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The Selective Sales and Use Tax Act: The Manufacturing Exemption

DEBATE

THE SELECTIVE SALES AND USE TAX ACT: THE MANUFACTURING EXEMPTION

INTRODUCTION

The increase in the cost of government caused by a rising population and expanded governmental services has forced the fiscal system of the Commonwealth of Pennsylvania to turn to and become dependent on a form of broad-based taxation as a principal source of tax revenue. The Selective Sales and Use Tax Act became effective March 6, 1956, replacing the Consumers Sales Tax Act and the Use and Storage Tax Act which expired in 1955.

The Selective Sales and Use Tax Act imposes a tax on the sale at retail or use of selected classes of personal property as defined in Section 2 (l) and certain services. Tangible personal property and services used or consumed directly in manufacturing are exempt.

The present debate deals with the scope of the term "manufacture" as defined in Section 2(c) of the Act. Mr. Gabig argues that the interpretation adopted by the Bureau of Sales and Use Tax of the Department of Revenue is too restricted. Professor Del Duca supports the interpretation of the Department of Revenue.

AN ANALYSIS OF THE LEGISLATURE'S DEFINITION OF MANUFACTURING *

Pennsylvania's Selective Sales and Use Tax Act [1] imposes a tax of four per cent on the purchase price of each separate sale at retail.[2] The term "sale at retail" is defined in Section 2(j) to include, *inter alia,* "Any transfer, for a consideration, of the ownership, custody or possession of tangible personal

* The writer gratefully acknowledges the opportunity of discussing the problem with Howell C. Mette, Esq., Adjunct Professor of Law, Dickinson School of Law; Robert Hibbard, Research Manager, Pennsylvania State Chamber of Commerce, and Ronald M. Katzman, Esq., former Assistant Attorney General of the State Bureau of Sales and Use Tax, Department of Revenue, Commonwealth of Pennsylvania in the preparation of this article.

[1] PA. STAT. ANN. tit. 72, §§ 3403-1 *et seq.* (1956).

[2] PA. STAT. ANN. tit. 72, § 3403-201 (a) (1956). Section 201 (b) imposes a use tax upon the use of tangible personal property purchased at retail. The use tax, however, is not to be collected when the retail sales tax has been imposed and collected under Section 201 (a).

property. . . ." The definition of "sale at retail" also provides that the terms shall *not* include

> . . . the transfer of tangible personal property, including, but not limited to, machinery and equipment and parts and foundations therefor, and supplies to be used or consumed directly in any of the operations of (1) the manufacture of personal property . . .

Various other tax provisions have been enacted which are enforceable either on a state-wide basis or within its political subdivisions, exempting manufacturing industries from the imposition of the tax.[3] However, the Selective Sales and Use Tax Act is the only enactment to define "manufacturing." It is defined in part, as follows:

> The performance of manufacturing, fabricating, compounding, processing or other operations, engaged in as a business, which place any personal property in a form, composition or character different from that in which it is acquired. . . .[4]

This legislative definition has brought about a major conflict. The Sales and Use Tax Bureau asserts that the definition as set out in the act is merely an expression of the judicial definition developed under the previous Pennsylvania tax provisions.[5] Manufacturing industries and others affected by the Bureau's interpretation contend it is a much broader definition and covers the processing, fabricating and compounding industries.

What constitutes "manufacturing" is not a new problem. The term has been the subject of constant litigation in Pennsylvania for over a hundred years, the landmark case being *Norris Brothers v. Commonwealth.*[6] This case involved a mercantile tax act of 1846,[7] a predecessor to the old State Mercantile License Tax. The Commonwealth asserted that the taxpayer was not a manufacturer because certain parts which he used were made by other persons, and that the exemption, which was extended to manufacturers, was permitted to only those who completely manufactured their own products. In rejecting this contention the Pennsylvania Supreme Court stated:

> But what is manufacturing? It is making. To make in a mechanical sense does not signify to create out of nothing; for that surpasses all human power.

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[3] Capital stock-franchise tax law: PA. STAT. ANN. tit. 72, § 1871 (1889), as amended. State mercantile license tax law: Act of May 2, 1899, P. L. 184, last amended by the Act of July 10, 1941, P. L. 368, and abolished by the Act of May 7, 1943, P. L. 237. Local tax enabling act: PA. STAT. ANN. tit. 53, § 6851 (1947).

