment of the tax which he is required to pay".
6. See *Baldwin v. Roby,* (1939) 54 Wyo. 439, 458; 93 P. (2d) 940, 947; *Equitable Life Assur. Society of U. S. v. Thulemeyer,* (1935) 49 Wyo. 63, 94; 52 P. (2d) 1223, 1233.
7. See *Christensen v. Sikora,* (1941) 57 Wyo. 57, 74, 75; 112 P. (2d) 557, 563; *Hodgell v. Wilde,* (1937) 52 Wyo. 310, 320; 74 P. (2d) 336, 340. For a pertinent discussion of legislative acquiescence and the place of clearly erroneous interpretations, see, Use and Abuse of Tax Regulations in Statutory Construction, Randolph E. Paul, (1940) 49 Yale L. J., 660-685.
8. An annotation entitled Validity of so-called "Sales Tax", 110 A.L.R. 1485, 1486, states: ". . . there is a lack of harmony as to the exact nature of the so-called 'sales tax', various courts describing it as a license tax, a privilege tax, an occupation tax, an income tax, and an excise tax". For a thorough discussion of the historical development of the sales tax in the several states, see, Haig and Shoup, The Sales Tax in the American States, (1934) Chapters 5, 6, 7, and 8. Problems involved in the administration of a sales tax system are enumerated by Rousee and Hester in The Sales Tax, (1938) P. 160.
9. Alfred B. Buehler, An Appraisal of General Sales Tax Experiences in the United States, Tax Policy, 3:2, March 1936: "An interesting development in American general taxation has been the provision in many state laws that the tax must not be absorbed by dealers but must be shifted to consumers." An Act to Raise Revenue, Public Laws of North Carolina, 1939, Ch. 158, Art. V, Schedule E, Sec. 401, makes a public offer, on the part of a merchant, to absorb the state sales tax, a misdemeanor. The Emergency Retail Sales Tax Act, S. L. Colo., 1935, Ch. 189, Sec. 5(d), provides for a similar restriction.
10. In a letter dated December 23, 1946, Benjamin D. Mintener, Assistant Attorney General of South Dakota, states: "The Supreme Court of our state held that the

Blume, C. J., reached conclusions which clash sharply with the tenor of the majority opinion. The dissent conducted an historical appraisal of the tax statute and concluded that the legislature intended to fashion a more adequate scale for assessing an *average* tax, and not to subject vendors to a separate tax burden. An attack was also made, in the dissenting opinion, upon the constitutionality of the tax on sellers.[11]

The concept of a dual sales tax is described by the majority opinion as "unique", and by the dissent, as a "maverick". This point of superficial accord embraces an element which is meaningful to evolution of taxation policies. One might well inquire whether Wyoming has not taken a step toward making the term "sales tax" more truly descriptive of the burden actually imposed since the tax is conventionally construed as being levied purely upon the privilege of acquiring (not selling) property.

Concrete judicial sanction of a tax which is legally directed at vendors will stir the interest of professional students of the subject who have, for economic reasons, expressed doubt as to the ability of merchants to shift a sales tax to consumers.[12]

South Dakota sales tax was a tax upon the retailer rather than upon the consumer." *State ex rel, Sioux Falls Motor Co. v. Welch,* (1936) 65 S. D. 68; 270 N. W. 852.

In a letter dated December 16, 1946, Irving H. Perluss, Deputy Attorney General of California, states: "Section 6051 of the Revenue and Taxation Code provides that the tax is imposed upon *retailers* for the privilege of selling tangible personal property at retail".

In a letter dated December 13, 1946, George F. Barrett, Attorney General of Illinois, states: ". . . the State of Illinois does have a revenue measure imposing an occupation tax on all persons engaged in the sale of tangible personal property at retail, said tax being computed on a basis of a percentage of the gross receipts from such sales. This is a tax against the retailer and is not a tax on the purchaser. . . . the constitutionality of this statute was considered and upheld by the Illinois Supreme Court in the case of Reif v. Barrett, 355 Ill. 104, 188 N. E. 889."

The Mississippi Sales Tax Law of 1934, as amended, Sec. 2: "There is hereby levied and shall be collected annual privilege taxes, measured by the amount or volume of business done, against the persons, on account of the business activities, and in the amounts to be determined by the application of rates against values, or gross income, or gross proceeds of sales, as the case may be, . . .".

