



PennState
Dickinson Law

DICKINSON LAW REVIEW
PUBLISHED SINCE 1897

Volume 37
Issue 2 *Dickinson Law Review* - Volume 37,
1932-1933

1-1-1933

The Emergency Relief Sales Tax

Sanford D. Beecher

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlra>

Recommended Citation

Sanford D. Beecher, *The Emergency Relief Sales Tax*, 37 DICK. L. REV. 101 (1933).
Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol37/iss2/2>

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.

THE EMERGENCY RELIEF SALES TAX

The Emergency Relief Sales Tax,¹ passed by the Legislature at the second Special Session called by the Governor to afford unemployment relief, has resulted in some uncertainty as to its scope and application. Perhaps any new tax, no matter how clear and concise its terms, would result in a flood of foolish questions from persons who would be reluctant to believe what the terms clearly stated. But among the thousands of questions which have been received by the Department of Revenue, many raise problems of extreme difficulty. The duty to assume the initiative in solving these problems is not an enviable one. However, in fairness to taxpayers, the Department of Revenue has made every effort to answer all inquiries and make known what position it will take in administering the law, so that the payment of the tax may be adjusted between buyer and seller when the transaction takes place, in advance of the due date. This is a dangerous practice. Good intentions may prove a boomerang. Experience is the most reliable teacher in the administration of any new tax law. Experience and further study may compel a change in present rulings.²

The purpose of this article is to discuss some of the features of the tax and a few of the more important problems arising under it, indicating conclusions reached by the Department of Revenue.

Though one may ask what possible bearing it has on the meaning of words, it should not be overlooked that this is a temporary tax, in effect for only six months; that its

¹[Ex. Sess.] Act of August 19, 1932, P. L. 92, No. 53.

²This word is used here and elsewhere in this article for lack of a better word. Strictly speaking, the Department of Revenue makes no rulings on legal questions save on the basis of an opinion by the Department of Justice.

purpose is to raise funds for unemployment relief; and that the revenues which the tax is expected to produce have already been appropriated and will already have been spent for relief by the time the tax becomes due. The significance of these things is impossible to analyze. It may be psychological. But consciously or unconsciously, the mind of the tax administrator does and should take these things into account.

In kind and constitutional limitations, the tax presents no novelty in Pennsylvania. In these respects it is similar to the Mercantile License Tax³ on dealers which, in one form or another, has been in force in Pennsylvania since 1821.⁴ The Mercantile Tax has been called a tax on sales or the business of selling.⁵ But here the similarity ceases.

Much misunderstanding results from confusing the Sales Tax with the Mercantile Tax.⁶ The Mercantile Tax Act defines wholesale and retail sales and imposes a tax on both, though at different rates. The act itself by definition limits wholesale transactions to sales to dealers. All other sales are defined as retail.⁷ This statutory line of demarcation has caused some confusion and dissatisfaction in the Mercantile Tax, as it does not correspond, in every instance, with the understanding and terminology of business men. The Sales Tax is limited to consumers' sales only. In the sections of the Sales Tax defining terms and imposing the tax, the word "retail" does not appear.⁸ The sole test, under the Sales Tax, is whether the sale is to a con-

³Act of May 2, 1899, P. L. 184, as amended.

⁴Act of April 2, 1821, P. L. 244; 7 Sm. L. 471.

⁵*Knisely v. Cotterel*, 196 Pa. 614, 46 A. 861 (1900); *Crew Levick Company v. Pennsylvania*, 38 S. Ct. 126, 245 U. S. 292, 62 L. Ed. 295 (1917).

⁶*Pittsburgh Press*, October 30, 1932, article entitled "State Tax on Sales is Amazing Puzzle; Few Able to Agree on Who Must Pay." This article cites a current mercantile license tax decision as a sales tax case.

⁷Act of May 2, 1899, P. L. 184, Section 2.

⁸The word "retail" does appear in Section 21. This section was inserted by the Ways and Means Committee of the House after the bill was introduced.

sumer or to any person for any purpose other than for resale, regardless of the amount charged, margin of profit, or quantity of goods involved. Thus, while it is true that the ordinary retail dealer must pay the Sales Tax, the tax is by no means limited to the ordinary retail sale.