[4] PA. STAT. ANN. tit 72, § 3403-2(c) (1956).

[5] From the brief of the State Bureau of Sales and Use Tax, Commonwealth v. Donovan Co., No. 155 Commonwealth Docket, 1959.

[6] 27 Pa. 494 (1856).

[7] Act of April 22, 1846, P. L. 486.

> It does not often mean the production of a new article out of the materials entirely raw. It generally consists in giving new shapes, new qualities or new combinations to matter which has already gone through some artificial process.[8]

Presently, the capital stock-franchise tax law also exempts manufacturing from taxation.[9] The exemption dates back to 1885 when the then existing capital stock tax law was amended.[10] Until 1935, foreign and domestic corporations were taxed on the same basis. In that year, the legislature changed the capital stock imposed on foreign corporations into a franchise tax, providing for a statutory rule of apportionment.[11] From 1935 until 1958, there was no exemption granted to corporations by the capital stock-franchise tax law,[12] but the question of what constituted manufacturing in Pennsylvania continued to be litigated under the mercantile license statutes. Like the capital stock-franchise taxes, the mercantile statutes had no legislative definition of "manufacturing." During this period, the courts handed down decisions arising under the State mercantile law[13] and later under the local tax enabling act[14] (the so-called "Tax Anything Law").

The decisions under the capital stock-franchise tax law and the other tax provisions lead to the conclusions that follow: (1) Manufacturing is the application of art, science, skill or labor that produce a change or modification in the materials or products so as to adapt them to human wants;[15] (2) It constitutes the producing of a new and different product from previously acquired materials;[16] (3) The mere application of labor or skill or large expensive machinery does not determine whether or not the product is manufactured;[17] (4) But where the application of labor or skill or machinery results in a transformation of materials into a different or new product, man-

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[8] 27 Pa. 494 at 496.

[9] PA. STAT. ANN. tit. 72, § 1871 (1935).

[10] Act of June 30, 1855, P. L. 193. The Acts of June 1, 1889, P. L. 420 and June 8, 1891, P. L. 229, as amended, are the basis for the present law.

[11] PA. STAT. ANN. tit. 72, § 1871 (1935).

[12] The Act of May 16, 1935, P. L. 184 suspended the manufacturing exemption in both foreign and domestic corporations for a two year period. At the end of this period, the exemption was repealed, but was revived in 1958 by the Act of March 14, 1956, P. L. 1285.

[13] Act of May 2, 1899, P. L. 184, last amended by the Act of July 10, 1941, P. L. 358 and abolished by the Act of May 7, 1943, P. L. 237.

[14] PA. STAT. ANN. tit. 53, § 6851 (1947).

[15] See, *e.g.*, Commonwealth v. Consolidated Dressed Beef Co., 242 Pa. 163, 88 Atl. 975 (1913); Commonwealth v. Harrisburg Gas Co., 50 Dauph. Co. Rep. 383 (1941).

[16] See, *e.g.*, Commonwealth v. Marsh, 3 Pa. Dist. Rep. 489, 14 Pa. County Ct. Rep. 369 (1894); Commonwealth v. Peerless Paper Speciality, Inc., 344 Pa. 283, 25 A. 2d 323 (1942).

[17] See, *e.g.*, Commonweath v. Boyer Plumbing and Heating Co., 23 Dauph. Co. Rep. 296, 49 Pa. County Ct. Rep. 610 (1920); Commonwealth v. Sunbeam Water Co., 284 Pa. 180, 130 Atl. 405 (1925); Commonwealth v. Weiland Packing Co., 292 Pa. 447, 141 Atl. 148 (1928); Armour & Co. v. Pittsburgh, 363 Pa. 109, 69 A. 2d 405 (1949); Hazen Engineering Co. v. Pittsburgh, 189 Pa. Super. 531, 151 A. 2d 855 (1959). *But see* Commonwealth v. Peerless Paper Specialty, Inc., 344 Pa. 283, 25 A. 2d 323 (1942); Commonwealth v. Snyder's Bakery, 348 Pa. 308, 35 A. 2d 260 (1944); Horigan v. Pittsburgh, 178 Pa. Super. 558, 116 A. 2d 228 (1955).

ufacturing has been performed;[18] (5) If, however, there is only a superficial change in the original materials and no substantial transformation in the form, quality or adaptability different from the original materials, a new product has not emerged;[19] (6) Where there is merely a chemical change in the product, manufacturing has not occurred, but if a new and different product emerges with that chemical change, the result is a manufactured product.[20]

With the increase of government expenditures in the field of public education and welfare, along with other increases in most phases of the government, a new source of state revenue was imperative. In 1953 Pennsylvania enacted the Consumers Sales Tax Act and the Use and Storage Act.[21] The Consumers Sales Tax Act imposed a one per cent tax on retail sales of tangible personal property to consumer. The Use and Storage Tax Act, also one per cent, affected the purchase of tangible personal property for use and storage within the Commonwealth.

