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SOME LEGAL ASPECTS OF STATE SALES AND USE TAXES

ROBERT C. BROWN*

Outside of the federal field—and it has its possibilities there too—there has been no more striking tax phenomenon in the past few years than the development of sales and use taxes. These are not wholly new, but their tremendous development in scope and importance came within the last decade. With the tendency of the states to withdraw largely from the property tax field in favor of the local sub-divisions, the state sales tax, with the supplement of the use tax, has become one of the largest sources of revenue; and comparatively few are the states which are not now making increasing use of this expedient. It may indeed be added that several of our larger municipalities are embarking more or less upon the same course.

The present paper is an attempt to consider the more important legal problems which are presented by these taxes. The economic problems must be largely left to those more qualified.¹ However, it is impossible to disregard entirely the most important economic argument which has been made against these taxes—namely, that they are regressive or, to use more colloquial language, that they are poor man's taxes. By this is meant that the tax burden is upon the consumer, and that since the rich man does not consume an amount

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* Professor of Law, Indiana University School of Law. This paper is based upon an address given by the author at the National Tax Conference at St. Paul, Minnesota, Oct. 14, 1941.

¹ See King, "Various Tax Theories and their Current Applications" (1941) 19 Taxes, 583.
greater in proportion to his riches, the poor man bears more than his fair share of the total tax burden.

This argument obviously rests heavily upon the assumption that the sales tax is fully passed on by the seller, who formally pays it, to the consumer. Here we need only consider the sales tax itself, since the use tax, as will presently appear, was at least originally conceived of merely as a supplement to the sales tax for the purpose of preventing its avoidance in circumstances where evasion was otherwise possible. Even so, the validity of the assumption that a sales tax is passed on has been challenged by several authorities.² It is certainly true that under unusual circumstances even a sales tax imposed by a statute which requires it to be passed on will not always be entirely escaped by the seller. Thus it has been held that the New York City sales tax is such an obligation of the seller that the city has a prior claim on his bankruptcy, even though the act imposing the tax contemplates and really requires that the tax burden be passed on to the purchasers.³

But on the whole it seems probable that the bulk of the tax burden is borne by the consumer in normal circumstances, and therefore the argument of regressiveness is of some weight. On the other hand, this disadvantage is minimized, if not entirely wiped out, by a selective sales tax, since then the tax can be imposed only with respect to commodities not ordinarily purchased by persons of moderate means. Furthermore, the undoubted regressive effect of a general sales tax is minimized by the use of other taxes falling more heavily upon persons of large resources, notably the net income tax. At any rate, 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. Nor, so far as one can see, will war conditions affect other than favorably upon the employment of this tax. It is true that the war may reduce certain state and local burdens connected with relief—as evidenced by the recent reduction of the New York City sales tax. But by the same token the tax must be retained and later probably increased in order to take care of the enormous relief demands which

will presumably arise when the expected post-war depression appears.

Apart from problems of interstate commerce and trade barriers, which will be considered hereafter, there appear to be no serious legal difficulties in the way of this tax. Since it is an excise tax, the strictest equality and uniformity provisions of state constitutions do not generally affect it. To be sure, the federal Supreme Court decided a few years ago in *Stewart Dry Goods Co. v. Lewis*\(^4\) that a sales tax cannot be imposed at a graduated rate—that is, that it cannot be increased in rate as the amount of sales by the particular seller increase.

This decision was by only a six to three vote, and there is no great probability that it would be adhered to by the present Court. In fact it seems quite doubtful in principle. It is true that if the tax is fully passed on there seems no reason why a person should pay more because he has bought from a larger store. But a graduated tax would probably be more difficult to pass on, as against competitors paying a lower rate, and the higher rates would, it seems, be borne at least in part by the larger stores as overhead. It is true also that a graduated sales tax is more objectionable than a graduated net income tax; but the Kentucky law invalidated in the *Stewart* case had a maximum rate of 1 per cent, which because of the lower brackets could never be fully reached. The invalidation of a sales tax on the basis of this very slight measure of graduation seems unjustified, and the dissenting opinion by Mr. Justice Cardozo quite unanswerable.