Soon after the act was passed, a question of vital importance arose; namely, is a buyer necessarily a consumer if he proposes to sell what he buys, made over or manufactured into some different form or condition? In other words, in order to "resell" must the goods purchased be sold again in the same form or condition they were in when purchased? A moment's reflection will show the significance of the question. In terms of dollars, the difference in revenue would be expressed in millions. As applied to resales of goods in the same form or condition as purchased, the act is clear. It does not apply to a sale for resale. It is a single turnover tax. But as applied to sales of raw materials, for instance, which are made over or manufactured into some distinctly different commodity and then offered for sale, the answer is not so clear. It was known that the Legislature assumed that the tax would not apply to such sales. Before the bill passed the Senate, that body first assured itself that the act would be so interpreted by the Revenue Department.⁹ But once enacted, it became a

⁹In a letter dated August 18, 1932, when the bill was before the Senate, Senator Sordani wrote to the then Secretary of Revenue as follows:—

"Dear Dr. King:

Will you be good enough to let me know what would be the ruling of your Department in connection with House Bill No. 264, which comes before the Senate for action.

For instance the Carnegie Steel Company sells bars to the McKeesport Tin Plating Company, they in turn selling tin plate or block sheets to the Wilkes-Barre Construction Company, the Wilkes-Barre Company in turn selling the completed can to the X Y Z Oil Company. The X'Y Z Oil Company filling the can with oil and selling it to the blank store who in turn sells it to the consumer. Would there be a tax on each of the companies mentioned or would the tax only apply when

question whether the Legislature had succeeded in expressing its intent. The doubt grew out of the case of *Commonwealth v. Sun Oil Company*¹⁰ which arose under the Liquid Fuels Tax Act of 1923 imposing a tax on "liquid fuels sold in this Commonwealth for any purpose whatsoever, except for the purpose of resale."¹¹ The Sun Oil Company sold liquid fuels to a manufacturer of asphalt. The liquid fuels were mixed with other ingredients and actually became a part of the manufactured product which, of course, was sold. The Sun Oil Company contended that the sale of the liquid fuels to it was not subject to tax because the liquid fuels were resold. The Supreme Court denied this contention in the following terms, at p. 543:

" * * * The use of the gasoline purchased by the Good Roads Company for mixing with other ingredients to make a separate and distinct article of commerce does not constitute a resale within the meaning of the act so as to exempt the purchaser from liability. The object of the exemption was apparently to prevent double taxation and impose the tax on the consumer only. This is shown by section 8 of the act, which provides that 'the tax imposed by this act shall be paid by the person, firm, copartnership, association or

the can is at last sold to the consumer, namely, the man who buys the can and oil?

Thanking you for a prompt reply, I am

Yours very truly,"

The reply, dated the same day, was as follows:

"My dear Senator Sordoni:

With reference to your letter of August 18th I beg to say that in the opinion of the Department of Revenue the tax to which you refer would be paid when the can is at last sold to the consumer and will be paid by the vendor who sells to the consumer.

The act specifically exempts from the tax all sales to those who sell again.

Sincerely yours."

These letters were read into the minutes of the Senate before the bill was passed.

¹⁰290 Pa. 539, 139 A. 156 (1927).

¹¹Act of June 15, 1923, P. L. 834, as amended.

corporation purchasing liquid fuels for his or its own use, and not for the purpose of resale'. When used commercially in the manufacture of other products there is no resale of the 'liquid fuel' within the meaning of the act. In such case it has changed its form and identity and has become merely one of the ingredients which go to make up an entirely distinct commercial commodity. The manufacturer of such commodity has used or consumed it and is, therefore, liable for the tax * * *."

Confining the inquiry to the mere words used compels the conclusion that here is a recent decision squarely in point. But the inquiry cannot be confined to words alone. When a tax is limited to sales of any *specific* commodity, such as liquid fuels, it follows naturally and logically that liquid fuels are not being resold when they constitute merely an ingredient part of some entirely different commodity. No one would claim that the Liquid Fuels Tax of 1923 applied to the sale of asphalt merely because asphalt is made in part of liquid fuels. Asphalt is not liquid fuels, nor is it "ordinarily, practically, and commercially usable in internal combustion engines."¹² The tax applied to such liquid fuels usable, even though not actually used, in internal combustion engines. The court was, therefore, confronted with the practical problem of deciding whether liquid fuels, admittedly "usable", finding their way into other commodities, were to be subjected to the tax once or were to escape the tax altogether.

