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MISSOURI USE TAX—LIABILITY OF OUT OF STATE VENDORS

I. INTRODUCTION

The use tax is a relative newcomer to state revenue raising techniques, having made its appearance less than thirty years ago.¹ Aside from the more familiar type of use tax applied to motor fuels, it is usually defined by statute as a tax upon the "use, storage, or consumption . . . of tangible personal property . . ."² within the taxing state. This tax seems to have been developed primarily to complement the state sales taxes.³ It was felt that the use tax provided a "taxing method that was symmetrical and complete,"⁴ when it operated in conjunction with a retail sales tax. That is if a sale escaped the state sales tax the consumer was still liable for an equivalent amount under the use tax statute. It has been said that the use tax is more important for its effect in discouraging out of state purchases to avoid state sales taxes than for the actual amount of revenue raised.⁵ However the amount of revenue which may be raised by this tax is not insubstantial.⁶

The use tax, like the sales tax, has been uniformly held to be an excise tax and not a property tax.⁷ The Supreme Court has pointed out that this is a tax on *use* which is only one attribute, among many, that make up complete ownership.⁸ This holding avoids the problem frequently raised by state constitutions which require property taxes to be uniform and equal.⁹

The ultimate liability to pay the use tax falls on the purchaser or consumer. However the problem of collecting the tax from each of the literally millions of purchasers on hundreds of millions of transactions is beyond solution. For that reason states generally attempt to collect both the sales and use taxes not from the ultimate purchaser or user but from the person making the sale. Little, if any, difficulty is presented in making the local merchant the tax collector in either case. Probably the most serious problem today arises where the taxing state attempts to force the out of state vendor to collect and forward the use tax. In recent years this has been the most prolific source of litigation involving state use taxes and the state of the law in this area is far from clear. It is this problem of collection that is the primary concern of this Comment.

1. For a thorough treatment of the development and present status of both sales and use taxes see *A Symposium on Sales Taxation*, 9 VAND. L. REV. 121-371 (1956).

2. MD. ANN. CODE art. 81, § 373 (1957).

3. *Tawes v. Thompson Trailer Corp.*, 209 Md. 490, 121 A.2d 850 (1956).

4. Greener, *The Use Tax: Its Relationship to the Sales Tax*, 9 VAND. L. REV. 349 (1956).

5. *Miller Bros. v. Maryland*, 347 U.S. 340 (1954).

6. It has been estimated that Missouri's use tax will produce 8-12 million dollars in annual revenue.

7. Greener, *supra* note 4, at 351.

8. *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

9. Greener, *supra* note 4, at 350.

II. CONSTITUTIONALITY OF THE USE TAX

The first case to test the type of use tax considered here was *Henneford v. Silas Mason Co.*¹⁰ The state of Washington levied a "compensating use tax" on the privilege of using, within the state, any article of tangible personal property purchased at retail after a stated date. The tax was enacted to complement Washington's sales tax and provided that if a sales tax had been paid on the goods either in that state or some other state the use tax on the property would be reduced by the amount of the tax paid. The tax rate, both on sales and use, was two per cent of the selling price. Thus if a buyer purchased property in California and paid a tax of two per cent or more on the item he would not be required to pay any additional tax for the use of the item in Washington. Defendant, Silas Mason Co., was a construction firm which purchased equipment outside the state and brought it into Washington for use on a construction project there. The Silas Mason Co. had paid no sales or use tax on this equipment. Washington sought to collect the tax from the Silas Mason Co. after the equipment had been brought into the state.

In upholding the Washington use tax the Supreme Court held that this tax was not a burden on interstate commerce since the tax was levied on the privilege of use after the goods had come to rest within the state. The court also pointed out that this was not discrimination against interstate commerce since a credit was allowed for taxes paid in other states. However, the court did not say that such a tax would be bad if no credit was allowed, specifically reserving a decision until such time as that problem should be raised. Little doubt as to the validity of such taxes as imposed upon, and collected from, the ultimate user could remain in view of the court's broad statement that "a tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate."¹¹

The next case to test the validity of such taxes arose when California attempted to apply its use tax to goods purchased by a railroad and brought into the state for installation in the facilities used in interstate commerce.¹² The railroad contended that the tax was a burden on interstate commerce since the equipment in question was to be used in interstate commerce. The court sustained the application of the tax stating: "We think there was a *taxable moment* when the former had reached the end of their interstate transportation and had not begun to be consumed in interstate operation."¹³ (Emphasis added.) The court also reaffirmed the validity of use taxes citing the *Silas Mason* case.

