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People v. Medjdoubi: A New York Supreme Court Concludes that Sales Tax Is Not Part of the Market Value of Stolen Retail Merchandise When Determining Which Degree of Larceny Is Applicable

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RECENT DEVELOPMENTS IN NEW YORK LAW

People v. Medjdoubi: A New York supreme court concludes that sales tax is not part of the market value of stolen retail merchandise when determining which degree of larceny is applicable

All New York shoppers have an obligation to pay sales tax.\(^1\) According to two New York supreme court decisions, however, sales tax is not included in the value of the stolen goods when determining the degree of larceny in a criminal prosecution.\(^2\) In *People v. Medjdoubi*, the most recent case involving this issue, the New York supreme court held that the market value of stolen property from a retail establishment does not include sales tax.\(^3\) The exclusion of sales tax from the market value of stolen property may in some instances lower the category of the offense from grand larceny, a felony,\(^5\) to petit larceny, a misdemeanor.\(^6\)

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1 New York State imposes a 4% tax on “every retail sale of tangible personal property” with certain exceptions. N.Y. TAX LAW § 1105(a) (McKinney 1987). The state also authorizes counties, cities, and certain school districts to impose local sales and use taxes at rates of up to 4.25%. See N.Y. TAX LAW § 1210 (McKinney Supp. 1998). Transactions within the New York City metropolitan commuter district are subject to an additional .25% tax. See N.Y. TAX LAW § 1109(a) (McKinney 1987).

2 People v. Medjdoubi, 661 N.Y.S.2d 502 (Sup. Ct. 1997); People v. Barbuto, 434 N.Y.S.2d 120 (Sup. Ct. 1980). In *Barbuto*, the defendant wrote a bad check to purchase a television set. 434 N.Y.S.2d at 121. The value of the television, including sales tax, met the statutory requirement for grand larceny. *See id.* The court held that “while a sales tax may increase the cost of an object it does not increase the value thereof.” *Id.* (italics omitted). *But cf.* People v. Bazo, 529 N.Y.S.2d 432, 435 (Sup. Ct. 1988) (holding that the value of a television set stolen from a person’s apartment a few days after it was purchased includes the sales tax paid on it).


4 *Id.* at 506.

5 *See N.Y. PENAL LAW § 155.30* (McKinney 1988) (“Grand larceny in the fourth
thereby affecting the punishment that can be imposed upon a defendant."

In *People v. Medjdoubi*, the state charged the defendant with grand larceny in the fourth degree, a felony. A security camera videotaped the defendant using a stolen credit card to purchase a leather jacket and two shirts at a Saks Fifth Avenue department store. The price of the clothes, exclusive of sales tax, was $1,000. The cost charged to the card totaled $1,082.50 due to the 8.4% sales tax imposed on sales in New York City.

The court reduced the grand larceny charge to petit larceny, a misdemeanor, concluding that the "value of stolen property which is retail merchandise is its market value as reflected by the purchase price exclusive of any levied sales tax." Exclusive of sales tax, the merchandise totaled $1,000, but to sustain a grand larceny conviction in the fourth degree charge, the value must exceed $1,000. In *Medjdoubi*, the court stated that "[a] defendant, found guilty of higher felony level charges due to the addition of sales tax, would be subjected to greater punishment in no way related to a higher level of criminal conduct." The court reasoned that where tax is paid in an illegitimate purchase, the criminal conduct involved is no greater than if the defendant shoplifted the property and thus paid no tax.

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degree is a class E felony."). "A person is guilty of grand larceny in the fourth degree when he steals property and when: 1. The value of the property exceeds one thousand dollars ...." *Id.* In 1986 the value for a grand larceny offense was increased from $275 to $1,000, to "bring the 1965 Penal Law into the monetary world of 1985." Memorandum of State Executive Department, reprinted in 1986 N.Y. Laws 2962.

6 *See N.Y. PENAL LAW § 155.25 (McKinney 1988) ("Petit larceny is a class A misdemeanor."). "A person is guilty of petit larceny when he steals property." *Id.*

7 *See Medjdoubi*, 661 N.Y.S.2d at 504. The degrees of grand larceny range from fourth degree, which is a class E felony, to first degree, which is a class B felony. *See N.Y. PENAL LAW §§ 155.30 - 155.42 (McKinney 1988 & Supp. 1998).*

8 *Medjdoubi*, 661 N.Y.S.2d at 504. The defendant was also charged with two counts of criminal possession of stolen property in the fourth degree, and forgery in the second degree. *See id.*