An entirely different situation arises under a tax which applies to tangible personal property in general as contrasted with specific commodities. In such a case, can it be said with equal force that goods are not purchased for resale by a buyer who mixes, manufactures, or applies some process to the goods and sells them in a different form or condition? Although one selling asphalt composed in part of liquid fuels is not reselling liquid fuels, does it necessarily follow that in such a case liquid fuels are not being resold as tangible personal property? The practical problem is entirely different than that found in the *Sun Oil* case.

¹²Id. Section 1 (a).

Here, the practical question is whether the same goods are to be subjected to the same tax two, three, or more times, every time their condition or character is changed, or whether they are to be taxed but once. The *Sun Oil* case can be cited for the proposition that the purpose of the resale provision is to prevent double taxation.¹³

The only other Pennsylvania tax which applies to sales of personal property in general is the Mercantile Tax, which applies to sales of goods, wares and merchandise by wholesale and retail dealers. If any authority is to be drawn from the cases on the point in question, it should be found in decisions under the mercantile law. Since the Mercantile Tax imposes a lower rate of tax on wholesale sales than on retail sales,¹⁴ the question frequently arises in which class a given transaction falls. As previously stated, the Mercantile Tax Act itself defines wholesale sales as those made to dealers, while all others are defined as retail. Furthermore, since the early case of *Norris Bros. v. Commonwealth*,¹⁵ a mercantile dealer or vendor has been uniformly judicially defined as "one who buys to sell again." Therefore, save for the fact that this latter is a case law definition instead of a statutory definition, the mercantile tax affords a very close analogy to the question being discussed under the Sales Tax.

The following Mercantile Tax cases are enlightening on this point. In *Pittsburgh Brewers' & Bottlers' Supply Company's Mercantile Tax*,¹⁶ the Commonwealth claimed that the retail rate applied to sales by a brewers' supply company of malt, hops, isinglass, bottles, and corks to brewers, bottlers, and wholesale liquor dealers. The Superior Court held that the wholesale rate applied to such sales including the sales of malt and hops to brewers. The

¹³Supra note 10 at p. 543. Referring to the resale provision, the court states:

"The object of the exemption was apparently to prevent double taxation * * * ."

¹⁴Act of May 2, 1899, P. L. 184, Section 1, as amended.

¹⁵27 Pa. 494 (1856).

¹⁶38 Pa. Super. Ct. 121 (1909).

court quotes with approval the time honored definition of a dealer, but states at p. 127, et seq.,

"The cases fall very far short of establishing the general proposition that vendors of or dealers in goods, wares and merchandise must necessarily mean those and those only who carry on the business of selling things previously purchased, in the same form and condition, and not in the form or condition to which they have changed after passing through some process. * * * It is reasonable to suppose that if the legislature had intended in the first clause of the section to include such sales only as are made to persons carrying on the business of buying and selling goods in an unchanged form or condition, they would not have left that qualification to uncertain inference but would have expressed it in unequivocal terms."

Again, in the recent case of *Commonwealth v. Bay State Milling Company*,¹⁷ the Commonwealth sought to impose the retail mercantile rate to sales of flour to a baker. In denying this claim and holding that the wholesale rate applies, the Allegheny County Court, per Snee, J., states, " * * * the mere fact that the resale is made in another form does not necessarily make such dealer the consumer."

The Revenue Department is persuaded that these cases set forth the true principle governing a sales tax applying to all tangible personal property sold for purposes other than resale. The *Sun Oil* case is believed to be not in point, as it concerns a tax limited to sales of particular property. This is the basis of the Department's rule that the Sales Tax does not apply to sales of goods which, as ingredients or constituents, go into and form a part of tangible personal property sold by the buyer. It seems unlikely that any litigant will contest the Department's ruling concerning ingredients or constituents, such as raw materials. In any case, the department charged with its enforcement will administer the tax according to its present view, until a higher authority requires a different construction.

¹⁷Court of Common Pleas of Allegheny County, decided October 6, 1932.