But even if this doctrine is adhered to, there seems no reason to think that the utility or progress of the sales tax will be much hampered. While it seems unwise to deprive the taxing authorities of the right to make some small measure of graduation of rates if deemed desirable, yet graduation of sales taxes was not used much before the *Stewart* case, and it is undoubtedly possible to impose an effective and productive sales tax at a uniform rate.

One other problem has caused some difficulty in some states, notably Illinois. This is the question what constitutes a sale of tangible personal property—the usual basis of the tax. It seems that this is largely a question of the law of

\(^3\) *New York v. Feiring*, 313 U.S. 283 (1941).

sales, and that, in the absence of specific provisions of the statute to the contrary, all sales should be taxed. Nor should any distinction be made because of the particular title of the act—the distinction between a so-called sales tax and a retailer's occupation tax or something of the sort measured by sales, being obviously merely verbal, so far as this problem is concerned. On the other hand, a contract for repairs is not to be regarded as a taxable sale, even though the repairman adds some materials to the repaired article, merely as a necessary incident to performing his services.

Use Taxes

The use tax has made an even more recent but almost equally spectacular entrance upon the stage. It is clearly a tax imposed upon the consumer, so that no problem of passing on is involved. Presumably such restrictions as there are on sales taxes, such as the possible prohibition of a graduated rate, apply to use taxes also; but graduation is still less needed here.

The close connection between sales and use taxes appears from the fact that the latter were originally intended only to supplement sales taxes. For many years it was, or was supposed to be, the law that a sales tax could not be imposed directly by any state upon interstate commerce transactions, on the ground that this was a prohibited regulation of interstate commerce. This rule was rigidly limited by the courts. Thus in *Witco Corp. v. Pennsylvania*, it was held that a state might tax the sale of petroleum to a purchaser in that state, though the contract provided for a shipment from a point outside the state, and this agreement was carried out. The Court held that since the goods could have been procured from the seller in the taxing state, the interstate shipment was unnecessary, and was therefore not entitled to the exemption from state sales tax.

But this rule of exemption could not be escaped by the states when, as frequently happens, the goods are not pro-

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6 This matter was fully discussed by the Supreme Court of Illinois in *Mahon v. Nudelman*, supra, note 5; but the application of the rule in that case is somewhat questionable.
8 294 U.S. 169 (1935).
curable from the seller, or perhaps at all, within the state of the purchaser, which is the state generally seeking to impose the tax. The use tax was therefore imposed upon the consumers in sales tax states who bought goods in interstate commerce, thereby escaping the sales tax. The rate of the use tax was usually equal to that of the sales tax, and the obvious intent, and the substantial result, was to equalize the burden, and thereby protect both the state revenues and the local merchants. It was upon this general theory that the use tax was originally justified.9

However, this particular justification has departed with the ending of the restriction on the state taxing power which the use tax was intended to escape. The decision in 1940 of the federal Supreme Court in McGoldrick v. Berwind-White Coal Mining Co.10 substantially overruled the previous restrictive authorities, by holding that the jurisdiction of the purchaser may impose a sales tax with respect to goods even necessarily purchased in interstate commerce.

This decision, regarded as rather revolutionary, does not, on analysis, seem actually so. It merely gave the death blow to a doctrine which, while insistently stated, was actually already moribund. The whole doctrine had been more and more closely confined by exceptions,11 but even where it definitely applied, there were rather simple expedients for depriving it of nearly all effect.