9 *See id.*
10 *See id.*
11 *See id.*
12 *Id.* at 506.
13 *See N.Y. PENAL LAW § 155.30 (McKinney 1988).*
14 661 N.Y.S.2d at 506.
15 *See id.* "The manner in which the theft occurs does not change the property's value under the Penal Law." *Id.* The court pointed out that "[t]he purpose of ... penal statutes fixing the higher degrees of crimes is not related to regulating the economic market but to assessing the scale of criminal operations by the defendant." *Id.* (citing People v. Colasanti, 322 N.E.2d 269 (N.Y. 1974)).
The New York supreme court in People v. Medjdoubi, however, misconstrued the New York Penal Law in holding that sales tax is not included in the market value of stolen retail merchandise. The court based its conclusion on the New York Court of Appeals definition of market value enunciated in People v. Irrizari,\(^6\) which indicates that a property’s list price is not necessarily conclusive.\(^7\) According to the Irrizari court, “[t]he vital finding which the jury must make is the price at which the property would have been sold if it had not been stolen, and any evidence bearing on that question may properly be considered.”\(^8\) Although subsequent cases found the store’s list price indicative of the market value of the stolen property,\(^9\) the inclusion of sales tax constitutes a sounder application of the rationale of Irrizari, which stated that the legislature implicitly “rejected [the] replacement cost to the owner” standard by using the value of stolen property as the benchmark of the gravity of the offense.\(^2\) The legislature fixed the value at the amount which the thief would have to pay had he purchased the goods instead of stealing them.\(^21\) Accordingly, the price that a thief would have to pay in order to obtain the property without stealing it would include

\(^6\) 156 N.E.2d 69 (N.Y. 1959). Irrizari became the first New York case to define what constitutes market value under the larceny statute. See id. at 70. The issue was whether “the market value [was] to be determined by the value in the market in which the thief would have had to purchase the goods or the value in the market in which the owner would have had to replace them.” Id. The court concluded that:

“Market value... denotes not the value of the goods in the market in which the owner had purchased them or in which he could replace them, but the value in the market in which the goods were being traded, namely, the price at which they would probably have been sold in the regular course of business at the time when and place where they were stolen.” Id. at 71.

\(^7\) See id. (holding that although “the price at which it is there listed ordinarily reflects its market value... we do not, of course, mean to imply that such price is necessarily conclusive”).

\(^8\) Id.

\(^9\) See Medjdoubi, 661 N.Y.S.2d at 505; see also People v. Wynn, 574 N.Y.S.2d 83, 85 (App. Div. 1991) (finding that price tags on stolen garments indicate value); People v. Vanderhall, 563 N.Y.S.2d 517, 518 (App. Div. 1990) (positing that the value of a stolen video camera is reflected on the price tag); People v. Basir, 529 N.Y.S.2d 841, 842 (App. Div. 1988) (holding that the value of a skirt and blouse is indicated by price tags on the garments); People v. Felder, 522 N.Y.S.2d 60, 61 (App. Div. 1987) (holding that the price tags on stolen leather jackets are proof of value).

\(^2\) Irrizari, 156 N.E.2d at 70.

\(^21\) See People v. Steinberger, 392 N.Y.S.2d 191, 193 (Sup. Ct. 1977) (“[M]arket value of stolen property is its value in the market in which the thief would have to purchase the property.”).
sales tax. Moreover, when *Irrizari* was decided in 1959 New York state did not have a sales tax. Therefore, the court never addressed the issue of whether sales tax is part of the market value. Since its holding, the *Irrizari* definition of market value within the context of the larceny statute remains precedent in New York despite the subsequent imposition of sales tax, and no appellate court has addressed the sales tax issue directly.

The case law in other jurisdictions addressing the issue of whether sales tax is included in the market value of a stolen item is limited. There are some federal cases which hold that sales tax is part of the value of an item where the value is an element of the crime. In *United States v. Picquet*, the Fifth Circuit held that “the cost of a good or service and the cost of sales taxes combine to aggregate the value of the goods and services ....” The facts in *Picquet* were similar to those of *Medjdoubi*. Both cases involved the use of a stolen credit card to purchase retail merchandise. In both cases the inclusion of sales tax increased the value of the stolen property to over $1,000, which escalated the degree of the crime charged. The court in

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22 See United States v. Draves, 103 F.3d 1328, 1332 (7th Cir.) (“The fair market value of property is commonly defined as the price a willing buyer would pay a willing seller for the property, when neither is under compulsion to buy or sell.”), cert. denied, 117 S. Ct. 2528 (1997); see also United States v. Picquet, 963 F.2d 54, 56 (5th Cir. 1992) (“A purchaser of goods or services incurs sales tax liability at the time of purchase, and such a condition precedent to consummating the transaction is inextricably intertwined with the act of obtaining the goods and services.”).

23 See John F. Due & John L. Mikesell, *Sales Taxation, State and Local Structure and Administration* 3 (1983). New York's sales tax was reinstated and became permanent in 1965. See id. The tax had expired in 1934 after it was imposed in 1933 in response to the decrease in tax revenues due to the depression. See id. at 2.