Some have urged what might be called the economic theory that the rule should be extended to include all items which enter directly into the manufacturing cost, regardless of whether such item actually becomes an ingredient part of the thing manufactured. In the economic sense, perhaps there is no difference between ammonia used and consumed in manufacturing ice cream, and sugar, cream, flavoring, et cetera, which actually become constituent parts of the ice cream. But where would the line be drawn? Would the rule, so extended, include machinery, oil used to lubricate the machinery, and tools? It seems impossible to so extend the rule without doing violence to the language used. This question was avoided in the *Pittsburgh Brewers' & Bottlers'* case.¹⁸

The question, "who is a consumer" arises in other ways. What is the consequence, for instance, when a buyer disposes of tangible personal property in some manner other than by sale? In other words, if a buyer disposes of such goods in some manner other than by sale, as defined by the act, must such buyer be considered the consumer, and sales to him taxable? Sale is defined as "Any transfer, exchange or barter, in any manner or by any means whatsoever, for a consideration."¹⁹ Resale, in the expression "for any purpose other than for resale"²⁰ appearing in the definition of vendor, must be used in the same sense. It seems, therefore, that a buyer who disposes of goods other than by sale must be considered the consumer. Otherwise, such goods would escape the tax altogether. The problem is then reduced to the question of what is a sale under this quoted definition, and here it becomes necessary to determine where a line is to be drawn between transactions which involve purely a transfer of title or property in goods from

¹⁸Supra, note 16, at p. 128 the court states:

"The question whether sales of goods to vendors or dealers which do not enter into the product sold by the latter or the package in which sold, is not involved in the question presented for our decision, and need not be discussed."

¹⁹Supra, note 1, Section 2.

²⁰Ibid.

seller to buyer, for a consideration, and transactions which are contracts for services or labor. Such service or labor contracts may be divided into two general classes. One class involves the application of labor or skill in the *production* of some item of tangible personal property which was not in existence at the time the contract was made. The other class involves the performance of labor or skill, not in the production of, but in connection with the article after it is finished. It is this latter class which has proved most troublesome, and this class of labor contract will be described first.

If the quoted definition of sale is not broader than the Uniform Sales Act definition,²¹ some precedent can be found. If broader, the question arises whether the definition includes every transaction which involves a transfer of goods from one to another? This latter construction would lead to surprising if not absurd results. For instance, when a bootblack shines shoes, the transaction involves a transfer of goods or tangible personal property from the bootblack to his customer. Still, no one would maintain that the bootblack is engaged in the sale of goods. He sells a service. On the other hand, when a radio dealer sells a radio, it is none the less a sale merely because he agrees to install or attach the radio. If the consequences may be weighed in arriving at a correct interpretation, then these illustrations, to which hundreds could be added, certainly urge the advisability of following what precedent may be found under the Uniform Sales Act, by considering sale to mean the same under both statutes. The association, in the definition, of the term "sale" with the terms "exchange or barter" lends additional support to this view.

Persuaded by these various considerations, the Revenue Department has concluded that so far as construction or labor-service contracts are concerned, it will follow Uniform Sales Act precedent wherever such precedent can be found. This course will reduce, but by no means eliminate,

²¹"A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." Act of May 19, 1915, P. L. 453, Section 1.

difficulty. For instance, in *Farr v. Zeno*,²² a Uniform Sales Act implied warranty was recognized in a contract to furnish and install a carbide generator. Apparently, no contention was made that the Sales Act did not apply. On the other hand, in *York Heating and Ventilating Company v. Flannery*,²³ in passing on the sufficiency of the affidavit of defense, the court held that there was no implied warranty of fitness in a contract for the furnishing and erection of a heating system, on the ground that the contract in suit was a construction contract and not a contract for the sale of goods. At page 23 et seq. the court states:

"We are of opinion that the Sales Act has no application to the contract in suit. That statute is an act relating to sales—since amended to include choses in action (Act of April 27, 1925, P. L. 310). It defines a sale of goods as an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price, and a contract to sell goods as a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price. The contract in suit was in no sense a contract of sale. It was a construction contract. The transfer of property in the fan, motor, pipe coil heater, air washer, reheater coils, condensation system, duct system and steam piping was but incidental to the main purpose which was the furnishing of labor and the assembly of material in the erection and construction of a heating system. It would be just as proper to call a contract for the construction of a building a sale of the stone, brick, cement, wood, etc., which entered into the erection of the building. This plaintiff took specified materials and apparatus, manufactured and supplied by various dealers, and by assembling them and connecting them into a system designed by its engineers constructed a new and different unit, a completed heating system. The operation was one of building, or construction, not of sale, within the meaning of the Sales Act aforesaid. Where a dealer sells a machine or similar apparatus and the setting up or installation is but incidental to the sale, as in *Farr v. Zeno*, 81 Pa. Superior Ct. 509, the Sales Act applies;

²²81 Pa. Super. Ct. 509 (1923).