The 1953 sales tax, like the present tax, was imposed upon each "sale at retail" within the Commonwealth. "Sale at retail" was defined as "any transaction by which ownership of tangible personal property is transferred for a consideration when such transfer is made to the transferee for consumption or use. . . ." [22] The term did not include ". . . Sales of tangible personal property (i) which is to be used in fabricating, compounding or manufacturing tangible personal property. . . ." [23]

As interpreted by the Department of Revenue, manufacturing meant either the making of raw materials or partly finished goods into a product of a different character, or the changing of the inherent nature by a combination of materials. According to Regulation 262 on Manufacturing, compounding and fabricating meant the combining or uniting of different elements or parts to form a new product. Purchases of tangible personal property actually consumed in compounding, fabricating or manufacturing were exempt. As a

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[18] See, *e.g.*, Commonwealth v. Marsh, 3 Pa. Dist. Rep. 489, 14 Pa. County Ct. Rep. 369 (1894); Commonwealth v. Boyer Plumbing and Heating Co., 23 Dauph. Co. Rep. 296, 49 Pa. C. C. 610 (1920); Rieck-McJunkin Dairy Co. v. Pittsburgh S. D., 362 Pa. 13, 66 A. 2d 295 (1949).

[19] See, *e.g.*, Commonwealth v. Weiland Packing Co., 292 Pa. 447, 141 Atl. 148 (1928).

[20] See, *e.g.*, Commonwealth v. Lowry-Rodgers Co., 279 Pa. 361, 123 Atl. 855 (1924); Commonwealth v. Weiland Packing Co., 292 Pa. 447, 141 Atl. 148 (1928); Commonwealth v. Snyder"s Bakery, 348 Pa. 308, 35 A. 2d 260 (1944). It is to be noted that future courts may permit exemptions when the product is a result of a chemical change. This is foreshadowed by such court decisions as Gulf Oil Corp. v. Philadelphia, 357 Pa. 101, 53 A. 2d 250 and The Atlantic Refining Case, 398 Pa. 30, 158 A. 2d 855 (1959).

[21] Consumers Sales Tax Act: PA. STAT. ANN. tit. 72, §§ 3407-101 *et seq.* (1953). Use and Storage Tax Act: PA. STAT. ANN. tit. 72, §§ 3406-101 *et seq.* (1953).

[22] PA. STAT. ANN. tit. 72, § 3407-102 (7) (1953).

[23] PA. STAT. ANN. tit. 72, § 3407-102 (7) (o) (1953).

result, such industries as electroplating, galvanizing, canning and others were exempt.[24] In excluding property used in "fabricating, compounding or manufacturing," the Legislature showed a distinct intent to expand the narrow exemption permitted by the courts under the capital stock tax law.[25]

The 1956 Selective Sales and Use Tax Act was a major revision in the Pennsylvania tax structure, imposing a substantial broad-based tax of three per cent upon each separate sale at retail.[26] Since the act contains its own definition as to what constitutes manufacturing, that definition must govern the decision as to which industries are entitled to the exemption. The definition of "manufacture" which originally appeared in the act, in part was as follows: "The performance of manufacturing operations which place tangible personal property in a form different from that in which it is acquired. . . ." [27] This definition seemed to be very broad in comparison to those judicial definitions described earlier. Under the present definition the Legislature even further indicated its intent that the exemption be broader.