In the first place, there was the doctrine of American Manufacturing Co. v. St. Louis,12 that a license tax could be imposed upon a local manufacturer measured by goods sold, even though these sales were exclusively in interstate commerce. The theory was that this tax was not a tax upon interstate commerce but rather upon the local manufacturing business. But the difference in terminology and theory does not change the fact that the burden is, or may be made, precisely the same as a tax upon the sales. The verbal distinction which the court insisted upon between measure and

9 See Mann v. McCarroll, 198 Ark. 628, 130 S. W. (2d) 721 (1939).
10 309 U.S. 33 (1940). The case involved the sale of anthracite coal by a producer in Pennsylvania (in which state all anthracite in this country is produced) to a New York City purchaser. The New York City sales tax was held to be properly imposed upon this transaction.
11 See Wiloil Corp. v. Pennsylvania, supra, note 8.
12 250 U.S. 459 (1919).
subject is a beautiful example of one without a substantial difference.\textsuperscript{13}

But if this were not enough, the use tax itself, which was previously sustained by the federal Supreme Court,\textsuperscript{14} enabled the states to entirely avoid the unfortunate effect of the old rule. If the state is prohibited from taxing the sale but can impose the same tax directly upon the consumer simply by calling it a use tax, the state is no worse, and the consumer is certainly no better off, at least so far as the use tax is as effectively collectible as the sales tax, a problem which will be considered later. The use tax cases had therefore settled the economic issue and the Berwind-White case merely sensibly recognized the fact.\textsuperscript{15} It is to be noted, however, that this frank subjection of interstate transactions to state sales taxes has removed the original justification for use taxes, and if they are to be continued, some other reason for them must be found.

The Trade Barrier Aspect

Before considering what the states ought to do with respect to this problem, it is important to consider whether the present situation is satisfactory from the standpoint of the national interest, and more particularly from the standpoint of the possibility of trade barriers. Notice that not much emphasis is now laid upon the problem of interstate commerce. The Berwind-White case\textsuperscript{16} has seemed to remove any necessity of discussing that problem in this connection. We seem to be approaching, if we have not already reached, that paradise where everything is interstate commerce for purposes of federal regulation (especially labor regulation) and nothing is interstate commerce so far as state taxing power is concerned. But if this new dispensation is leading us into serious trade barriers, we should certainly watch our step.

\textsuperscript{13} There are a number of other cases applying this doctrine sometimes under rather extreme circumstances. Typical of these are \textit{Hope Gas Co. v. Hall}, 274 U.S. 284 (1927), and \textit{Utah Power & L. Co. v. Pfost}, 286 U.S. 165 (1932).

\textsuperscript{14} \textit{Henneford v. Silas Mason Co.}, 300 U.S. 577 (1937).

\textsuperscript{15} See Powell, "New Light on Gross Receipts Taxes," (1940) 53 Harv. L. Rev. 909. It has even been argued that a use tax is a more direct burden upon the consumer than the sales tax, because the consumer inevitably bears the burden of the use tax. See the note in (1940) 16 Ind. L. J. 260.

\textsuperscript{16} \textit{Supra}, note 10.
Until recently one would have supposed it unnecessary to argue this point. But the idea has risen in some quarters that trade barriers between states are innocuous or even desirable. To this it should be sufficient to say that the fundamental reason for the adoption of our original constitution was to do away with existing trade barriers, and thereby to have a national economy. If this is considered too antiquated a theory to be advanced at present, it still seems reasonable to say that present events abroad do not indicate any great desirability of splitting up this country into separate small economic units, with no communication other than political.

A more subtle, but not less effective, way of excusing trade barriers is to say that it is a problem for Congress, and that the courts should not interfere. Mr. Justice Black, practically from the time of his appointment, has vigorously championed this view of judicial self-abnegation or neglect of duty, whichever one pleases to call it. Two still more recent appointees to the Court, Justices Frankfurter and Douglas, have indicated some sympathy for this view; and perhaps other members of the Court may follow them.

But, as already said, this is really nothing but indiscriminate approval of trade barriers, and so does not seem desirable. An omniscient Congress with nothing else to do would have its work cut out for it to block in advance all ingenious schemes which the states might concoct for "protecting," as they call it, their local industries from those in other states. And Congress, however nearly it approaches omniscience, still has quite a number of other things to do. Besides all this, if a national court is to resign the responsibility of preventing the states from blocking trade with other states, by taxation or otherwise, it is hard to see what function the court has left, at least so far as the states

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17 See his dissenting opinions in Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938) and in Guin v. Henneford, 305 U.S. 434 (1939), in the latter of which he suggests that Congress might deem such trade barriers as desirable in some situations.

