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Carl E. Alper

Moses J. Katz

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CURRENT LEGISLATION

Faculty Advisor—PROFESSOR WILLIAM TAPLEY

Editor—CARL E. ALPER

SOME ASPECTS OF THE NEW YORK CITY RETAIL SALES TAX.—On December 5, 1934, pursuant to power and authority delegated by the State Legislature,¹ the Municipal Assembly of New York City imposed a tax of two (2) per cent upon the amount of receipts from retail sales in the city.²

Although the sales tax in form is of ancient origin,³ it has only lately become prominent in the fiscal systems of governments. At the close of the World War, when financial difficulties were acute, its use became quite general in modern Europe, then Australia, next South and Central America and finally in Canada and various parts of Asia.⁴

In this country, the states were slow to adopt such a tax, but after its appearance in West Virginia in 1929, it quickly spread in various guises throughout the Union.⁵

From the fact that the various sales tax statutes were passed so recently, it may be inferred that they were merely temporary measures. This is true, for in few of the states is the taxing period extended beyond 1935.⁶ That this tax shows no signs of permanency appears from the fact that although manifestly undesirable, it is supported by many (who oppose it in principle) only because they feel

¹ N. Y. LAWS 1934, c. 873. "An act to enable, temporarily, any city of the state having a population of one million inhabitants or more to adopt and amend local laws, imposing in any such city any tax and/or taxes which the Legislature has or would have power and authority to impose, to relieve the people of any such city from the hardships and sufferings caused by unemployment and to limit the application of such local laws."

² N. Y. CITY LOCAL LAW No. 20 (1934), effective Dec. 5, taxing date begins Dec. 10, 1934 and terminates Dec. 31, 1935.

³ Haig and Shoup trace it, in some form or other, to ancient Greece and Rome, and, but intermittently, in various European countries up to the year 1800.

⁴ Germany, in 1918, was the first to adopt the sales tax to bolster its failing financial structure, France made use of it in 1920, and by the year 1923, all of the belligerents in the late war but England had availed themselves of its possibilities. Haig and Shoup (1934) 34 COL. L. REV. 809; *Sales and Turnover Taxes*, NATIONAL INDUSTRIAL CONFERENCE BOARD (1929).

⁵ Haig and Shoup, *The Sales Tax in the American States* (1934) 34 COL. L. REV. 809; Arizona, Arkansas, California, Connecticut, Delaware, Georgia, Illinois, Indiana, Louisiana, Kentucky, Michigan, Minnesota, Mississippi, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, North Dakota, South Dakota, Utah, Vermont, Virginia, Washington, Wisconsin.

⁶ See PRENTICE HALL SALES TAX REPORTS; Tax Statutes of the several states in COMMERCIAL CLEARING HOUSE REPORTS.

that any source of revenue is preferable to further curtailment of government activity.⁷

The sales tax is of such recent importance, that present day scholars and laymen alike have been generally uninformed as to the economic principles and potentialities of such a tax. Although the opinions of political and tax economists are not at all in harmonious agreement as to its revenue producing capabilities,⁸ there is something akin to complete unanimity in roundly condemning its effects, if the tax is to be more than temporary. Professor Seligman characterizes it as a tax of "the last resort,"⁹ and objects to it strenuously as a "tax on consumption and expenditure."¹⁰ Such a tax is anathema, to the poor, for it reduces their consumption purchases¹¹ even as to necessities.¹² Similarly, it is disliked by the wage and salary earners of the middle class, who are faced with the alternatives of reducing their savings or their purchases. Nor is it welcomed by business people, who realize not only that such a tax drives business into neighboring cities or states free from the burden of tax on sales,¹³ but also that the payment of higher wages is almost a necessary concomitant.¹⁴

Nor do European economists or financial experts welcome the sales tax there, for Sokolnikoff, writing in England, and Bokenowski,¹⁵ speaking in France, follow Adam Smith in denouncing it as economically unsound if it is to be permanent; although the latter (Bokenowski) hastens to apologize for it as an "impôt d'urgence, un impôt de salut public."

In opposition to charges that the sales tax will lead to petty evasions and that it is unjust, burdensome and unsound, its exponents maintain that it is only a temporary expedient, simple to administer and a boon to the already overburdened tax sources of the community.¹⁶

⁷ *Sales and Turnover Taxation*, NATIONAL INDUSTRIAL CONFERENCE BOARD (1929).

⁸ O'Connor, *The Availability of a Sales Tax in Tennessee*, 12 TENN. L. REV. 249; GREEN, *THE THEORY AND PRACTICE OF MODERN TAXATION*, at 128.

⁹ Senate Hearing on Revenue Act, 1921, at 462.

¹⁰ Professor Edwin R. A. Seligman, *The Sales Tax*, in *STUDIES IN PUBLIC FINANCE*, at 136.

¹¹ Alfred G. Buehler, *Recent Developments of the General Sales Tax*, 36 JOUR. OF POLITICAL ECONOMY 92.

¹² For, gas and electric service, certainly necessities today, are taxable under our sales tax.

¹³ Walter S. Hallanam, *West Virginia Sales Tax, A Year's Administration Experience*, NATIONAL TAX ASSOCIATION PROCEEDINGS, 15th Nat. Conf., 1922, at 108.

¹⁴ 2 ADAM SMITH, *THE WEALTH OF NATIONS* 535.

¹⁵ M. Sokolnikoff (July 2, 1928) MANCHESTER GUARDIAN SUPP. at 225. M. Bokenowski, speaking before the French Chamber of Deputies finance committee, cited in *Sales and Turnover Taxation*, NATIONAL INDUSTRIAL CONFERENCE BOARD (1929).

¹⁶ Authorities cited in *Sales and Turnover Taxation*, NAT. IND. CONF. BOARD (1929).

The purpose of the Sales Tax as set forth in the Enabling Act¹⁷ and the local law is to meet the pressing financial problems besetting local unemployment relief.