Both the manufacturing exemption under the capital stock-franchise tax law and the selective sales and use tax law were enacted during the 1955 session of the Legislature. On March 6, 1956, the sales tax was enacted with the original definition of "manufacture." Nine days later, the capital stock-franchise tax manufacturing exemption was revived, effective January 1, 1958. In the latter enactment, there was no mention of what constituted "manufacturing," an indication of the Legislature's intent to use the century-old definition of the Pennsylvania courts. On May 24, 1956, the definition in the selective sales and use tax was changed, as noted previously, to include "fabricating," "compounding," and "processing" activities. This even further indicates the legislative intent to make the definition broader under the sales act, since it would seem unlikely that these changes would be necessary if the Legislature intended "manufacturing" to have the same narrow construction as in the capital stock-franchise tax law.[28]

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[24] Dyers and bleachers were declared exempt by a long line of decisions, the leading one being Commonwealth v. Jefferies Processors, Inc., Board of Finance and Revenue, Docket No. R-13329, order dated July 19, 1956. It should be noted that the Legal Unit Interpretation has been overruled by the Board of Finance and Revenue in Commonwealth v. Erie Electroplating, Docket No. R-15491, order dated December 23, 1958, and Commonwealth v. Donovan, Docket No. R-15514, order dated February 2, 1959.

[25] It is to be noted that the exemption language in the Use and Storage Act was identical to that stated in the Consumer Sales Tax Act, *supra*. Thus, any property which was to be used as either an ingredient of other property or which was consumed in the production of other property, was exempt. See Regulation 703—Exempt Transactions.

[26] In 1959 the coverage of the tax was expanded considerably and the rate was increased to four percent. See the Acts of 1959, Numbers 14, 91, 98, 131, 258, 559, and 748.

[27] Act of March 6, 1956, P. L. 1228, Sec. 2(c).

[28] Brief for Donovan Co. as Amicus Curiae, Commonwealth v. Donovan Co., Court of Common Pleas of Dauphin County, No. 155 Commonwealth Docket, 1959.

The fact that such operations as mining, quarrying, building and repairing vessels, and research services (generally not considered as manufacturing functions) were expressly included within the definition also shows the intent to enact a change in the meaning of manufacture.[29] At the same time, the Legislature showed it was capable of restricting the definition by specifically excluding from the term manufacturing ". . . constructing, altering, servicing, repairing, or improving real estate or repairing, servicing or installing personal property." [30]

The Legislature's intent was also expressed in Senator Kessler's address to the Senate on March 12, 1957, concerning the application of the manufacturing exclusion to the canning industry.[31] Senator Kessler's remarks pertained to House Bill 337, which spelled out that manufacturing was to include "every operation commencing with the first production stage and ending with the completion of personal property having the physical qualities (including packaging, if any, passing to the ultimate consumer) which it has when transferred by the manufacturer to another. . . ." [32] Although Pennsylvania courts have declared that statements made in legislative debate are not relevant in court proceedings,[33] there is substantial evidence in the legislative record that the intention was to broaden the definition.

That persons engaged in manufacturing, fabricating, compounding, and processing were to be exempt was recognized by the Bureau of Sales and Use Tax when they published the Manufacturer's Regulation. The regulation contained the following in Subsection (a):

> "Manufacturing" is defined as the performance as a business of activities which place personal property in a form different from that which it is acquired. Fabricating, compounding, and processing are considered to be manufacturing activity.[34]

Subsequently, the Bureau expanded this regulation, and, in doing so, abandoned their previous opinion that "fabricating, compounding, and processing are considered to be manufacturing activity," by adopting the capital stock defi-

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[29] PA. STAT. ANN. tit. 72, § 3403-2(c), (3), (4), (5) (1956).

[30] PA. STAT. ANN. tit. 72, § 3403-2(c) (1956).

[31] 1957 Legislative Journal-Senate, p. 663. The key sentence in Senator Kessler's statement seems to be "We intended to exempt from the beginning of the processing to the end of the processing. . . ."

[32] This language was enacted into law, PA. STAT. ANN. tit. 72, § 3403-2(c) (1) (1956), and is so included in Regulation 225, Part II (b) (1).

[33] Bank of Pennsylvania v. Commonwealth, 19 Pa. 144 (1852).

[34] TRb 225, July 16, 1956.

nition of manufacturing.[35] It takes little imagination, when the subsequent regulation is compared with the statutory definition, to realize that the Sales Tax Bureau has drastically restricted the application of the definition of "manufacturing" from that which the Legislature intended it to be.