18 Justices Black, Frankfurter and Douglas joined in a dissenting opinion in McCarroll v. Dixie Greyhound Lines, 309 U.S. 176 (1940), which opinion was based in considerable degree upon the same doctrine that the Court should leave the correction of trade barriers between the states to Congress. The writer of this opinion is not specified.
are concerned.\textsuperscript{19} No doubt if the courts will not compel the states to behave, and the states do not behave voluntarily, Congress will interfere; but the interference will almost inevitably be in a manner so crude and harsh as to destroy many of the good and desirable as well as the bad exercises of state taxing power.\textsuperscript{20} It will be far better for the states themselves if the courts help them to solve this problem, than if it is left to Congress.

Of course taxes are not the only trade barriers. Nor are sales and use taxes inevitably the worst tax barriers. Indeed such chain store taxes as have been imposed in some states, notably Louisiana,\textsuperscript{21} are probably far worse.

Another concession must be made, and an important one. The doctrine of the \textit{Berwind-White} case does not necessarily involve any trade barriers. If it did, use taxes, at least as applied to interstate transactions, which is probably their chief purpose, would likewise be objectionable. In both instances there is no penalty for buying goods from an out-of-state seller; the sales tax or the use tax merely equals the tax which would have been imposed if the purchase had been made within the state. In other words, the new doctrine does not necessarily discriminate against interstate commerce, but merely removes a discrimination in favor of interstate commerce. Such is obviously not a trade barrier, which can hardly exist except by discrimination against interstate commerce. Indeed a removal of a discrimination in favor of interstate commerce not only sets up no trade barrier but seems clearly desirable.

A sales tax imposed solely upon interstate transactions would undoubtedly be a trade barrier, but probably even the present Supreme Court would invalidate it as discriminatory against interstate commerce. Even the "reconstituted" Supreme Court has without hesitation and unanimously invalidated state taxes which were deemed to plainly discrimi-

\textsuperscript{19} See Powell, "1939-40 Supreme Court Decisions on State Taxation of Interstate Commerce," (1940) 26 Bulletin of the National Tax Association, 23.


\textsuperscript{21} Here the tax rate is steeply graduated according to the number of stores wherever situated, whether inside or outside Louisiana. This scheme was sustained in \textit{Gt. A. & P. Tea Co. v. Grosjean}, 301 U.S. 412 (1937).
inate against interstate commerce. Of course no discrimination appears if a substantially similar tax burden is imposed upon intrastate transactions, thus equalizing the burden. Similarly, a use tax solely upon goods purchased outside the state would be invalid if it stood alone; but since it generally applies only where the purchase has not been subjected to an equal sales tax, there is no real discrimination and no substantial trade barrier.

On the other hand, if both the state of the seller and the state of the buyer impose a sales tax, the situation is rather different. Here we have two sales taxes to pay if the transaction is in interstate commerce, and but one if the sale is entirely consummated within one state. This is not merely a conceptual burden upon interstate commerce, but it seems to be a substantial trade barrier. Granting that sales taxes are not fully passed on to the consumer, it is submitted that they are passed on to an extent which would seriously discourage interstate transactions and therefore set up substantial trade barriers. Perhaps there is no apparent discrimination against interstate commerce and in favor of purchasing within the state; but such discrimination exists, all the same.

The Berwind-White case does not of itself sanction any such double burden. There the tax sustained was imposed by the jurisdiction of the purchaser alone; or at least no sales tax by the state of the producer was shown, or even less sustained. However, the same result might perhaps be obtained by an excise tax by the producing state measured by sales, as in the St. Louis case previously referred to.