That the state has the power to delegate such authority to tax is clearly recognized by the Constitution.¹⁸

Does it conform to the other Constitutional requirements? Under the State Constitution it is required that tax laws shall distinctly state the tax and the object to which it is to be applied, and it is further stated that it shall be insufficient to refer to any other law to fix such tax or object.¹⁹ It may be contended that the Enabling Act does not conform to this provision in that it fails to state the amount of the tax and, further, that it is necessary to refer to other laws (the local law) in order to ascertain the amount. This contention cannot be upheld for (1) this provision of the Constitution has no application to an act authorizing assessments for local purposes,²⁰ and (2) similar provisions in other state constitutions have been liberally construed so as to uphold the law, if practicable.²¹ The objection may not be heard that such a tax is a violation of the Fourteenth Amendment in that some taxpayers derive no benefit from unemployment relief. The rule is that the validity of the taxing power does not depend upon the taxpayers' enjoyment of any special benefit from use of funds raised by taxation as long as a general public purpose is served.²²

A municipality of itself has no inherent power of taxation.²³ Inherent right to tax exists only as an attribute of a sovereignty like the state or federal government, and the only right of a municipality to tax is by virtue of a delegation from the sovereignty.²⁴ This may

¹⁷ *Supra* note 2 as amended by Municipal assembly Dec. 21, 1934.

¹⁸ N. Y. CONST. art. XII, §§1 and 3. *Townsend v. New York*, 16 Hun 362 (1878), *aff'd*, 77 N. Y. 542 (1879); *In re Zoborowski*, 68 N. Y. 88 (1877).

¹⁹ N. Y. CONST. art. III, §24.

²⁰ *Guest v. Brooklyn*, 8 Hun 97 (N. Y. 1876).

²¹ *Unity v. Burrage*, 103 U. S. 447, 459, 26 L. ed. 405, 409 (1880); *Montclair v. Ramsdell*, 107 U. S. 147, 27 L. ed. 431 (1882); *Ackley School Dist. v. Hall*, 113 U. S. 135, 28 L. ed. 954 (1885); *Carter County v. Stinton*, 120 U. S. 517, 30 L. ed. 70 (1887); *People ex rel. City of Rochester v. Briggs*, 50 N. Y. 553 (1872); *In re McPherson*, 104 N. Y. 306, 10 N. E. 685 (1877); *Falconer v. Robinson*, 46 Ala. 347 (); *Johnson v. Harrison*, 47 Minn. 578, 50 N. W. 923 (1891).

²² *Nashville, Chattanooga and St. L. Ry. v. Wallace*, 288 U. S. 249, 53 Sup. Ct. 345 (1933).

²³ *In Metropolitan Theatre Co. v. Chicago*, 246 Ill. 20, 92 N. E. 597 (1910), *aff'd*, 228 U. S. 61, 33 Sup. Ct. 441 (1913), *Vickers, C. J.*: "They (municipalities) do not possess, independently of grant, any inherent power, the statute under which they act is a grant of power and not a limitation, as is the constitution of the state. In the case of a municipality tax, its validity depends upon whether the power to levy it has been expressly granted, while in respect to a tax levied by the state the only question is "Does the constitution prohibit it?"

²⁴ *City of Rochester v. Bloss*, 185 N. Y. 42, 77 N. E. 794 (1906); *In re Second Ave. M. E. Church*, 66 N. Y. 395 (1876); *Sharpe v. Johnson*, 4 Hill 92 (N. Y. 1843) *Sharpe v. Speir*, 4 Hill 76 (N. Y. 1843); *Commrs. Brownsville*

be in the form of a grant directly by constitutional provision, by charter or by statute. In the case of the tax law now under consideration, the delegation resulted by virtue of a statutory authorization.²⁵

A further limitation or restriction upon the power of the municipality concerns the right to grant exemptions. A local government has no inherent powers to grant exemptions from local taxes,²⁶ for, inherent power to exempt presupposes inherent power to tax and this power, as we have seen, does not exist in a municipality. An exemption by the local municipality will be upheld as valid only where the State Legislature expressly grants the right to make exemptions in its tax laws²⁷ or where the power to grant exemptions may be necessarily implied from the grant of power to tax.²⁸ In the *Athens* case the court held that where the grant by the state to the municipality authorized "*full power and authority*" to tax, by implication of the courts, the power to make exemptions will be included in the grant. This precise question arises as to our sales tax. Are the exemptions which the city has made in the cases mentioned below, and several other exemptions included in the act, valid? We are fully cognizant of the fact that exemptions are not favored and will be sustained, only where specifically granted by the legislature, in clear and unambiguous language,^{28a} but it seems fairly reasonable that a valid grant of power to exempt from taxes may be implied from the language employed in the State Enabling Act, to wit: "To impose any tax or taxes which the Legislature has or would have power and authority to impose." Of course, whether the New York courts would follow the decision of the *Athens* case is impossible to predict with certainty, yet, it seems very likely that it would be followed if the precise question arose.

The New York City Sales Tax itself²⁹ imposes a tax of two

Taxing District v. Loague, 129 U. S. 493, 9 Sup. Ct. 327 (1888); *United States v. County of Macon*, 99 U. S. 582 (1878); *City of Cleveland v. United States*, 111 Fed. 341 (C. C. A. 6th, 1901); *Lane v. Mayor of City of Unadavilla*, 154 Ga. 577, 114 S. E. 636 (1922).

²⁵ N. Y. LAWS 1934, c. 873.

²⁶ *J. W. Perry Co. v. Norfolk*, 220 U. S. 472, 31 Sup. Ct. 465 (1911); *City of St. Louis v. United R. Cos.*, 210 U. S. 266, 28 Sup. Ct. 630 (1908).