III. LIABILITY OF OUT OF STATE VENDORS TO COLLECT THE USE TAX

With the constitutionality of the use tax established the problem became one of finding the most efficient method to collect the tax. Clearly, in most instances, the vendor is in the best position to collect the tax. In a situation where the vendor

10. 300 U.S. 577 (1937).

11. *Id.* at 583.

12. *Southern Pac. Co. v. Gallagher*, 306 U.S. 167 (1939).

13. *Id.* at 177.

maintains an office in the taxing state and processes orders and goods through that office, the state may require collection even though the technical sale and passage of title occur outside the state.¹⁴ Some two years after upholding this requirement of collection the Supreme Court took another step, holding that a foreign corporation operating retail stores within the state could be required to collect this tax even though the order did not pass through any sales outlet within the taxing state.¹⁵ The court pointed out that these sales were still a product of the seller's business within the state. The court indicated that since the taxing state (Iowa) had extended the seller the privilege of doing business within the state that state "can exact this burden as a price of enjoying the full benefits flowing from its Iowa business."¹⁶ In 1944 Iowa extended its reach still further when the Supreme Court, in *General Trading Co. v. State Tax Comm'n*,¹⁷ held that Iowa could require a foreign corporation, not authorized to do business in the state, to collect and forward the use tax when the corporations only contact with the state was through traveling salesmen who took orders in Iowa subject to acceptance outside of the state. In spite of possible problems under the due process and commerce clauses Mr. Justice Frankfurter dismissed the whole problem of collection by the out of state vendor with one sentence: "To make the distributor the tax collector for the State is a familiar and sanctioned device."¹⁸ He cited as authority for this statement two cases dealing with collection by foreign corporations authorized to do business within the taxing state.¹⁹ This statement was criticized by Mr. Justice Jackson in his dissent and has received generally unfavorable comment by law review writers.²⁰ Mr. Justice Jackson, citing *McLeod v. Dilworth*,²¹ which was handed down the same day, thought it odd that a state should have the power to make a tax collector out of one whom it had no power to tax.

With the *General Trading Co.* case as precedent it appeared that the only restraint on states collecting the use tax through out of state vendors would be the problem of getting judicial jurisdiction over the seller. However, in *Miller Bros. v. Maryland*²² the court, in an opinion by Mr. Justice Jackson, imposed a due process restraint. In that case Miller Brothers was a Delaware furniture store and had made sales to Maryland residents. There was no solicitation within Maryland and no advertising reached Maryland residents other than that which reached them incidentally through general advertising media. Sales were made on both a cash and credit basis but in no instance had Miller Brothers availed itself of Maryland

14. *Felt & Tarrant Co. v. Gallagher*, 306 U.S. 62 (1939).

15. *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941). *Accord*, *Nelson v. Montgomery Ward*, 312 U.S. 373 (1941).

16. *Nelson v. Sears, Roebuck & Co.*, *supra* note 15, at 364.

17. 322 U.S. 335 (1944).

18. *Id.* at 338.

19. *Felt & Tarrant Co. v. Gallagher*, *supra* note 14; *Monamotor Oil Co. v. Johnson*, 292 U.S. 86 (1934).

20. Hartman, *Sales Taxation in Interstate Commerce*, 9 VAND. L. REV. 138, 171 (1956); Howard, *Constitutional Law Cases in the United States Supreme Court: 1941-1946*, 11 MO. L. REV. 197, 252 (1946).

21. 322 U.S. 327 (1944).

22. 347 U.S. 340 (1954).

courts to collect any accounts. Some merchandise was sold on a cash and carry basis while some was delivered by common carrier and some by seller's own truck. On one such trip into Maryland, seller's truck was seized and this action brought for failure to collect and forward the Maryland use tax. The court first recognized that a state may reach beyond its borders in some situations "if there is some jurisdictional fact or event to serve as a conductor."²³ The court then went on to point out "that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."²⁴ The court then asked: since Maryland can't reach the seller to impose the tax on the seller, can she reach the seller to make it a tax collector? This question is answered in the negative. The court does not purport to overrule the *General Trading Co.* case but distinguishes it on the basis that there is a wide gulf between the presence of traveling salesmen actively soliciting orders and an occasional delivery within the state. The court indicates that the presence of these salesmen amounts to such rivalry with local merchants as to make the vendor equivalent to a local merchant.