The Department of Justice was in agreement with the original regulation of the Sales and Use Tax Bureau.[36] In a detailed analysis of House Bill 337, *supra,* which was released just seven months before the filing of the revised Regulation 225, they acknowledged that the definition was much broader than that found in other areas of tax law.[37]

An excerpt of this analysis reads as follows:

> Section 2 (c) of the present act then defines "manufacture" very broadly as the performance of manufacturing, fabricating, compounding, processing or other operation engaged in as a business which places any personal property in a form, composition, or character different from that in which it is acquired. This is a much broader definition of the term "manufacture" than that found in other areas of tax law. . . .[38]

On page 21 of this analysis, the Department of Justice concludes:

> The general definition of manufacturing as "manufacturing, fabricating, compounding, processing, or other operations which place any personal property in a form, composition or character different from that in which it is acquired" is much broader than the definition found in Pennsylvania law generally. . . .

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[35] Regulation 225, filed November 1, 1957, and retroactively effective April 5, 1957. Part II, A, of this regulation states:

> (1) "Manufacturing" is the performance as a business of an integrated series of operations which place personal property in a form, composition or character different from that in which it was acquired. The change in form, composition or character must be a substantial change, and it must result in the transformation of property into a new and different product having a distinctive name, character and use. Operations such as compounding, fabricating or processing are illustrative of the type of operation which may result in such a change, although any operation which has such a result may be a manufacturing operation.
>
> (a) Mere changes in chemical composition or slight changes in physical properties are not sufficient.
>
> (b) A "manufactured product" further, is substantially different from component materials used.
>
> (c) However, a taxpayer claiming the manufacturer's exemption need not start from basic elements, so long as a new and different product is made.
>
> (d) The fact that a taxpayer performs some activities upon one of the listed products[a] is not conclusive as to whether or not he produces a "manufactured product"; the test remains whether or not, in using his facilities, capital and/or labor, the taxpayer accomplishes a substantial change in producing the product. . . .

[a] The regulation offers examples of what the Bureau classifies as manufactured products and products which are not manufactured.

[36] TRb. 225, July 16, 1956.

[37] Analysis of House Bill 337 (Printer's No. 160) Session of 1957, March 28, 1957.

[38] *Id.* at page 9.

Pennsylvania's Statutory Construction Act has been a guide for the administrative, judicial and legislative branches of our government since the time of its enactment.[39] Article IV, Section 51, of this act provides, in part:

> The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the Legislature. Every law shall be construed, if possible, to give effect to all its provisions.

If this provision of the Statutory Construction Act is to have any significance, then Section 2(c) of the Selective Sales and Use Tax Act should be considered in the light of creating a change from past meanings of the term "manufacture." Those who may question the all-inclusiveness of this definition should be reminded that Section 51 of the Statutory Construction Act also states that when the words of the law are not explicit, the intention of the Legislature may be ascertained by considering other factors, such as: the object to be attained, the consequences of a particular interpretation, the contemporaneous legislative history, the former laws dwelling on the same or similar subjects and the legislative and administrative interpretation of the law.[40]

Regardless of what courts may state as to the relevancy and legal significance of the legislative history of an act, many judges refer to it as an indication of the legislature's intent. Pennsylvania courts, although inconsistent in determining the value of legislative intent, have never hesitated in using that intent when a statutory provision seemed ambiguous.[41] The Pennsylvania Supreme Court, in *Commonwealth ex rel. Kelley v. Pommer*,[42] stated:

> In applying a statute, it is first necessary to ascertain the meaning of the words used by the Legislature; that meaning is matter of fact; having ascertained the meaning, the next step is to determine what the Legislature intended should be their legal effect.

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[39] PA. STAT. ANN. tit. 46, §§ 501 *et seq.* (1937).

[40] The purpose of the manufacturers' exemption has been to encourage the expansion of industries within the state. A leading case on this point is Commonwealth v. Northern Electric Light & Power Company, 145 Pa. 105, 120 (1891), where the court discussed the purpose of the Act of 1885, which exempted manufacturers from the capital stock tax. The court stated:

"When the Act of 1885 was passed laws had been made in adjoining states which gave encouragement to the establishment of factories by exempting them from certain forms of taxation. The mischief to be remedied was the danger that such legislation might lead to the removal of capital and labor from this state to others, to the detriment of the business and prosperity of our own. The remedy provided was the removal of the tax imposed by the Act of 1879, so as to remove the inducement to leave the state. It was as broad as the mischief it was intended to meet, and made applicable to the class which since 1836 it had been the policy of the state to encourage, viz., 'manufacturing corporations' . . . which the legislature had sought to encourage as a means of bringing and keeping within our borders. . . ."