²⁷ *City of Denver v. Stenger*, 295 Fed. 809 (C. C. A. 1st, 1924); *McTwiggan v. Hunter*, 19 R. I. 265, 33 A. 5 (1895); *Henderson v. Hughes County*, 13 S. D. 576, 83 N. W. 682 (1900).

²⁸ *Athens v. Long*, 54 Ga. 330.

^{28a} *People ex rel. Andrews v. Cameron*, 140 App. Div. 76, 124 N. Y. Supp. 949 (1910), *aff'd*, 200 N. Y. 585, 94 N. E. 1097 (1911); *In re Francis' Estate*, 121 App. Div. 129, 105 N. Y. Supp. 643 (1907), *aff'd* on opinion below, 189 N. Y. 554, 82 N. E. 1126 (1907); *People v. Purdy*, 179 App. Div. 805, 167 N. Y. Supp. 285 (1917), *aff'd*, 224 N. Y. 710, 121 N. E. 885 (1918).

²⁹ N. Y. CITY LOCAL LAW No. 20 as amended by N. Y. CITY LOCAL LAW No. 24 (effective Dec. 28, 1934).

per cent³⁰ on sales³¹ made within the city of New York. Sales of food products, of periodicals, of water delivered through mains, sales by or to semi-public institutions and sales by or to the city and state, are expressly tax exempt.³² Are these exemptions a denial of the equal protection of the law under the Fourteenth Amendment? Do they offend against the principle of equality upon which every just and reasonable system of taxation is based?³³ That the city has no power to discriminate is well settled,³⁴ but "perfect equality in assessment of taxation is unobtainable."³⁵ Classification, in itself, is not inherently bad. It is only where it is unduly discriminatory or unreasonable that it is objectionable.³⁶ No iron-bound rule of equality need be adopted and the exemptions found in the Sales Tax Law are not unreasonable classifications such as would constitute unequal protection of the law.³⁷ The state may exempt certain classes of property from any tax whatsoever, and among these are the semi-public institutions enumerated in the law.³⁹ The power of the legislature to exempt as well as to tax cannot be disputed where the power is not specifically curbed by the Constitution.⁴⁰

³⁰ N. Y. CITY LOCAL LAW No. 20 §2. But the comptroller was empowered to create a schedule to practically apply the two per cent provision. See RULES AND REGULATIONS art. 3, issued Feb. 11, 1935, for schedule. In operation, the schedule imposes a tax of from 8% on small-priced items, but never less than 2%. For example, the tax on a thirteen-cent article is one cent.

³¹ Sales, as defined in §1, subd. (e) of the Local Law, mean any transfer of title or possession (for consumption and not for resale) of personalty and the rendition of services popularly denominated of a public utility nature. Under this definition many transactions would be classified as sales and taxable as such which are not sales within the meaning of the Uniform Sales Act. For the sale to be a true sale under the Sales Act, the agreement must contemplate a present transfer of title, a transfer *in praesenti* rather than a transfer of title *in futuro*. WHITNEY, LAW OF SALES 2 ed. (1934). *Edwards v. Farmers' Fire Ins. Co., etc., Co.*, 21 Wend. 467 (N. Y. 1839); *Barber Asphalt Paving Co. v. Standard Asphalt Co.*, 39 App. Div. 617, 58 N. Y. Supp. 405 (1899). Therefore under the Local Law, contracts or agreements to sell and contracts for hire or leasing of personal property are classed as sales and are taxable. RULES AND REGS. art. 9 (1935).

³² *Supra* note 29, §2, subd. (d).

³³ *People v. Barker*, 150 N. Y. 52, 44 N. E. 785 (1896).

³⁴ *Hoffman Candy Co. v. City of Newport Beach*, 120 Cal. App. 525, 8 Pac. (2d) 235 (1932); *Chalker & Birmingham R. R. et al.*, 249 U. S. 522, 39 Sup. Ct. 366 (1919); *Singer Sewing Machine Co. v. Brichell*, 233 U. S. 304, 34 Sup. Ct. 493 (1914).

³⁵ COOLEY, LAW OF TAXATION 177, quoting *Commonwealth v. Savings Bank*, 3 Allen (Mass.) 436.

³⁶ *People v. Raynes*, 136 App. Div. 417, 120 N. Y. Supp. 1053, *aff'd*, 198 N. Y. 539, 92 N. E. 1097 (1910).

³⁷ *Lutz v. Arnold*, Sup. Ct. of Indiana, Jan. 29, 1935.

³⁸ *Supra* note 37; *Bell's Gap Rd. v. Penn*, 134 U. S. 232, 10 Sup. Ct. 533 (1890).

³⁹ RULES AND REGS. art. 12 (1935).

⁴⁰ COOLEY, LAW OF TAXATION 4; BLACK, CONSTITUTIONAL LAW (2d ed.) 375.

All properties, callings, etc., need not be classified together.⁴¹ It is enough that there be no discrimination within any class and that the taxing authority treat all within the same class alike.⁴² That the sales of food stuffs and water delivered through mains are free from tax, does not constitute unlawful discrimination within the purview of the Constitution, for so long as the exemption is based upon sound public policy, and is aimed at the preservation of public health and welfare, the courts will uphold it as reasonable.⁴³

The Act provides further that the tax be paid by the purchaser to the vendor who shall be deemed the agent and trustee for the city.⁴⁴ As defined by Section 1, subdivision (a), the word "person," referring to purchasers and vendors, includes practically every legal entity including receivers. In *the Matter of Flatbush Gum Co., Inc.*,⁴⁵ the court raises the rather baffling question as to the legality of a tax on sales made by receivers in bankruptcy, as a tax on an instrumentality of the national government. The question was not before that court, however, since the State Sales Tax,⁴⁶ there litigated, did not include federal receivers in the enumeration of "persons" taxable. The New York City Sales Tax does specifically include receivers⁴⁷ and therefore the question is squarely put.