²³87 Pa. Super. Ct. 19 (1926).

but where as here the contract is really a building or construction agreement and the furnishing of material and apparatus is merely an incident thereto, the Sales Act has no application."

Such distinctions are bound to lead to honest misunderstanding and difficulties in administration. Sales to building contractors, plumbers, carpenters, painters, tin-smiths, roofers, repairmen, and like artisans, involve this question. It frequently happens that such buyers will sometimes sell "off the floor" or "over the counter", and sometimes merely use or supply such materials in connection with the performance of a construction or job contract. In such cases, or in any case where doubt is entertained as to whether the goods purchased are to be disposed of by sale, the Department has suggested that the seller either pay the tax (whether he passes it on or not) or procure from the buyer a certificate stating that the goods are being purchased for resale as tangible personal property. If such a certificate is given, the Department proposes to look to the buyer for the tax, assuming, of course, that the goods are sold or otherwise disposed of before the expiration of the tax on February 28, 1933.

The other type of so-called labor contract, where skill or labor is applied in the production of some item of tangible personal property agreed to be sold, which was probably not in existence at the time of the agreement, may be dismissed with comparative finality. Under the definition of gross income, the act provides that there shall be no deduction on account of the cost of labor, service, or materials used.²⁴ This is meaningless unless the tax applies to sales or transfers of goods which are not in existence at the time the contract to sell is entered into, and which the seller agrees to produce or manufacture for the buyer. This conforms to the Uniform Sales Act, which defines such goods as "future goods," and contracts respecting them as contracts to sell goods.²⁵ It should be observed, however, that

²⁴Supra, note 1, Section 2.

²⁵Act of May 19, 1915, P. L. 543, Section 5. It makes no difference that the goods are to be made specially for the buyer. While executory,

the tax does not apply until there is a sale. It does not apply to contracts to sell, as such.²⁶

The manner of disposing of the goods becomes important also in the case of public service companies in connection with the sale or distribution of water, gas and electricity. There are two avenues of approach to this question. One is whether gas, water and electricity are tangible personal property. The other is whether such companies are engaged in selling within the meaning of the act. In an opinion dated November 19, 1932, the Attorney General ruled that the tax did not apply. Although the opinion is so brief that it affords little to challenge, it is doubtless sound. Without denying that a public service company sells, nor that water, gas and electricity are tangible personal property, the opinion simply concludes that public service companies distributing these commodities are not subject to the tax. While the opinion will not be questioned by the public service companies, it may not be as cordially accepted by those it affects adversely, such as a company selling coke or coal to a gas company; or a company, not a utility, selling gas to a public service company which actually does the distributing to the public.

A somewhat similar question has arisen concerning the taxability of prepared food and beverages sold in restaurants, eating houses, et cetera. A newspaper recently carried an article citing authorities to the effect that such transactions are not sales under the Uniform Sales Act.²⁷ If Uniform Sales Act cases are controlling, and it is believed that they are, then such transactions are doubtless

it is a contract to sell goods. *Davis-Watkins Dairymen's Manufacturing Company v. Cronin Dairy, etc., Company*, 186 Wisc. 106, 202 N. W. 293 (1925) (holding that a contract for milk bottles with the name of the buyer pressed in the glass is a contract to sell goods). Whether such contracts need be in writing under Section 4 (Statute of Frauds) of the Uniform Sales Act is another matter.

²⁶This follows from the definition of "sale" as being "any transfer * * * for a consideration." *Supra*, note 1, Section 2.