An Act to Raise Revenue, Public Laws of North Carolina, 1939, ch. 158, Article 5, Schedule E, Sec. 401, describes the state tax upon the sale of tangible personal property as a "license or privilege tax for engaging or continuing in the business of a 'wholesale' or 'retail' merchant . . .". The same section, however, expresses an intention that the tax levied shall be passed on to consumers.

Excise Taxes in their Relation to Property Taxes, Arthur S. Dayton, (1939) 46 W. Va. L. Q., 21-46. In discussing taxes upon the transferor of property and taxes upon those who acquire property, Mr. Dayton says: "It is conceivably possible that they might be extended and merged so that every sale of property would be subject to two kinds of tax—(1) upon the seller—, and (2) upon the purchaser".

11. Blume, C. J., maintained that an independent tax upon vendors lacks uniformity and is discriminatory in that merchants selling goods for less than twenty-five cents are prohibited from collecting the tax on such sales from consumers. In State v. Holly Sugar Co., (1941) 57 Wyo. 272, 285, 116 P. (2d) 847, 851, the court construed the 1937 tax statute as being, in many respects, amendatory of the 1935 Sales Tax Act.

12. Carl Shoup, The Sales Tax, Annals of the American Academy, 183:104, Jan., 1936: "A survey of some thirty thousand retailers made in the summer of 1933 in three sales-taxing states indicated that during the first few months of the tax, particularly under a rate of 2 per cent or less, many merchants were finding it advisable to absorb part or all of the burden out of their profits or capital rather than attempt to pass it on to consumers."

Criticism of the sales tax has long clustered about a charge that it is regressive in that it places an inordinate burden upon the poor. The extent to which a so called "separate" tax will be passed on to consumers is not to be easily determined.[13] It is conceivable, however, that an assumption by vendors of a portion of the sales tax burden could assist in rebutting the argument that the tax works a hardship upon vendees who are possessed of limited assets.

There seems to be no doubt that the sales tax will, because of its revenue gathering attributes, insure its own survival.[14] A realistic acceptance of the presence and permanence of the tax leaves small ground for condemnation of the innovation which Wyoming has placed upon it. The collection mechanisms in force throughout the nation are too broadly divergent in type and method to justifiably censor any one technique as a departure from some hypothetical norm. Judgment as to the attributes and evils of particular systems and features thereof must be founded upon sound principles of public welfare, fiscal need, and constitutional conformity.[15]

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13. Dayton D. McKean, Soaking the Poor, New Republic, 84:121, Sept. 11, 1935: "A tax of 1 per cent is often absorbed by the seller".
14. Robert C. Brown, Some Legal Aspects of State Sales and Use Taxes, (1943) 18 Ind. L. J., P. 78: "The enormous productivity of the sales tax, even in periods of comparative financial stress, is likely to insure, not merely its maintenance, but its continual extension."
15. In Walgreen Company v. State Board of Equalization, Civil Number 3045, an action pending before the District Court of the United States for the District of Wyoming, an injunction is presently being sought, on grounds of constitutionality, against the payment of the tax attacked in the instant case.

OIL AND GAS ROYALTY SYNONYMOUS WITH MINERAL INTEREST

In an action for an accounting the parties were in sharp conflict as to the meaning of the term "royalty" as used in an oral contract and in letters pertaining to the contract. Hudson owned a one-half interest in and under three separate tracts of land, which he conveyed to the Mabee Oil and Gas Co. reserving to himself a one-fourth interest in the profits in excess of $6,000.00. In letters relating to the oral contract, Hudson always referred to his interest as the "mineral interest", while Mabee referred to Hudson's interest as the "royalty" interest. The dispute arose when Hudson contended that he was to receive his share from all the profits derived from the "mineral interest" even after the expiration of the existing leases, whereas Mabee contended that Hudson was to receive his share from the existing leases only. The first drilling had resulted in dry holes and after the expiration of the leases the Mabee Co. developed the property and realized substantial production. In determining the case the trial court held that the term "royalty" as used in the contract was synonymous with the term "mineral interest" and that Hudson's "royalty" was a real property interest. This decision was upheld by the Tenth Circuit Court of Appeals as being the meaning attached to the term "royalty" in the Oklahoma oil fraternity. *Hudson v. Mabee Oil & Gas Co.,* (1946) 156 F. (2d) 450.