Recognizing the principle that the unrestrained power to tax involves, in law, the power to destroy,⁴⁸ the courts have consistently protected from state interference all privileges lawfully granted by the United States.⁴⁹

A federal statute⁵⁰ has only lately resolved the question (which

⁴¹ *State Board of Tax Com'rs etc. v. Jackson*, 283 U. S. 527, 51 Sup. Ct. 540 (1931); *cf. Liggett Co. v. Lee*, 288 U. S. 517, 53 Sup. Ct. 481 (1933); see also *Bells Gap R. R. v. Penn.*, *supra* note 38; *Grozzi v. Tiernan*, 148 U. S. 657, 13 Sup. Ct. 721 (1883); *Pacific Express Co. v. Siebert*, 142 U. S. 339, 12 Sup. Ct. 250 (1892).

⁴² *Gregg Dyeing Co. v. Query*, 286 U. S. 472, 52 Sup. Ct. 631 (1932); *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 21 Sup. Ct. 43 (1900).

⁴³ *D. A. Shulte, Inc., Minton v. Groves*, 274 N. Y. Supp. 641 [App. Div. (3d Dept. 1934)]; *People ex rel. Farrington v. Mensching*, 187 N. Y. 8, 79 N. E. 884 (1907); *Park and Tilford v. Graves*, 273 N. Y. Supp. 431 [App. Div. (3d Dept. 1934)].

⁴⁴ N. Y. CITY LOCAL LAW No. 24 §3; also RULES AND REGS. art 16 (1935).

⁴⁵ U. S. Circuit Ct. of Appeals, 2d Dist., Nov. 5, 1934, 73 F. (2d) 283 (C. C. A. N. Y. 2d, 1934).

⁴⁶ N. Y. TAX LAW §391.

⁴⁷ LOCAL LAW No. 24 §1 subd. (a).

⁴⁸ *M'Culloch v. Maryland*, 4 Wheat. 416 (U. S. 1819); *Osborn v. Bank of U. S.*, 9 Wheat. 733 (U. S. 1824); *Weston v. City Council, etc.*, 2 Pet. 449 (U. S. 1829); *People of New York v. Com'r of Taxes*, 2 Black 620 (U. S. 1862); *Bank Tax Case*, 2 Wall. 200 (U. S. 1864); *Van Allen v. Assessor*, 3 Wall. 573 (U. S. 1865).

⁴⁹ *Gibbons v. Ogden*, 9 Wheat. 1 (U. S. 1824); *Passenger Cases*, 7 How. 283 (U. S. 1848); *Hays v. Pacific Mail Steamship Co.*, 17 How. 596 (U. S. 1854); *Sinnot v. Davenport*, 22 How. 227 (U. S. 1859).

⁵⁰ H. B. 8544, Public Act 392, effective June 18, 1934.

had until then been in doubt)⁵¹ of the taxability of sales by receivers engaged in conducting the business of a bankrupt, by permitting the state to tax them to the same extent as if such business were conducted by an individual or corporation.

But the New York City statute does not distinguish between sales by a receiver authorized to conduct and continue the business of a bankrupt, and sales made by a receiver in liquidating the assets of a business. Instead, the comptroller, in interpreting the Act, flatly asserts that sales by the latter are taxable, even when the receiver is appointed by a federal court.⁵² Is such an interpretation valid?

That it is not within the power of a state to lay a tax upon an instrumentality or agency of the United States Government, when that agency is engaged in executing a federal function,⁵³ has been clearly recognized.⁵⁴ Marshall, *C. J.*, said in *M'Culloch v. Maryland*,⁵⁵ that "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the Constitutional laws enacted by Congress to carry into execution the powers vested in the general government." Is this so only where the tax directly constitutes a burden on governmental functions of the United States?⁵⁶ Taxes by a city or state, which place no excessive burden on an instrumentality of the government, but, instead, allow it to function, unhindered and unimpaired, and as expeditiously as it was intended by the Federal Government, have been held not to fall within the prohibition of *M'Culloch v. Maryland*.⁵⁷

⁵¹ Illinois: Niel H. Jacoby, *Conflicting Interpretations of Retail Sales Tax*, 2 U. OF CHIC. L. REV. 78, 93.

California: Cal. Letter of Frank M. Keeling, Ass't Director, Sales Tax Division, State Board of Equalization, Oct. 24, 1933.

Oklahoma: OKLA. RULES AND REGS.; Okla. Tax Comm., Dec. 22, 1933, §5 (1933).

These states contend that sales made pursuant to their respective statutes are within the purview of the law, and are supported by *Howe v. Atlantic, Pacific and Gulf Oil Co.*, Dist. Ct. for Northern of Ill. Eastern Div., No. 11268, May 4, 1934. A contrary view, taken in *Howe v. Atlantic, Pacific and Gulf Oil Co.* (State of Mo. Interveners) 4 F. Supp. 162 (D. C. 8th, 1933) was reversed.

⁵² RULES AND REGS. art. 64 (1935).

⁵³ U. S. CONST. Art. 1, subd. 4.

⁵⁴ *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 51 Sup. Ct. 601, 75 L. ed. 1277 (1931); *Willcuts v. Bunn*, 282 U. S. 216, 51 Sup. Ct. 125, 75 L. ed. 304 (1931); *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, 48 Sup. Ct. 45 (1928); *City of New Brunswick v. United States*, 276 U. S. 547, 48 Sup. Ct. 371, 72 L. ed. 693 (1928); *Metcalf and Eddy v. Mitchell*, 269 U. S. 514, 46 Sup. Ct. 172, 70 L. ed. 384 (1926); 61 C. J. 371, §370, subd. 2, and cases cited therein; *People ex rel. Donner Hanna Coke Corp. v. Burke*, 222 App. Div. 790, 226 N. Y. Supp. 882, *aff'd*, 284 N. Y. 507, 162 N. E. 503 (1928); 61 C. J. 372, §370, subd. 2, and cases cited therein.