No doubt influenced by these considerations, several commentators have suggested that an interstate sale may be

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22 *Hale v. Bi-mxo*, 306 U.S. 375 (1939), opinion by Mr. Justice Frankfurter; *Best & Co. v. Maxwell*, 311 U.S. 454 (1940), opinion by Mr. Justice Reed. Mr. Justice Black's concurrence with this doctrine, in spite of its apparent inconsistency with his advocacy of judicial self-abnegation with reference to trade barriers, is shown not only by his concurrence in these decisions, but also by express language in his dissenting opinions cited in note 17, supra.


25 See McNamara, "Jurisdictional and Interstate Commerce Problems in the Imposition of Excises on Sales," (1941) 8 Law & Contemporary Problem, 482.

taxed only by the state of the purchaser.\textsuperscript{27} As already shown, this seems to be a satisfactory solution, and avoids any serious possibility of trade barriers of this kind. But no square authority can apparently be found for this proposition, at least in the federal courts, and there is at least one state decision directly to the contrary. This is the recent case of \textit{O'Kane v. State},\textsuperscript{28} decided by the New York Court of Appeals. This sustained a New York stock transfer tax (essentially a sales tax on corporate stock) imposed on sales of stock by New York sellers to out-of-state purchasers. The opinion of the majority purports to rely upon the Berwind-White case, and says that a sales tax by the jurisdiction of the purchaser would not result in a multiple burden, since the tax by the purchaser's jurisdiction would be on a different taxable event—namely, the purchase rather than the sale. This is obviously another excursion into pure verbal metaphysics. When one comes down to earth, there has been one event and it has been subject to two taxes. This is a strong inducement to "buy at home," which may be a good slogan sometimes, but is not good constitutional law or practice. It is submitted that this scheme should not be permitted.

The use taxes are often designated as "compensatory" since they normally allow a credit for the amount of sales taxes of the same state paid by the person upon whom the use tax is imposed. But suppose the sales tax has been paid to another state? Then the use tax is certainly not compensatory in any realistic sense, unless a similar allowance is made for the sales tax of such other state, as does not seem to be the usual practice.

Of course the problem of the correct verbal characterization of the tax is far less important than whether such a use tax, making no allowance for out-of-state sales taxes, is in fact an effective trade barrier. It should be noted, however, that the courts occasionally attempt to evade a direct answer to this question by shuffling the various taxes by name—as the New York court did in the \textit{O'Kane} case.

Passing from such verbal metaphysics to actualities, it must still be conceded that under some circumstances, a use tax which fails to allow for a sales tax imposed by another

\textsuperscript{27} See e.g., Vaske, "Are You Selling in Foreign States?", (1941) 19 Taxes, 467. Cf. McNamara, \textit{op. cit.}, note 25, \textit{supra}.

\textsuperscript{28} 283 N.Y. 439. 28 N.E. (2d) 905 (1940).
jurisdiction is unobjectionable. For example, if no sales tax can be imposed except by the state of the purchaser, there is no possibility of this problem even arising; but as already shown, it is by no means certain that the state of the seller is precluded from imposing the tax. Furthermore, such a use tax imposed by a jurisdiction like New York, which imposes no personal property taxes, may be all right, since the use tax may well be regarded as in lieu of a property tax. And on somewhat similar reasoning, a tax on the use of gasoline or similar commodities as a fuel for transportation need not make any allowances for out-of-state sales taxes, since the use tax is itself proportioned to the actual consumption in the state and is in no way supplementary to a sales tax;29 indeed in such cases the same state will often impose both a sales and a use tax without either tax making any allowance for the other.30

But where, as is usual except in the situation just mentioned, the use tax is supplementary to the sales tax and makes allowance for the sales tax paid by the purchaser to the same state, the imposition of a use tax without allowing for a sales tax actually collected by the state of the seller is a definite trade barrier, at least to the extent that the burden of the sales tax is passed on to the purchaser. This is because a purchase from a seller outside the state involves at least a possible sales tax in that state plus a use tax in the state of the purchaser's residence or place of business; whereas a purchase from a seller within a state involves only one such tax, or, if both taxes are exacted, the total amount will be only that of the larger of the two taxes. Whether or not there is a difference in form, there is certainly the difference in substance that in an interstate sale the amount of the sales tax will be added to the use tax. This would seem to be at least potentially a substantial trade barrier. If the imposition on the same transaction of a sales tax by two states is objectionable—and even the most vigorous advocates of liberalism in construing state taxing power seem to admit that it is31—a use tax which allows for a sales tax