²⁷Harrisburg Telegraph, September 14, 1932, "City Attorney Says Restaurant Owners are Safe from Tax."

taxable, as the recent decisions, the most recent being Pennsylvania, hold that such transactions are sales.²⁸

Another typical situation growing out of the troublesome question, who is a consumer, occurs when the buyer resells the goods purchased as something other than tangible personal property. To illustrate, the purchaser of building materials may construct a building to sell as real estate. In such a case, the materials are being resold, but not as tangible personal property. The Department has ruled that under these circumstances, the tax applies to the sale of the building materials as such. It has been argued by some who question this ruling that it amounts to inserting the words "as tangible personal property" after the word "resale" in the definition of "vendor" and that, therefore, the ruling is unwarranted. Others have said that the Department's ruling respecting ingredients conflicts with this ruling. The *Sun Oil* case²⁹ seems to furnish a sufficient answer to both objections. The Supreme Court had no hesitancy in holding that liquid fuels were not being resold when sold as a part of asphalt, although the words "as liquid fuels" did appear in that statute after the word "resale". Furthermore, it necessarily follows from the reasoning which distinguishes between a tax on resales of tangible personal property in general, and a tax on resales of specific commodities, such as liquid fuels, that the former must apply to sales of tangible personal property which are resold as something other than tangible personal property. The principle of the *Sun Oil* case, in this connection, might be stated as being that a tax on sales of a given class of goods, not for resale, applies to all sales of goods of the class which are resold as anything which does not fall within the class. This is the basis of the Department's rule that the Sales Tax applies to all sales of tangible personal property which are resold as something other than tangible personal property, such as real estate. The practical question is the same as that found in the *Sun Oil* case; viz,

²⁸West v. Katsafans, Pa. Superior Ct., October 10, 1932. See annotation 50 A. L. R. 231.

²⁹Commonwealth v. Sun Oil Company, supra note 10.

whether such goods should be taxed once or escape the tax altogether?

Pennsylvania attorneys may with some reason inquire by what process of logic the Revenue Department arrived at its ruling that a tax on sales applies to bailment or installment lease sales.

Stress is placed on the numerous decisions recognizing the difference between bailment or installment lease sales, on the one hand, and conditional and outright sales, on the other. The differences between these various transactions are too well established to admit challenge or require citations. It should be observed here, however, that no Pennsylvania case has come to the attention of the Revenue Department which can fairly be said to control the question being discussed. Most bailment lease cases turn on the rights of the parties inter se, or on the rights of one against creditors of or purchasers from the other. Such cases merely demonstrate that bailment or installment sales possess different legal attributes than conditional or outright sales.

Further stress is placed on the fact that Section 1 of the Uniform Conditional Sales Act as enacted by our Legislature, excludes bailment leases from the definition of conditional sale; whereas, the original Uniform Conditional Sales Act, as drafted by the National Conference of Commissioners on Uniform State Laws, expressly includes bailment leases where the agreed compensation is substantially equivalent to the value of the goods.³⁰

³⁰The original draft defines conditional sale as follows:

"Section 1. Definition of terms.—In this Act "Conditional sale" means (1) any contract for the sale of goods under which possession is delivered to the buyer and the property in the goods is to vest in the buyer at a subsequent time upon the payment of part or all of the price, or upon the performance of any other condition or the happening of any contingency; or (2) any contract for the bailment or leasing of goods by which the bailee or lessee contracts to pay as compensation a sum substantially equivalent to the value of the goods, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming the owner of such goods upon full compliance with the terms of the contract."

The Pennsylvania act omits (2) from this definition.

Act of May 12, 1925, P. L. 603, Section 1, as amended.

Finally, it is pointed out that the Commonwealth itself has, in the past, successfully maintained that the installment lease seller has more than a mere paper title. In *Commonwealth v. National Cash Register Company*,³¹ the Commonwealth claimed that the National Cash Register Company, a foreign corporation, was liable for capital stock tax on cash registers delivered to residents under bailment leases with options to purchase. The capital stock tax requires reports of foreign corporation " * * * doing business in and liable to taxation in this Commonwealth, or having capital or property employed or used in this Commonwealth, * * * "³² and requires all such companies, from which a report is required, to pay " * * * a tax at the rate of five mills upon each dollar of the actual value of its whole capital stock of all kinds * * * ."³³ The Supreme Court held that in computing the taxable value of this company's capital stock, the cash registers were properly included. At p. 409 the court states:

"Under the terms of the lease, the ownership of the registers remains in defendant until designated payments are made and the customer exercises his option to buy. Consequently, the agreement is a bailment and not a sale of the register. The situs of the property is in Pennsylvania and represents an investment here of the capital of a company doing business in this State. * * * In the present case, defendant is concededly doing business here and is properly taxable on such property as it uses within the jurisdiction in the conduct of its business."