⁵⁵ 4 Wheat. 415, 436 (U. S. 1819).

⁵⁶ *Grayburg Oil Co. v. State* (Tex. Av. App.) 286 S. W. 489, *aff'd* (Comm. App. 3 S. W. 2d, 427).

⁵⁷ *Educational Films Corp. v. Ward*, 282 U. S. 379, 51 Sup. Ct. 170, 75 L. ed. 400 (1931), *aff'g*, 41 F. (2d) 395 (D. C. S. D. N. Y. 1930); *St. Louis*

The courts may, in dealing with the present problem, consider that a privilege, vested solely in Congress by the Federal Constitution, will be directly impinged by the assumed authority to tax, and its concomitant, the power to ultimately destroy. That the complete immunity from taxation may be protected in such a case, irrespective of the amount of the tax, or the extent to which it curtails a federal power, is not too remote to expect.⁵⁸ "Just what instrumentalities of either a state or the Federal Government are exempt from taxation by the other must receive a practical construction, which permits both to function with a minimum of interference, each with the other; and the limitation cannot be so varied or extended as to seriously impair either the taxing power of the government imposing the tax, or the appropriate exercise of the function of the government affected by it."⁵⁹ The dissent in the *Panhandle* case indicates that such may be the law.^{59a}

The local law states generally that the purchase of tangible property not for *resale* is taxable,⁶⁰ and the comptroller and city counsel have interpreted this to include purchases, by a manufacturer, of commodities which do not appear, in tangible form, in the article manufactured.⁶¹ As to such purchases the manufacture is treated like any other ultimate consumer. For instance, if a soap maker were to purchase tools and perfumes, the perfume, appearing in tangible form in the finished product, is "resold" and the sale of the perfume is not subjected to tax, while tools used and destroyed in making the soap, but which do not appear in tangible form in the property created, are subject to tax.

A Michigan court⁶³ interpreting a provision of the Michigan Sales Tax Law,⁶⁴ similar to ours, held that machinery, tools, etc., used in production, go to make up the cost, and are covered by the ultimate selling price. "To tax the sale, to the manufacturer, who produces the ultimate product, of instrumentalities used or consumed in the making of that product is to tax twice."⁶⁵ Since the power

San Francisco Ry. Co. v. Midlekamp, 256 U. S. 226, 41 Sup. Ct. 488, 65 L. ed. 905 (1921); Union Pac. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787 (U. S. 1873); Louisville First National Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701 (U. S. 1869); People v. Cantor, 187 N. Y. Supp. 467, 114 Misc. 419 (1921); 61 C. J. 372, §50 and cases cited.

⁵⁸ Indian Motorcycle Co. v. United States, *supra* note 54; Mid-Northern Oil Co. v. Walker, 65 Mont. 414, 211 Pac. 353 (1922); 61 C. J. 373, §370, subd. 2.

⁵⁹ Metcalf & Eddy v. Mitchell, 269 U. S. 514, 46 Sup. Ct. 172 (1926).

^{59a} Panhandle Oil Co. v. Mississippi, *supra* note 54, four judges dissenting.

⁶⁰ N. Y. LOCAL LAW No. 24, §1, subd. (g).

⁶¹ RULES AND REGS. art. 32 (1935).

⁶² *Ibid.*

⁶³ Boyer-Campbell Co. *et al.* v. Fry (C. D. Wayne County), Mich., April 11, 1934.

⁶⁴ PUBLIC ACT No. 167, Acts of 1933.

⁶⁵ *Supra* note 63.

to tax is the power to destroy,⁶⁶ it is proper to assume that the legislature does not intend to tax oppressively or unjustly unless there is no construction of the law which is consistent with justice and inconsistent with the desire to destroy.⁶⁷ The law should not be given an interpretation that imposes double taxation⁶⁸ or operates more heavily on some commodities than on others, unless the statute expressly requires it or unless such construction is necessarily implied.⁶⁹ Consequently, the court held that sales of tools, machinery, etc., to a manufacturer are not subject to tax,⁷⁰ an interpretation squarely at odds with that given by the comptroller. Should this question arise in New York, it is quite likely that our courts would follow the rule of the *Michigan* case.

The local law requires a tax on sales *made within the city of New York*.⁷¹ However, there are limitations imposed upon this all-embracing provision.

That a state has authority to tax tangible personal property located within its jurisdiction is unquestioned.⁷² It matters not that the person taxed is neither a citizen nor a resident of the state, so long as the property be situated within the state.⁷³ There is, however, a Constitutional restriction upon the power of the states to tax. The "commerce clause" of the Federal Constitution, gives Congress the power "to regulate commerce with foreign nations and among the several states * * *"⁷⁴ The restriction on taxation of interstate commerce results from judicial interpretation of this clause.

⁶⁶ *M'Culloch v. Maryland*, 4 Wheat. 416 (U. S. 1819), and cases cited in note 48, *supra*.

⁶⁷ COOLEY, TAXATION (4th ed. 1924) 483, 487; *Tennessee v. Whitworth*, 117 U. S. 129, 6 Sup. Ct. 649 (1886); *N. Y. Cent. R. Co. v. Stevenson*, 277 Ill. 474, 115 N. E. 633 (1917); *Milwaukee Ry. & Light Co. v. Wis. Tax Comm.*, 207 Wis. 523, 242 N. W. 312 (1912); *Kingsley v. City of Merrill*, 122 Wis. 185, 99 N. W. 1044 (1904); *In re Estate of Wm. Barbour*, 185 App. Div. 445, 173 N. Y. Supp. 276 (1918), *aff'd*, 226 N. Y. 639, 123 N. E. 854 (1919).

⁶⁸ "By duplicate taxation in this sense is understood the requirement that one person or any one subject of taxation shall directly contribute twice to the same burden, while other subjects of taxation belonging to the same class are required to contribute but once." COOLEY, TAXATION (4th ed. 1924) 225 and 226.