29 Unless such a use tax with respect to transportation fuel is reasonably proportioned to use within the taxing state, it will usually be invalidated as a burden on interstate commerce. *McCarroll v. Dixie Greyhound Lines*, *supra*, note 18.
30 See Brown, "The Legal Aspects of Trade Barriers," (1940) 25 Bulletin of the National Tax Association, 98.
31 See McNamara, *op. cit.*, note 25, *supra*. 
paid to the same state but not for a sales tax paid to another state seems likewise improper.  

But assuming that all of this is true, the question still remains whether the courts will interfere. The courts certainly do not invalidate all trade barriers, and perhaps they are right in this, though it still seems that no substantial barriers should be permitted.

The first decision of the federal Supreme Court sustaining a general state use tax, Henneford v. Silas Mason Co., involved a Washington tax, which expressly gave a credit for all sales taxes imposed upon the acquisition of the article by the taxpayer, whether such tax was imposed by the state of his own domicile or some other. The Court seized upon this provision as demonstrating that there was no improper burden upon interstate commerce, since the total tax burden was the same whether the transaction was interstate or intrastate. This seems quite convincing, but by itself would indicate that the Court would insist upon such a provision in all state use tax laws. However, the writer of the opinion (Mr. Justice Cardozo) added a distinctly disturbing caveat to the effect that such a provision is unnecessary. In the course of this he said, "A state, for many purposes, is to be reckoned as a self-contained unit," an idea which seems not only inconsistent with the whole principle of our economic national solidarity, but also with the statement of the same jurist in an earlier case, which invalidated an attempt by one state to prescribe the price paid for milk produced in another state merely because the milk was sold in the state seeking to impose the regulation. Mr. Justice Cardozo said that such a regulation would violate the principle that a state cannot be permitted to put itself in a position of "economic isolation." It is submitted that this earlier idea of Mr. Justice Cardozo was much sounder than the theory which he propounded in the Silas Mason case.

Unfortunately, however, Mr. Justice Cardozo's successors have seemed more favorable to his "self-contained unit"

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32 This matter is more fully discussed in Brown, "Judicial Trends with respect to Trade Barriers," Chap. XXV of the Symposium on "Tax Barriers to Trade," published by the Tax Institute, Philadelphia, 1941. See also the note in (1941) 6 Mo. L. Rev. 57.

33 See Waters, "Interstate Trade Barriers," (1941) 19 Taxes, 472.

34 supra, note 14.

idea of a state than to his disapproval of economic isolation. To be sure, the Court has from time to time condemned state taxes which were deemed to lead to the possibility of "multiple burdens." Thus in *Adams Mfg. Co. v. Storen,* the Indiana gross income tax (in this aspect a sales tax, though covering other transactions than sales) was held inapplicable (at least without apportionment) to an Indiana manufacturer which shipped most of its products outside of that state. The Court rested its decision primarily upon the proposition that other states into which the products were sent could impose a similar tax and that there would thus be a multiple burden discriminatory against interstate commerce. The opinion was written by Mr. Justice Roberts, and was unanimous except for Mr. Justice Black. It may be added that Mr. Justice Roberts attempted to distinguish *American Co. v. St. Louis* and cases following it, by saying that there state excise taxes were involved, whereas the Indiana tax was one on gross receipts. But after all, is not a gross receipts tax one kind of an excise tax, and a rather burdensome one, at that?

Similarly the Court, and again with Mr. Justice Black the sole dissenter, invalidated in *Gwin v. Henneford,* a Washington gross receipts tax on a domestic selling agent for local fruit growers, most of the sales being in interstate commerce. Here too the Court was impressed with the probability of multiple burdens by reason of the power of states where the fruit was sold to impose similar taxes. The prevailing opinion in this case was written by Mr. Justice Stone, now the Chief Justice.