Again, in *Commonwealth v. Motors Mortgage Corporation*,³⁴ also a capital stock case, this decision was followed and its principle applied to a foreign corporation engaged in the business of financing automobile sales under the customary plan, whereby the company purchased from the original dealer-lessor, bailment leases providing for periodic payments of rental with an option in the lessee to purchase

³¹271 Pa. 406, 114 At. 366, 117 At. 439 (1921).

³²Act of June 7, 1879, P. L. 112, Section 20, as amended.

³³Id., Section 21, as amended.

³⁴297 Pa. 468, 147 At. 98 (1929).

on further payment of one dollar after all installments of rental had been paid.

These constitute the chief arguments which must be met if it can be maintained that the Sales Tax applies to installment or bailment lease sales.

Practically without exception, objections to this ruling have come from attorneys, and this seems highly significant. The courts are telling us with increasing emphasis that taxation is a practical matter. It is easily possible to become too correct in construing words in a tax statute. The Supreme Court tells us that " * * * Laws are written ordinarily in the language of the people, and not in that of science * * * ." ³⁵ In capital stock tax cases involving the manufacturing exemption, the Supreme Court has said that what is manufacturing must be considered "in the popular, and therefore in the statutory sense of the word." ³⁶ Again, in a recent manufacturing case, the Supreme Court reversed the lower court for having failed to follow "the natural reaction of the mind." ³⁷ It is a common sense rule that addresses such inquiries to the impartial mind of the average person. The business man and the accountant have accepted the ruling with no flourish of surprise, but rather as of course. The flourish of surprise comes after the business man has consulted an attorney (in some cases, vice versa) and discovered his technical viewpoint.

Capital stock tax cases are believed to be not in point. A company holding legal title of chattels under a bailment lease with right to repossess in case of default does, in a very real sense, continue to have its capital invested in that property. Invested capital in property with a Pennsylvania tax situs is the criterion for purposes of the capital stock tax which is a tax on capital stock as property. Capital stock tax cases, therefore, shed little light on the question whether the Sales Tax applies to installment lease sales. It is submitted that the Commonwealth may con-

³⁵Commonwealth v. Light & Power Company, 145 Pa. 105 (1891).

³⁶Commonwealth v. Lowry-Rodgers Company, 279 Pa. 361 (1924).

See Commonwealth v. Glendora Products Company, 297 Pa. 305 (1929).

³⁷Commonwealth v. Sunbeam Water Company, 284 Pa. 180 (1925).

sistently maintain that a corporation lessor or bailor has its capital invested in property leased or bailed and at the same time maintain that "sale" in the Sales Tax includes bailment or installment lease sales.

Nor is the fact conclusive that such transactions were excluded by the Legislature from the Uniform Conditional Sales Act. Because the Legislature provides that sales under the Uniform Sales Act shall have certain legal attributes not possessed by conditional sales; that the latter shall have certain features and attributes not possessed by installment or bailment leases; and because our courts recognize and apply these distinctions, by no means does it follow that all are not to be grouped together under the common designation of sales, which, in ordinary business parlance, applies to all alike. The business man understands that the bailment lessor has certain legal rights which the conditional seller or the one who sells outright on open credit does not have. In other words, the business man understands exactly what the Legislature intended. Still, the bailment lessor considers himself as engaged in the business of selling. To the business man, a bailment lease is simply an installment sale.

Of all the undercurrents frequently detected between the lines in tax decisions, perhaps the most prominent is the element of competition. A tax statute should apply equally to all engaged in competitive business. While a desire to accomplish this end, no matter how meritorious, cannot warrant extending a statute beyond its terms, it does justify a construction that avoids inequities if the terms fairly support it. The taxing officer would be reluctant to subscribe to the proposition that A, who sells a chattel for \$500.00 on the installment lease plan on February 27, with the added security of the property to assure payment, owes no tax; while B, his competitor, who sells the same article on the same day on open credit, with no added assurance of payment, must pay the tax on the full selling price, even though no part of the purchase price is ever actually received.