⁶⁹ *Merchants Ice & Cold Storage Co. v. Commonwealth*, 154 Ky. 452, 157 S. W. 717 (1913); *Woodruff v. Oswego Starch Factory*, 177 N. Y. 23, 69 N. E. 122 (1903); *In re Estate of Wm. Barbour*, *supra* note 67; *N. Y. & N. Y. Cent. & Hudson River R. R.*, 32 App. Div. 113, 52 N. Y. Supp. 859, *aff'd*, 157 N. Y. 677, 51 N. E. 1093 (1898).

⁷⁰ *Supra* note 63.

⁷¹ N. Y. LOCAL LAW No. 24, §2.

⁷² *M'Culloch v. Maryland*, 4 Wheat. 415, 429 (U. S. 1819); *Leloup v. Mobile*, 127 U. S. 640, 649 (1887).

⁷³ *Savings etc. Soc. v. Multnomah County*, 169 U. S. 421, 18 Sup. Ct. 392 (1898).

⁷⁴ U. S. CONST. Art. I, §8, subd. 3.

The decisions uniformly hold that no state may tax or otherwise burden interstate commerce.⁷⁵

But this does not prevent the imposition of a tax on goods contracted for in one state merely because delivery is incidentally made from goods in another state.⁷⁶ Again, where goods used in interstate commerce have reached their ultimate destination in this state and become incorporated in the goods of that state, when sold here, the sale is taxable;⁷⁷ but where the goods have not reached their final destination and are still in their original package, they are regarded as still being in interstate commerce and hence not taxable.⁷⁸ It must also be borne in mind that a state may tax property located within the state, even though interstate movement is ultimately intended, provided that such movement has not yet commenced.⁷⁹ Where a telegraph company is engaged in the business of sending messages, part of which is interstate and part intrastate, the imposition of a tax on those messages sent and received wholly within the state, is not violative of the "commerce clause."⁸⁰

As we shall now see, these principles have been adhered to by the comptroller. Under the rules promulgated, where the sale has been made outside the city, even though delivery is made in New York, no tax may be collected. But where the sale is made in the

⁷⁵ *Leloup v. Mobile*, 127 U. S. 640, 648, 8 Sup. Ct. 1383 (1888); *Case of State Freight Tax*, 15 Wall. 232 (U. S. 1872); *Pensacola Tel. Co. v. Western Union Tel. Co.*, 960 So. 1 (1877); *Mobile v. Kimball*, 102 U. S. 691 (1880); *Walling v. Michigan*, 116 U. S. 446 (1885); *Picard v. Pullman Southern Car Co.*, 117 U. S. 34 (1886); *Wabash Railroad Co. v. Illinois*, 118 U. S. 557 (1886); *Robbins v. Shelby County Taxing Co.*, 120 U. S. 489 (1887); *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126 (1887).

⁷⁶ *Wiloil Corp. v. Comm. of Pa.*, Sup. Ct. of U. S., Feb. 4, 1935. In the *Wiloil* case, X and Y, in Pennsylvania, contracted for sale of coal to X, delivery to be in Pennsylvania. No mention of any particular coal was made, a delivery of any coal of the specified quality wheresoever found would have satisfied the contract. Y shipped the coal from Delaware and the sale was held taxable in Pennsylvania.

⁷⁷ *Woodruff v. Parham*, 8 Wall. 123, 127 (U. S. 1868); *Brown v. Houston*, 114 U. S. 622, 632, 5 Sup. Ct. 1091 (1884); *American Steel and Wire Co. v. Speed*, 192 U. S. 500, 519, 24 Sup. Ct. 365 (1904); *Sonnebon v. Cureton*, 262 U. S. 506, 43 Sup. Ct. 643 (1923); *Hart Refineries v. Hermon*, 278 U. S. 499, 49 Sup. Ct. 188 (1929); *Gregg Dyeing Co. v. Query, et al.*, 285 U. S. 472, 52 Sup. Ct. 631 (1932); *State of Minnesota v. Blasius*, 290 U. S. 1, 54 Sup. Ct. 34 (1933).

⁷⁸ *Boyer, Campbell Co., et al. v. Fry*, Circuit Ct. of Wayne County, Mich., April 11, 1934; *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678 (U. S. 1828); *Leisy v. Harden*, 135 U. S. 100, 10 Sup. Ct. 681 (1890); *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. 725 (1890).

⁷⁹ *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475 (1886); *Diamond Watch Co. v. Ontonagon*, 188 U. S. 82, 23 Sup. Ct. 266 (1903). Example: A sells goods to a foreign corporation doing business in New York and delivers them to the New York City warehouse of the corporation; the tax must be paid even though the corporation intends later to remove the goods to another state.

⁸⁰ *Telegraph Co. v. Texas*, 105 U. S. 460 (1881); *Western Union Tel. Co. v. Pennsylvania*, 128 U. S. 39, 9 Sup. Ct. 6 (1888); *Western Union Tel. Co. v. Alabama*, 132 U. S. 472, 10 Sup. Ct. 161 (1889).

city, and delivery is made to the purchaser himself in the city, the tax is collectable through the purchaser intended to take the property outside the city.⁸¹ This is based on the reason that both the sale and delivery are made within the city. On the same theory where the sale is in the city and delivery is made partly within and partly outside the city, the tax is to be paid only on that portion which has been delivered within the city.⁸²

One more important situation must be noticed. The tax is payable on property sold to a steamship company tied at piers in New York City though the property is to be consumed by the steamship in conducting interstate commerce. Similarly in the case of gasoline or oil (sold to a railroad or aeroplane company) which is to be consumed in carrying on interstate commerce.⁸³

The authority to collect the tax has been vested in the comptroller. To expedite this duty various other powers covering a wide range of functions have been delegated to him.⁸⁴ In conformity with these powers, the comptroller has provided that delinquent taxpayers may be compelled to pay their tax debts in two ways, (1) the ordinary procedure by which the corporation counsel institutes an action in the name of the city to recover the amount due,⁸⁵ and (2) by summary procedure, whereby warrants are issued, under the comptroller's seal, to the sheriff or marshal who is commanded to sell the property of the tax debtor.⁸⁶ These warrants when served partake of the nature of a judgment, and the property may be sold in payment of the tax *without a judicial proceeding*.⁸⁷

While the legislature may provide for the collection of taxes by judicial proceedings, it has uniformly been held that due process of law in taxation does not require judicial procedure.⁸⁸ What is due process of law depends upon the class of cases to which it refers,

⁸¹ RULES AND REGS. art. 94 (1935).