[41] SCHUTZ AND STAHL, *The Enactment and Construction of Statutes in Pennsylvania*, PA. STAT. ANN. tit. 46, pp. 27, 28 (1952).

[42] 330 Pa. 421 at 432, 199 Atl. 485 at 489 (1938).

Contemporaneous legislative history shows the view of the Legislature as expressed by Senator Kessler and by the Justice Department in their interpretation of House Bill 337.

Pennsylvania courts have consistently held that a change of language in a statute indicates a change in legislative intent.[43] If this is so, we can not say the additions to the definition of "manufacturing" are mere surplusage. As the Pennsylvania Supreme Court so aptly stated, the legislative body cannot ". . . be deemed to intend that language used in a statute shall be superfluous and without import." [44]

Furthermore, the courts have been consistent in the use of the ordinary or "popular" meaning of a word in the absence of any specific guide to another usage in the statutes.[45] This is in accord with Article III, Section 33, of the Statutory Construction Act which provides, in part:

> Words and phrases shall be construed . . . according to their common and approved usage, but technical words and phrases and such as have acquired a peculiar and appropriate meaning . . . shall be construed according to such peculiar and appropriate meaning or definition.

The definition of "manufacture" as expressly brought forth in the Selective Sales and Use Tax Act indicates the legislative intent to expand the "popular" meaning of the term. Both the Sales Tax Bureau and the courts are bound to interpret that definition as intended by the Legislature.

Article IV, Sec. 58, of the Statutory Construction Act states that provisions imposing taxes shall be strictly construed. The construction is made in favor of the taxpayer. In this same section, any provision exempting persons or property from the tax is strictly construed against the taxpayer. However, if the exempt person or property is clearly within the terms of the statute, the tax exemption must be allowed.[46]

The Sales Tax Bureau has asserted that if a "new and different product test" were not applied, then a "quantitative test" and not a "qualitative test" would be used.[47] This, the Bureau contends, would be against the constitu-

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[43] Panik v. Didra, 370 Pa. 488, 88 A. 2d 730 (1952) citing Fidelity Trust Co. v. Kirk, 344 Pa. 455, 25 A. 2d 825 (1942); *see also* Vince v. Allegheny Pittsburgh Coal Co., 153 Pa. Super. 333, 33 A. 2d 788 (1943).

[44] Commonwealth v. Mack Bros. Car. Co., 359 Pa. 636 at 640, 59 A. 2d 923 at 925 (1948).

[45] Butler Co. v. Leibold, 107 Pa. 407 (1884); Commonwealth v. Bay State Milling Co., 312 Pa. 28, 167 Atl. 307 (1933); *In re* Jury's Estate, 381 Pa. 169, 112 A. 2d 634 (1955).

[46] Loeb v. Benham, 153 Pa. Super. 601, 34 A. 2d 835 (1943).

[47] From the brief of the State Bureau of Sales and Use Tax, pp. 26, 27, Commonwealth v. Donovan Co., 155 Commonwealth Docket, 1959.

tional requirement of uniformity as required by Article IX, Section 1 of the Pennsylvania Constitution. The Bureau insists it would be unconstitutional to classify business into:

> (1) An *exempt* class of operations consisting of those operations which, without producing a new and different product, make some changes in personal property, and
>
> (2) A *taxable* class of operations consisting of those operations which, without producing a new and different product, make some changes in personal property *but not as much change* as required for exemption.[48]

In a qualitative test, a new and different product has emerged. The Bureau says this falls within the uniformity required by the Constitution. But, if a quantitative test were used, there would be no uniformity. Thus, regardless of where the line of exemption would be drawn under the latter standard, those persons not permitted the exemption would be deprived of their constitutional rights. This would mean, according to the Sales Tax Bureau, either a qualitative standard must be applied, or the exemption must be available for everyone making any type of change. The Legislature specifically provided in the definition of manufacture (Section 2(c) of the Selective Sales and Use Tax Act) that the activity of manufacturing, or fabricating, or compounding, which places personal property in a different form, *must be engaged in as a business.* The sales tax definition of manufacturing expressly declares that the operation must place the property ". . . in a form, composition or character different from that in which it was acquired. . . ." Taking this clause by itself, it may mean *any* type of change by *any* person would qualify the user or maker for the exemption. But the clause must be interpreted with the entire definition. It can refer only to what the Legislature expressly includes in "manufacture." That is:

> The performance of manufacturing, fabricating, compounding, processing or other operations engaged in as a business, which place any personal property in a form, composition or character different from that in which it is acquired . . .[49]

Furthermore, Pennsylvania courts have held that in the tax field the uniformity clause of our state constitution runs hand in hand with the due process and equal protection clauses of the 14th amendment to the United States Constitution. To violate one is to violate the other. In *Commonwealth v. Girard Life Insurance Company,*[50] the court declared that the Act of May 6, 1925,

[48] *Ibid.*
[49] PA. STAT. ANN. tit. 72, Sec. 3403-2(c) (1956).
[50] 305 Pa. 558, 158 Atl. 262 (1932).

which levied a tax upon the gross premiums received by insurance companies, exempting those companies doing business upon a mutual plan without capital stock and mutual beneficial associations, was constitutional. The court, in rejecting the opinion that the Act violated Article IX, Sections 1 and 2, of the Pennsylvania Constitution and the Fourteenth Amendment to the United States Constitution, quoted Mr. Justice Roberts in the *Chain Store Tax Case:* [51]

> [In summarizing this constitutional principal] . . . A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law. It is not the function of this court . . . to consider the propriety or justness of the tax. . . . Our duty is to sustain the classification adopted by the legislature if there are substantial difference between the occupations separately classified. Such differences need not be great.[52]

In *Commonwealth v. Fireman's Fund Insurance Company,*[53] the court stated: "It is an accepted principle that in regards to reasonableness of classification, the Fourteenth Amendment of the Federal Constitution, and Article IX, Section 1, of the Pennsylvania Constitution stand in *pari materia.*" [54]

Pennsylvania's Sales Tax Law is very similar to the Ohio Sales Tax Law in the above respect. The Ohio law imposes an excise tax on each retail sale made in that state.[55] In a letter from the Ohio Department of Taxation, Mr. McGee states:

> . . . You will note that the Ohio law, in its definition of "retail sale," allows an exemption for tangible personal property used or consumed directly in the production of tangible personal property for sale by manufacturing, processing, mining or refining. The question of whether a person is manufacturing or processing is, under this section of the law, unimportant. Canners of foodstuffs and bottlers of soft drinks would be considered to be processors. Persons engaged in electroplating or galvanizing material owned by others would be considered to be engaged in production of fabrication. . . .[56]

The Ohio exemption, which includes processing and fabricating, has been in effect in that state for more than twenty-five years. This is an impor-

[51] State Board of Tax Commissions of Indiana v. Jackson, 283 U. S. 527 at 537, 75 L. Ed. 1248 at 1256 (1930).

[52] 305 Pa. 558 at 563, 158 Atl. 262 at 263 (1932), *affirmed without opinion,* 287 U. S. 571, 77 L. Ed. 501 (1932).

[53] 369 Pa. 560, 87 A. 2d 255 (1952).

[54] *Id.* at 565, 87 A. 2d at 258 (1952).

[55] OHIO REV. CODE tit. 57, § 5739.2 (1955).

[56] From James F. McGee, Legal Division, Division of Sales, Excise and Highway Use Taxes, to the writer, dated March 1, 1960.

tant fact when considering the validity of the argument offered by the Pennsylvania Sales Tax Bureau that a similar exemption in Pennsylvania would be unconstitutional under our State Constitution. It is true the administration of Pennsylvania's Selective Sales and Use Tax Act may present some difficulties, but this factor is no basis for declaring the act unconstitutional. Nor is the fact that there may be some inequalities a reason for finding an act unconstitutional.[57]

In construing statutes of 1841 and 1842 pertaining to the assessments of lands, the Pennsylvania Supreme Court aptly stated:

> Common sense and practical every-day business experience are the best guides for those entrusted with the administration of tax laws. Taxation is a practical and not a scientific problem.[58]

By a practical and common sense approach to the problem, such as that taken in Ohio, the Pennsylvania Sales Tax Bureau would be able to enforce the provisions of the Selective Sales and Use Tax Act along the lines intended by the Legislature.

A. JOHN GABIG.

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[57] Sablosky v. Messner, 372 Pa. 47, 92 A. 2d 411 (1952).

[58] Philadelphia and Reading Coal and Iron Company v. Northumberland County Commissioners, 229 Pa. at 471, 79 Atl. at 112 (1911).