Thus under the present state of the law it seems clear that an out of state vendor who is authorized to do business within the taxing state is obligated to collect and forward the tax even if the sale in question bears only a faint relationship to the vendor's operation within the taxing state. A vendor who is not authorized to do business within the taxing state may also be required to serve as tax collector if he enters the taxing state through traveling salesmen. On the other hand mere delivery of goods in the taxing state is not a sufficient competition with local merchants to justify imposing the same duty to collect taxes.

These decisions leave a wide area where the liability of the out of state vendor to act as tax collector is unsettled. How many salesmen, calling how frequently are sufficient to constitute competition with local merchants? Would a regular delivery into the taxing state amount to competition with local merchants? Suppose that Miller Brothers had brought actions in Maryland courts to collect its accounts? What about advertising placed in newspapers or other media within the taxing state? Would an aggressive campaign by an out of state mail order house be a sufficient basis for requiring collection? Which has more significance, the court's remark in *Miller Brothers* about the inconsistency of making a seller a tax collector when the state can't tax the seller or the court's remark about competition with local merchants?

It is difficult to determine whether *Miller Brothers* actually represents a reversal of the trend toward relatively unhampered state enforcement of these taxes or simply a brief deviation from the court's tendency to allow the states great latitude in developing this method of revenue raising. It should be noted in passing that in *Miller Brothers*, as in so many important decisions, the court split five to four.²⁵ Even more important, three of the five man majority have now left the court while

23. *Id.* at 343.

24. *Id.* at 344-45.

25. The majority in the *Miller Bros.* case consisted of Justices Burton, Frankfurter, Jackson, Minton, and Reed. The dissenters were Chief Justice Warren, Justices Black, Clark, and Douglas.

the four man minority remains intact.²⁶ While it would be mere speculation to suggest that the addition of three justices who have not yet expressed opinions in this area might change the court's approach in future cases, such a possibility cannot be completely negated. Perhaps the only safe conclusion is that there is considerable room for future litigation involving an out of state vendor's liability to collect and forward state use taxes.

IV. MISSOURI USE TAX

During the summer of 1959 Missouri joined the ranks of those states levying a use tax²⁷ in conjunction with the already established sales tax.²⁸ This act seems to follow the general pattern of use taxes adopted by other states. "A tax is imposed for the privilege of storing, using or consuming within this state any article of tangible personal property purchased. . . ."²⁹ This tax is clearly imposed on the privilege of use, and not on the property itself, with the obvious intent to make it an excise rather than a property tax. Use is broadly defined as "the exercise of any right or power over tangible personal property incident to the ownership or control of that property. . . ."³⁰ The tax rate is identical with the rate of the sales tax, two per cent,³¹ and with regard to tangible personal property both acts appear to have substantially the same coverage.

The act contains a provision to the effect that the tax does not apply until such time as the property, purchased outside the state, "has finally come to rest within this state or until the article has become commingled with the general mass of property of this state."³² This provision appears to have been prompted by the language of the *Silas Mason* case indicating that a use tax was not an interference with interstate commerce because it was not levied until the property had come to rest within the taxing state.

Section 144.615 contains certain specific exemptions from the tax. Perhaps the most important of these exemptions is sub-section (5) which exempts any article on which another state has levied a sales or use tax provided that the other state tax is equal to at least two per cent. In the event that the foreign state's tax is less than two per cent a credit for the amount actually paid will be allowed the user in computing the amount of the use tax due in Missouri. While it is not clear that such a provision is necessary to avoid a holding that the act is unconstitutional because of multiple taxation or discrimination against interstate commerce, such provision avoids any possibility of litigation in that area. In the *Silas Mason* case

26. Justices Burton, Minton, and Reed are no longer on the court having been replaced by Justices Brennan, Whittaker and Stewart.

27. §§ 144.600-.745, V.A.M.S. (1959 Supp.). All section references hereafter will be to VERNON'S ANNOTATED MISSOURI STATUTES (1959 Supp.) unless otherwise noted.

28. § 144.020, RSMo 1949.

29. § 144.610.

30. § 144.605(10).