⁸² *Ibid.*

⁸³ *Eastern Air Transport, Inc. v. South Carolina Tax Comm.*, 289 U. S. 249, 53 Sup. Ct. 591 (1933); *Nashville, Chattanooga and St. Louis Ry. Co. v. Wallace*, 288 U. S. 249, 53 Sup. Ct. 345 (1933); *Chassanoil v. City*, 291 U. S. 584, 54 Sup. Ct. 541 (1934); *A. G. Spalding v. Collector*, 262 U. S. 66, 43 Sup. Ct. 485 (1923). In the *Eastern Air Transport, Inc.* case, the court held that the purchase of supplies or equipment for use in conducting interstate commerce was a mere incident to and not the actual carrying on of interstate commerce.

⁸⁴ N. Y. LOCAL LAW No. 24, §2, subd. 11, including the authority to adopt rules and regulations to make valid extension of payment dates to "assess, revise, readjust and impose the taxes authorized to be imposed * * *," to request information and to prescribe methods for determining receipts from sales.

⁸⁵ RULES AND REGS. art. 25 (1935).

⁸⁶ *Scottish Union Co. v. Bowland*, 196 U. S. 611, 25 Sup. Ct. 345 (1905); *McMillen v. Anderson*, 95 U. S. 37 (1877).

⁸⁷ *Supra* note 85.

⁸⁸ *Dukich v. Blair*, 3 F. (2d) 303 (E. D. Wash. 1925), *appeal dismissed*, 270 U. S. 670, 46 Sup. Ct. 469 (1925); *Turpen v. Lemon*, 187 U. S. 51, 23 Sup. Ct. 469 (1902); *Kelly v. Pittsburgh*, 104 U. S. 78 (1881); *McMillen v. Anderson*, 95 U. S. 37 (1877).

upon the settled maxims of law for the protection of the individual,⁸⁹ and upon the history and the constitution of the government wherein it is applied.⁹⁰ It is within the power of the legislature to give to the tax authority special remedies to compel the payment of taxes, in addition to the ordinary methods of bringing suit.⁹¹ Governments must have their revenues promptly and at the appointed time, in order to discharge their functions. They cannot await the slow process of judicial trials in their ordinary course,⁹² but as an attribute of the sovereign power of taxation (subject only to constitutional limitations), the legislature has exclusive and discretionary power to prescribe the means by which taxes may be collected.⁹³

The one limitation upon this authority is that the procedure be not "utterly unreasonable, arbitrary, unequal or unjust in its operation."⁹⁴ That the method prescribed by the comptroller is due process, the courts of our state have consistently determined. This remedy (of summary procedure or distraint) existed at common law and has been on our statute books for almost a century and a half. It has been frequently enforced and until *Hersie v. Porter*, had never been questioned.⁹⁵ While it may be that under the provisions of Section 775 of the C. P. A., certain conditions are required to be shown before a proceeding of this kind, yet notwithstanding this section, the courts feel that it was the intention of the legislature to give to the tax collector power to enforce all remedies which would be available under the C. P. A., without requiring the comptroller to go through a "*needless performance of personal service, entry of judgment and issue of execution*." This provision under 380 of the Tax Law is not inconsistent with the provisions of the C. P. A. in the enforcement and collection of taxes.⁹⁶ Notice of intent to sell is given however, before the property is actually put upon the auction block.^{96a}

The courts feel that "when the assessment is made (or when the tax is levied), it partakes of the character of a judgment and

⁸⁹ STORY ON THE CONSTITUTION (5th ed.) §1945.

⁹⁰ *Kelly v. Pittsburgh*, 104 U. S. 78, 126 L. ed. 658 (1881).

⁹¹ *Matter of N. Y.*, 136 Misc. 104, 240 N. Y. Supp. 309 (1930).

⁹² *Dukich v. Blair*, *supra* note 88; *Lake Shore & Mich. So. Ry. Co. v. Roach*, 80 N. Y. 339 (1880).

⁹³ *Gautier v. Dilman*, 204 N. Y. 20, 97 N. E. 404 (1912); *Genet v. Brooklyn*, 99 N. Y. 296, 1 N. E. 777 (1885); *Litchfield v. Vernon*, 41 N. Y. 123 (1869); *N. Y. Protestant Episcopal Public School v. Davis*, 31 N. Y. 574 (1864).

⁹⁴ *Gautier v. Dilman*, *supra* note 93.

⁹⁵ *Hersee v. Porter*, 100 N. Y. 403, 3 N. E. 338 (1885); *Lake Shore etc. Ry. Co. v. Roach*, *supra* note 92; see *Sheldon v. Van Buskirk*, 2 N. Y. 473 (1849).

⁹⁶ *Matter of N. Y.*, *supra* note 91.