24 See *Medjdoubi*, 661 N.Y.S.2d at 504.


26 See United States v. Picquet, 963 F.2d 54, 55-56 (5th Cir. 1992) (holding that sales tax should be included in market value because it has value to numerous people and entities); United States v. Burns, 894 F.2d 334, 336 (9th Cir. 1990) (stating that the amount a willing buyer is prepared to pay for retail merchandise includes sales tax, thus it should be included in determining market value).

27 963 F.2d 54 (5th Cir. 1992).

28 Id. at 56.

29 In *Picquet*, the defendant was charged with using stolen credit cards to purchase merchandise which totaled $1,016.81 including sales tax. Id. at 55. The defendant was charged under 18 U.S.C. § 1029(a)(2) which “makes it a crime to obtain anything of value aggregating $1,000 or more during a one-year period by use of an
Picquet reasoned that sales tax has value to numerous people and should therefore be included in the value of stolen merchandise. The court also pointed out that because the payment of sales tax is "inextricably intertwined" with the purchase of property, "[i]t is of no lesser importance than payment of the basic consideration." This decision supports the argument that evading the tax, at least under certain circumstances, is part of the initial criminal conduct and should be reflected in the resulting criminal charge. Moreover, a number of federal courts have recognized that the very nature of a credit card purchase and its economic consequences pose additional considerations not present in outright theft, and have thus favored the inclusion of sales tax in determining the value of goods obtained through the fraudulent use of a credit card. The most recent case reasoned that a fraudulent credit card purchase places the burden on the credit card company to pay the merchant the total amount charged and not merely the listed price of the item.

Courts in the other states that have considered this issue have held, like the court in Medjdoubi, that sales tax should not be included in the market value of stolen property. The Kansas

unauthorized access device." Id. at 54.

See id. at 55.
The sales taxes at issue in this case have value to a number of persons and entities. First, because Picquet was required to pay sales taxes when she purchased the goods and services ... she obtained the value of tax payments when she acquired the goods and services .... Second, Picquet's credit card transactions imposed an obligation on Hibernia Bank to pay not only the cost of the goods and services ... but also sales taxes on them. Hibernia Bank's obligation to pay ... the sales taxes ... is a thing of value both to the merchants and Hibernia. Finally, the sales taxes incurred by Picquet have value to the taxing authorities.

Id. at 55-56.

See id. at 56.

See, e.g., United States v. Draves, 103 F.3d 1328, 1332 (7th Cir. 1997) (holding that when goods are obtained through the use of an "unauthorized access device ... 'anything of value' includes sales tax because it has value to several entities, including the defendant, the bankcard company, and the taxing authorities"); Picquet, 963 F.2d at 56 (determining the value of property obtained by fraudulent credit card use included sales tax); see also United States v. Burns, 894 F.2d 334, 336 (9th Cir. 1990) ("In ordinary retail trade the amount that a willing buyer is prepared to pay includes the tax and shipping costs.").

See Draves, 103 F.3d at 1332 ("[T]he appropriate meaning of 'value' under a statute penalizing fraudulent credit card use is the amount out of which the credit card company was defrauded: the total amount charged to the card.") (emphasis omitted).

Court of Appeals, in State v. Alexander, held that because the property was stolen and not purchased, no sales tax was imposed and therefore none was stolen. In Tunnell v. State, the Supreme Court of New Mexico held that sales tax would be included in the market value of the item only if it were part of the price listed or advertised. Finally, in State v. Adams, the Supreme Court of Ohio held that including sales tax to determine the degree of the crime charged would violate the Ohio constitution. The holdings of these courts evidence a narrow view of the issue. These courts do not distinguish between a fraudulent sale where taxes are paid, and a theft from the retailer where there is no taxable event. Further, these courts do not acknowledge that when the item is stolen so is the government's opportunity to obtain tax revenue on the item. By not including sales tax as part of the market value of the item, the thief is not being adequately punished for the total consequences of the theft.

To state that sales tax is not part of the market value of an item would ignore the effect that the tax has on the state and local economies. Sales tax represents approximately 27% of New York State's gross tax revenue. At the general sales level consisting primarily of retail sales, the state receives approximately 52% and the local government 48% of the total revenue generated by the sales tax. The fact that all counties in the state im-