From these cases, one might think that sales taxes could be imposed only by the state of the purchaser, and so that there is no possibility of multiple burdens. But in the first place, the Court has not always adhered to this doctrine, and has (though without much consideration of this aspect of the matter) sustained state taxes involving interstate transactions where the same, or nearly the same, possibility of multiple burdens appeared. Furthermore, the multiple burden doctrine was criticized, or at most followed without

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88 *Supra,* note 17.
87 *Supra,* note 12.
88 *Supra,* note 17.
enthusiasm, in the *Berwind-White* case.\(^4\) Chief Justice Stone, even though he concurred in the *Adams* case and wrote the opinion in the *Gwin* case, is no longer enthusiastic about them, and will certainly hold them to their narrowest implications.

At any rate, we are not left to mere speculation and to use taxes; for when this very problem of a non-compensatory use tax came before the Court, it declined to apply its supposed prohibition of multiple burdens. The case referred to is *Southern Pacific Co. v. Gallagher*,\(^4\) where California use tax was sustained, notwithstanding the fact that the law explicitly refused any credit for out-of-state sales taxes.\(^4\)

The opinion in this case was written by Mr. Justice Reed. He cited the *Silas Mason* case as conclusive, as indeed it is if we accept the dictum in it, already referred to. Mr. Justice Reed tries to persuade himself that there is no discrimination, on the ground that use within a state is not interstate commerce. This is another example of trying to ignore actualities by clever use of terms. However, he finally frankly concedes the possibility of discrimination, but holds that it should not be interfered with until actual discrimination is shown, and perhaps not even then.\(^4\)

The answer to the question whether the Court will compel an allowance for an out-of-state sales tax has therefore not been definitely made; but the prognosis does not seem very hopeful. Even if the Court does refuse to abdicate its power and responsibility to prevent serious trade barriers between the states, it is not very likely to interfere in this situation. The Court is likely to be persuaded by a combination of the arguments that this barrier is not a serious one, especially in view of the uncertainty as to how far sales taxes are actually passed on to the buyer; that any such prohibition could probably be evaded by the use of excise taxes on production; and that in any event the state is a "self-contained unit" and its taxing power should not be

\(^{40}\) *Supra*, note 10. The *Adams* case, *supra*, note 17, was clearly criticized, though not overruled.

\(^{41}\) 306 U.S. 167 (1939).

\(^{42}\) Since the *Silas Mason* decision, *supra*, note 14, the Washington use tax law has also been amended so as to deny any credit for sales taxes imposed by other states.

\(^{43}\) The Court states that this "argument" need not be resolved until a taxpayer shows that he actually pays twice. When the Court speaks thus, it clearly indicates that it has not made up its mind that such double payment is an undue burden.
restricted by that of other states. It must be granted that we should not expect the courts to solve all our difficulties for us, though it would seem that this is serious enough to justify their interference. But it seems rather improbable that they will help in this situation, unless indeed they do prohibit any sales tax except by the state of the buyer. This would automatically solve the difficulty, but here too one cannot be very optimistic as to the probability of the Supreme Court’s prohibiting more than one tax.

Should Either the Sales Tax or the Use Tax Be Given Up?

Since the original basis for the use tax—that is to fill in the gap in sales taxes on interstate transactions, a gap which no longer exists—is not now available, the suggestion has been made that the use tax should be given up by the states, and the sales tax alone employed. Conversely, the suggestion has been made that the sales tax be given up, and the use tax take its place.

Theoretically, either tax will function satisfactorily alone, and to adopt either of these suggestions would at least partially solve the problem of trade barriers with respect to them, which has just been discussed. But the practical desirability of either suggestion depends upon the collectibility as well as the legality of the imposition of the two taxes. Accordingly, this problem of collectibility must be given brief consideration.