^{96a} N. Y. City Charter, 928, provides that six days prior to the sale, the time and place of the sale is to be advertised in three public places, in the ward where the sale is to be made.

the acts of the assessors in making it up (or the acts of the sheriff in issuing the warrant) are judicial in their character."⁹⁷

The comptroller, under the Sales Act, is given authority also to compromise disputed tax claims.⁹⁸

It is a generally recognized principle of the law of taxation that a statute authorizing the acceptance, directly or indirectly of a part of the tax in satisfaction of the whole, is unconstitutional and is a disregard of the principles of equality and uniformity.⁹⁹ A settlement for less than the amount due is an unlawful diversion of public money to private use. A municipal corporation cannot under the guise of a compromise surrender valuable rights or interests in claims over which there can be no substantial controversy.¹⁰⁰ Municipal officials can not make gifts of corporate funds¹⁰¹ and persons contracting with them are bound to take notice of the limits of their powers.¹⁰²

The authority to compromise tax claims may be given, if at all, where it has actually been shown that no more than the amount settled for can be obtained,¹⁰³ and if the power of the comptroller to compromise claims will be upheld, it will be upheld on this ground. Otherwise, this power in the hands of unscrupulous officials would promote more political favoritism and greater corruption than has yet been known.¹⁰⁴

Section 71 of the Tax Law¹⁰⁵ provides that property in the possession of any person who ought to pay a tax may be seized and sold for its non-payment, and that no claim of property made to such goods by any other person shall be available to prevent such sale. For example, where property of *A* is in the possession of *B*, it may be sold to pay *B*'s delinquent taxes, for it has been held that, for the purposes of tax collection, the statute conclusively adjudges

⁹⁷ Brooklyn El. R. Co. v. City of Brooklyn, 11 App. Div. 127, 132, 42 N. Y. Supp. 683, 686 (1896). Words in parentheses interpolated.

⁹⁸ N. Y. LOCAL LAW No. 24, §11, subd. 2.

⁹⁹ Missouri v. Federal Lead Co., 265 Fed. 305 (E. D. Mo. 1920); Cincinnati Southern Ry. Co. v. Guenther, 19 Fed. 395 (C. C. E. D. Tenn. 1884); Webb v. Phoenix Title & Trust Co., 20 Ariz. 580, 185 Pac. 128 (1919); Ranger Realty Co. v. Miller, Sup. Ct. of Florida, 136 So. 546 (1931); Lincoln M. and T. Co. v. Davis, 76 Kan. 639, 92 Pac. 707 (1907). *Contra*: State v. State Ins. Co., 30 N. M. 491, 239 Pac. 741 (1925).

¹⁰⁰ McQUILLEN ON MUNICIPAL CORP., §2643.

¹⁰¹ O'Brien v. Mayor of City of N. Y., 40 App. Div. 331, 57 N. Y. Supp. 1039 (1899); N. Y. CONST. art. 8, §10.

¹⁰² Moore v. Mayor of City of N. Y., 73 N. Y. 238, 29 Am. Rep. 134 (1878); Parr v. President, *etc.* of Village of Greenbusch, 72 N. Y. 463, 472 (1878); Oswego Falls Corp. v. City of Fulton, 148 Misc. 170, 265 N. Y. Supp. 436 (1933).

¹⁰³ Ranger Realty Co. v. Miller; Lincoln M. and T. Co. v. Davis, both *supra* note 99.

¹⁰⁴ Brooklyn Elevated Ry. Co. v. City of Brooklyn, 16 Misc. 416, 417, 419, 38 N. Y. Supp. 154, 155 (1896), *aff'd*, 11 App. Div. 127, 42 N. Y. Supp. 683 (1896).

¹⁰⁵ N. Y. CONSOLIDATED LAWS c. 60; N. Y. LAWS 1909 c. 62.

title to be in the person taxed. Possession is not merely a badge of ownership, *it is title*,¹⁰⁶ and, further, it is stated, that the authority to seize *any* property in the possession of the person taxed for the payment of the tax, even though it is a bailment,¹⁰⁷ or sold on a conditional sales contract, is due process of law, and is constitutional.¹⁰⁸ This statute has been upheld by our courts, but the authors have found no decisions of the United States Courts on this point. What treatment it will receive there, in the light of the eminent domain and the due process clauses, is speculative. Suffice it to say our courts have held it to be constitutional time and again.¹⁰⁹

As yet, of course, there has been no litigation under the New York City Sales Tax. It has been the purpose of this review to present the possible points of conflict with a view to determining the social and legal aspects involved.

CARL E. ALPER AND MOSES J. KATZ.

CONSTITUTIONALITY OF THE "YELLOW-DOG" CONTRACT STATUTE.

"The widespread use of this type of contract and the injunction against labor is slowly impeding a large number of our population to such an extent that many workers are beginning to look upon the courts as allies of the employer class. If the laborer feels that justice cannot be obtained through the medium of the courts, he will use his own methods. Industrial peace is extremely difficult to maintain if the workers are not permitted to associate openly, since secret, underground organizations will then flourish. When responsible trade-unionism was driven out of Colorado some years ago, radical labor organizations stepped in with ensuing violence and lawlessness."¹

Such is the attitude of organized labor toward the use and effect of the "yellow-dog" labor contract, that instrument by which an employee is required to bind himself, as a condition of his employment, that he will not remain or become a member of a labor organization (except, possibly, a "company" union).

Congress, and many of the states, long ago began making efforts to ban the use of such contracts by passing laws rendering them un-

¹⁰⁶ *Hersie v. Porter*; *Lake Shore El. Ry. Co. v. Roach*; see *Sheldon v. Van Buskirk*, all *supra* note 95.

¹⁰⁷ *Pauley v. Wahle*, 29 Hun 116, 16 Week. Dig. 462 (N. Y. 1883).

¹⁰⁸ *Sheldon v. Van Buskirk*, *supra* note 95; *Coie v. Carl*, 82 Hun 360, 31 N. Y. Supp. 565, 64 St. Rep. 155 (1894).

¹⁰⁹ *Supra* notes 106, 107 and 108.

¹ O'Leary, *The Case Against the Yellow-Dog Labor Contract* (March 1932) AMERICAN FEDERATIONIST 304.