31. Use tax, § 144.610; sales tax, § 144.020, RSMo 1949.

32. § 144.610.

the Supreme Court refrained from passing on the effect of the absence of such a provision and the matter has apparently never been tested in the courts.

Sub-section (2) of section 144.615 exempts property the gross receipts from the sale of which have been used to measure the tax imposed under the Missouri sales tax law. Sub-section (3) goes on to exempt any property which would be exempt from, or not subject to, the Missouri sales tax under certain provisions of that act.

One interesting exemption relates to materials and equipment, "not readily obtainable in the state of Missouri . . . for use directly upon, and for the repair and maintenance of motor vehicles, railroad rolling stock or aircraft engaged in interstate or foreign commerce as common carriers of persons or property."³³ At first glance this would appear to exclude the very items described in *Southern Pac. v. Gallagher*³⁴ where the Supreme Court upheld the right of states to levy a tax on these items during the taxable moment before they were put to use in interstate commerce. However, it does not appear from the language of this section that the legislature intended to exempt the fixed facilities of these common carriers but only those items which actually move in interstate commerce. An interesting problem may be raised under the equal protection clause by this section in view of the omission of other types of common carriers, specifically barges and other vessels. An exemption of all common carriers would certainly be reasonable and within the permissible range of legislative activity but it may be difficult to rationalize the failure to provide an equal exemption for water borne common carriers.

Clearly the most controversial provisions of this act are those sections dealing with the liability of the out of state vendor to collect Missouri's use tax and forward it to the proper authorities. One section of the act requires all vendors selling for use in this state to register with the director of revenue.³⁵ In another section vendor is defined so broadly that it seems that the legislature was attempting to include all persons engaged in any type of sale of tangible personal property for use in Missouri.³⁶ If read literally every road side souvenir shop, wherever located, would be required to collect and forward Missouri's use tax when they made a sale to a Missouri resident, if for some reason that sale was not subject to a tax of at least two per cent within that state. The Missouri act further requires that non-resident vendors post a bond to secure payment of the tax, if the director of revenue should deem it necessary.³⁷

From the language of the Missouri act it is apparent that the legislature intended this tax to cover every transaction that could be brought safely within its reach. Thus the limits of coverage are essentially those discussed earlier in this Comment. One problem is simply that of obtaining judicial jurisdiction sufficient to give the state more than an empty judgment against the out of state vendor. As Mr. Justice Douglas points out in his dissent in the *Miller Brothers* case, "if appellant chooses to keep out of Maryland entirely, then the Maryland courts will

33. § 144.615(8).

34. 306 U.S. 167 (1939).

35. § 144.650.

36. § 144.605(11).

37. § 144.625.

of course have no jurisdiction over it."³⁸ Many vendors will never need to concern themselves with the operation of this act for that very simple reason. The more serious problem is the due process question raised by the majority in the *Miller Brothers* case. There is little to distinguish the Missouri and Maryland acts, as they apply to tangible personal property, and the same fate would probably befall Missouri if it attempted to use the collection device tested by Maryland in the same factual situation. The doubts and questions expressed earlier in this Comment relative to the reach of use taxes generally under the tests of this case apply with equal force to the Missouri tax.

In summary it appears that the Missouri use tax is valid as an excise tax on the storage, use or consumption of tangible personal property within its borders and little question can be raised as to its constitutionality when collected from the user within the state. The out of state vendor can be required to serve as tax collector when he meets the criteria of *Felt & Tarrant Co. v. Gallagher*,³⁹ *Nelson v. Sears, Roebuck & Co.*⁴⁰ or *General Trading Co. v. Tax Comm'n.*⁴¹ The liability of the out of state vendor remains unsettled in the vague area between these cases and the *Miller Brothers* case.⁴² A prediction as to the possible result in any given factual situation within that area would be little more than idle speculation.

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38. 347 U.S. at 358.

39. 306 U.S. 62 (1939).

40. 312 U.S. 359 (1941).

41. 322 U.S. 335 (1944).

42. After this Comment was written, the Supreme Court in *Scripto, Inc. v. Carson*, 361 U.S. _____, 80 Sup. Ct. 619 (1960) allowed Florida to collect its use tax from an out of state vendor in a factual situation similar to that in the *General Trading Co.* case, but with less contact by salesman, indicating a possible trend away from the *Miller Brothers* case.