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33 See id. at 817 ("Because the sweaters had not been sold, the Jones Store did not owe, and the state was not entitled to collect, a sales tax on them.").
37 See id. at 899.
38 529 N.E.2d 1264 (Ohio 1988).
39 Id. at 1266-67.
41 See id. (providing tax amounts for state and local governments for 1993-1994).
pose a sales tax at the maximum allowable rate demonstrates
the importance of sales tax at the local level.\footnote{See N.Y. TAX LAW § 1210 (McKinney Supp. 1987); see also AMERICAN BAR ASSOCIATION, SECTION OF TAXATION, SALES & USE TAX DESK BOOK 33-19 (D. Michael Young et al. eds., 1996-1997) [hereinafter ABA, SECTION OF TAXATION] (providing combined state and local tax rates for New York).} When an item is
stolen from a store, citizens are robbed of the tax revenue that
would have been generated from the sale of the stolen item. The
lost revenue means there is less money available at the state and
local levels to fund various services and projects. When short-
falls in revenue occur, tax rates, particularly sales tax rates, are
usually increased to eliminate the shortfall.\footnote{States usually do not choose to raise income taxes because they fear that
higher income taxes would drive individuals and businesses out of the state. See DUE & MIKESSELL, supra note 23, at 4. The states are also aware of how unpopular a
hike in such taxes is, given level of federal income taxation. See id.} Therefore, not to
recognize the value that the tax provides as part of the market
value of the stolen item fails to punish the defendant adequately
for the total consequences of the crime.

The New York State legislature, in recognizing the impor-
tance of sales tax revenue, provided for criminal penalties for
persons who evade the tax.\footnote{See N.Y. TAX LAW § 1817 (McKinney 1987). “Any person who willfully fails to
collect the tax ... shall, in addition to other penalties provided by law, be guilty of a
misdemeanor.” Id. § 1817(c)(1).} For example, a retailer was prose-
cuted for tax evasion for making a sale to a customer after ex-
plaining that the price of an item would be reduced by the sales
tax if the customer paid cash.\footnote{See John J. Tigue Jr. & Bryan C. Skarlatos, Tax Litigation Issues, New York
State Prosecutions, N.Y. L.J., May 25, 1993, at 3 (citing an interview with Robert
Shepherd, Deputy Commissioner, Office of Tax Enforcement, New York State De-
partment of Taxation and Finance).} Although the penalties are nor-
mally imposed upon retailers who are required to collect tax,\footnote{See N.Y. TAX LAW § 1133(a) (McKinney 1987) (stating that the seller is re-
quired to collect the sales or use tax and to remit it to the New York State Depart-
ment of Taxation and Finance).} the law indicates that the legislature considers it to be a crime
when sales tax is not paid.\footnote{See N.Y. TAX LAW § 1133(b) (McKinney 1987) (providing that a customer who has not paid sales
tax to a retailer is obligated to pay the tax directly to the tax commission).} When a thief steals property from a
retail store, the tax is evaded, just as if the retailer had sold the
item and not charged the tax. Therefore, the thief’s evasion of
the tax should be reflected in the resulting charge to account for
the crime that has been committed against the government and
the taxpayers who fund the government. Including sales tax in the market value of the item would ensure that thieves are properly penalized for the true impact of their crime.

Although technically there can be no tax imposed where an item is stolen, to ignore the fact that sales tax is part of the price a thief would have to pay to purchase an item is unjust. The New York Penal Law states that a penal statute should not be strictly construed but should instead "be construed according to the fair import of [its] terms to promote justice and effect the objects of the law." The inclusion of sales tax in the market value of a stolen item is consistent with the liberal construction that New York requires for its penal statutes.

Each time a thief leaves a store with stolen property, the store, the state and local governments, and the taxpayers all lose. To reflect these losses adequately, the resulting criminal charge should include sales tax. Sales tax is a burden for all shoppers in New York; why should a criminal profit from the exclusion of sales tax from the value of the stolen goods, while those who purchase goods legitimately cannot.

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60 The tax law imposes a tax on the receipts from every retail sale. See N.Y. TAX LAW § 1105(a) (McKinney 1987). "A 'sale' occurs whenever there is a transfer of title or possession (or both) of tangible personal property for consideration ... and includes any activity defined as a 'retail sale." See ABA, SECTION OF TAXATION, supra note 44, at 33-15 (citing N.Y. TAX LAW § 1101(b)(5)).

51 N.Y. PENAL LAW § 5.00 (McKinney 1998).

62 According to two recent surveys, shoplifting costs retailers an estimated $10 billion per year and that figure rises to $27 billion when employee theft is included. See Theft's Multibillion Dollar Impact on Retailers, CHAIN STORE AGE EXECUTIVE WITH SHOPPING CENTER AGE, Jan. 1997, at 175(2), available in 1997 WL Trade & Industry (DIALOG) File No. T1 File 148. The information for the survey was compiled from 171,141 shoplifting incidents reported by 171 retail chains. See id.

53 See supra note 1 and accompanying text.

* Candidate for Juris Doctor 1999. The author expresses sincere appreciation to her family, especially her parents, for all the unconditional love and support they provided throughout the years.