It is obvious that a state can effectively collect a tax on all sales within the state, even though the buyer intends to transport the goods at once to another state, since here the sale is purely within the taxing state. It is also possible, though perhaps not entirely clear, that a tax may be collected on all sales, no matter where the title passes, if shipments are made to destinations within the taxing state. While probably the tax cannot in such cases be collected by ports-of-entry, nevertheless collection can probably be made by methods analogous to those sustained with respect to use taxes, as hereafter set forth. In the latter case, the seller can be compelled to collect the tax imposed by the state

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45 See Brown, op. cit., note 30, supra.
where delivery is to be made. But it is completely impos-
sible to collect a tax on sales made to residents of the state
where the sale is outside the state and delivery is made
there. Obviously the seller cannot in any way be compelled
to collect this tax, whether or not he does business in the
taxing state, since he has no way of knowing the residence
of his customers. This difficulty can be largely avoided by
the use tax, but this very thing seems a decisive objection
to the proposal to abolish the use tax.

Now as to the use tax. Here the federal Supreme Court
has recently extended the power of the states to collect, and
has thus increased the desirability of employing the tax.

In *Felt and Tarrant Mfg. Co. v. Gallagher*, the Court
held that a seller may be compelled to collect a use tax on goods
sold to purchasers within the state even though the seller
was a foreign corporation and did no business within the
state except in respect to interstate sales. This doctrine was
more recently extended in *Nelson v. Sears, Roebuck & Co.* to
permit a state to compel mail order houses doing business
in the state by conducting retail stores, to collect a use tax
on mail orders by residents of the taxing state. The Court
brushed aside the contention of the mail order houses that
their retail store business in the state was completely sep-
arate from their mail order business and therefore subjected
them to no liabilities in connection with the latter. The
position of the Court was that doing any kind of business
in the state, subjected the mail order houses to the liability
to collect the use tax with respect to all sales to known resi-
dents of the state.

All this is quite satisfactory from the standpoint of the
states; but, as the Court admits, this will not enable a state
to compel the seller to collect a use tax upon shipments into
the state if the seller does no business there. Still less can

48 312 U.S. 359 (1941). See also the companion case, *Nelson v. Mont-
49 See *Nelson v. Sears, Roebuck & Co.*, supra, note 48. The Court says
that practical difficulties of collection do not necessarily prove lack
of jurisdiction to impose the tax.
50 Some attempts have been made to compel the seller to collect the
tax in this situation by such extra-legal methods as suing certain
of his larger customers within the state for the tax, with the
purpose of destroying the seller's good-will. See Brown, "The
Future of Use Taxes," (1941) 8 Law & Contemporary Problems,
495. But such expedients are obviously of rather limited scope.
an out-of-state seller be compelled to collect a use tax if the sale is consummated and the goods delivered in the outside state. This is true even though the seller does business in the taxing state, for he has no way of knowing the residence of purchasers who go outside the state to make their purchases and take delivery there. In that situation neither sales nor use taxes can be effectively collected, except by taking the arduous course of going directly against the purchasers—a scheme which will work very well in large transactions, but is obviously impractical with respect to ordinary household purchases.

On the whole then, the use tax seems more desirable, and if either is to be given up it should be the sales tax. The sales tax is desirable in that the state can go directly against the few sellers rather than the numerous purchasers; but the same is true of the use tax in many cases, and in those where it is not, the sales tax is likewise largely ineffective.

But why give up either tax? While a sales tax has perhaps no theoretical advantage over a use tax, yet experience shows that it is sometimes actually more desirable, especially from the standpoint of collection procedure. And the use tax has in many circumstances important advantages over the sales tax. Why not choose between these advantages by taking both?

As already indicated, the writer's opinion is that the use tax should, in the usual case, be credited with all sales taxes actually paid by the taxpayer to the state imposing the use tax or to any other state. This last limitation is unnecessary if it is finally decided that only the state of the purchaser can impose a sales tax; but pending authoritative settlement of this question, it seems desirable. But at least with this limitation, there seems no objection to the imposition of both sales and use taxes by each state, and no reason for any state to give up either of them.