These principles are applied by the Circuit Court of Appeals in the case of *Carter v. Slavick Jewelry Company*,⁸⁸ which arose in California under the Federal Revenue Acts of 1918 and 1921. These acts imposed a tax upon jewelry "when sold by or for a dealer * * * equivalent to five per centum of the price for which so sold." The Slavick Jewelry Company was engaged in selling jewelry under a plan by which it delivered possession but retained title until the full purchase price was paid. The tax was assessed and computed upon the gross contract sales price. In sustaining this assessment the Circuit Court states, at p. 1044 et seq.:

"It is undoubtedly true, as the jewelry company contends, that in its primary meaning the term 'sale' imports a consummated transfer of title from one person to another for a money consideration. But it is equally true that in private contracts and public laws it is not infrequently employed to characterize transactions which do not effect an absolute transfer. Illustrative are the following cases: *Crall v. Com.* 103 Va. 855, 49 S. E. 640, *id.* 103 Va. 862, 49 S. E. 1038; *South Bend v. Martin*, 142 Ind. 31, 29 L. R. A. 531, 41 N. E. 315; *Watson v. Brooks*, 8 Sawy. 316, 13 Fed. 540; *Eaton v. Richeri*, 83 Cal. 185, 23 Pac. 286; *Shainwald v. Cady*, 92 Cal. 83, 28 Pac. 101; *Pettinger v. Fast*, 87 Cal. 461, 25 Pac. 680; *Smith v. Mariner*, 5 Wis. 551, 581, 68 Am. Dec. 73; *Houston, E. & W. T. R. Co. v. Keller*, 90 Tex. 214, 37 S. W. 1063; *Rice v. Mayo*, 107 Mass. 550; *Humphries v. Smith*, 5 Ga. App. 340, 63 S. E. 249; *State v. Betz*, 207 Mo. 589, 106 S. W. 66.

"Even in treatises on Sales the subject of so-called conditional sales is sometimes treated. See, for example, Mechem on Sales, Section 558 et seq. Upon the street and in the commercial world, such is common usage. Indeed, we have no other single word descriptive of transactions such as are here involved. One who procures an automobile or a piece of furniture upon the installment plan, where, as here, the dealer retains title, is commonly thought and spoken of as a purchaser, and when the dealer so disposes of merchan-

⁸⁸26 F. (2nd) 571, 58 A. L. R. 1043 (1928). Cf. *Anthony v. United States*, 57 Ct. Cl. 259 (1922).

dise it is treated and regarded as a sale, and moneys received on account thereof as sales receipts. In the absence of something in the act to suggest that Congress intended the term to be understood in its restricted primary meaning, we must assume it was used in the broad sense in which it is commonly understood. Measurably in point is the case of *Earle C. Anthony v. United States*, 57 Ct. Cl. 259.

"To conclude, it is our view that Congress intended no distinction between an absolute sale and a conditional sale, and that in either case the transaction is assessable when it is entered into. If it be suggested that under that construction the jewelry company here would be required to pay a tax upon a part of the sale price it has not received, the answer is that with equal force the same plea could be made upon behalf of the dealer who sells outright upon credit. * * *

"Merchants doing a credit business upon the plan of the jewelry company here could collect the major part of the sales price, and by charging off the residue escape the sales tax entirely, and at the same time utilize the charge-off as a credit against gross income, and thus escape a ratable portion of that tax also; whereas, a merchant engaged in the same business, who extends credit without the protection afforded by conditional sale contracts, is required to pay the sales tax upon the entire price, whether collected or not.

"We cannot believe that Congress contemplated such an unreasonable and discriminatory result. * * *"

The Department of Revenue is persuaded that these same principles apply to installment lease sales in Pennsylvania under the Sales Tax. Of course, the rule is limited to bailments or leases in which the compensation is substantially equivalent to the value of the goods, and in which the bailee or lessee is either bound to become or has the option of becoming the owner upon full compliance with the terms of the contract. In short, the rule is limited to such transactions as are ordinarily classified as sales.

Harrisburg, Pa.

SANFORD D. BEECHER