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COMMONWEALTH v. SHAFER: LIABILITY FOR EMBEZZLEMENT OF SALES TAX FUNDS BY VENDORS AS "TAX COLLECTORS"

A new form of criminal liability was adopted by the Pennsylvania Supreme Court in *Commonwealth v. Shafer*¹ as to retail vendors under the Pennsylvania Sales Tax Act.² Reversing a unanimous decision below,³ the court held that vendors who misapply sales tax funds accumulated in the course of their business may be prosecuted under section 823 of the general Penal Code,⁴ entitled "Embezzlement by Tax Collectors," despite specific penal provisions already within the Sales Tax Act. Section 823 had previously been invoked exclusively against public officials;⁵ however, in *Shafer*⁶ the section was applied to retail vendors. It is the purpose of this Note to analyze *Shafer's* interpretation of section 823 in view of the statutory rules of construction applicable to criminal cases and the ambiguous nature of the vendor's relationship to the state. Also, Pennsylvania's sales tax legislation and case law will be compared with other states.

Marcus Shafer, president of a corporation engaged in the retail selling of rugs and carpets was indicted for non-payment and mis-application of more than 30,000 dollars allegedly collected by his firm as sales taxes over a period of seven months. A motion to quash the indictment was granted and affirmed by the superior court only to be reversed by the supreme court.

The supreme court in finding a section 823 indictment,⁷ completely

1. 414 Pa. 613, 202 A.2d 308 (1964).

2. Sales and Use Tax Act, Act of March 6, 1956, P.L. (1955) 1228, amended, PA. STAT. ANN. tit. 72, §§ 3403-1 to -605 (Supp. 1963). The act was amended subsequent to the litigation of the instant case. Except as specifically noted, the act remains essentially the same.

3. *Commonwealth v. Shafer*, 202 Pa. Super. 179, 195 A.2d 825 (1963), *rev'd*, 414 Pa. 613, 202 A.2d 308 (1964).

4. Penal Code § 823, PA. STAT. ANN. tit. 18, § 4823 (1963), provides:

Whoever, being charged with the collection, safekeeping, or transfer of any taxes of the Commonwealth . . . converts or appropriates the moneys so collected, or any part thereof, to his own use in any way whatever, or uses by way of investment in any kind of property or merchandise any portion of the money so collected by him as taxes, and proves a defaulter or fails to pay over the same . . . is guilty of embezzlement, a felony

5. See *Commonwealth v. Simpson*, 74 Pa. D. & C. 313 (C.P. 1951). It was cited by the superior court below and quoted with approval as follows:

In passing, it is well to observe that section 823 of the Penal Code of 1939 and its predecessor, the Act of June 3, 1885, P.L. 72 . . . have consistently been applied to collectors who are officials, elected or appointed, "duly qualified" as "public officers" having a "term of office" where their "official capacity" is to collect taxes.

202 Pa. Super. at 182, 195 A.2d at 827.

6. Justice Eagen dissented without opinion.

7. Similar indictments have produced conflicting results, and provide no clear precedent for section 823's application to sales tax cases. *Commonwealth v. Grace*, 52

ignored the section's title heading of "Embezzlement by Tax Collectors," choosing not to make any distinction within the class of tax collectors, *i.e.*, between official and nonofficial tax collectors. While section headings may be used in statutory construction,⁸ they are not controlling⁹ and may be disregarded where in conflict with the clear intent of the legislature as determined by the "plain words" of the statute.¹⁰ Relying on these rules of construction, the court noted that the text of section 823 does not contain the term "tax collector," and furthermore, imposes embezzlement liability upon a class described as "*whoever*, being charged with the collection, safe-keeping, or transfer of any taxes of the Commonwealth . . ." ¹¹ reasoning that "whoever" as defined in section 103 of the Penal Code¹² means "any person," without qualification by the heading. Thus, the court concluded that it is "clear beyond question that vendors under the Sales Tax Act, are 'charged with the collection, safekeeping, or transfer' of the sales tax."¹³

Further justification for the court's conclusion was drawn from the relationship between sections 823 and 822¹⁴ of the Penal Code. The latter section, by providing for the punishment of an "officer, employee or agent" of the Commonwealth who converts "public money" entrusted to him, makes specific reference to *public officials*, while section 823 omits any such reference. Thus, the court concluded that by negative implication section 823 was not intended to be limited to public officials.¹⁵

Finally, the court determined that resort to the general Penal Code in sales tax prosecutions is not precluded by the special penal provisions in the Sales Tax Act. The court concluded that these special penal provisions were not controlling in view of the act's saving clause which states that nothing in the act shall be deemed to repeal, modify, suspend or render inoperative any provision of the general laws, and that criminal offenses and penalties specified should be in addition to the application of the general laws arising from any transaction.¹⁶

Whether the court properly disregarded section 823's title heading,

Luz.L.J. 286 (Pa. C.P. 1962) (Section 823 held inapplicable to vendors under the Sales Tax Act). *Contra*, Commonwealth v. Arnold, 76 York 110 (Pa. C.P. 1962).

8. See PA. STAT. ANN. tit. 46, § 554 (1952).

9. PA. STAT. ANN. tit. 46, § 554 (1952). The statute also states that provisos of titles and preambles shall be considered to limit rather than extend the operation of clauses to which they refer, but the statute distinguishes these from headings.

10. See *In re American Surety Co. of New York*, 319 Pa. 549, 181 Atl. 364 (1939).

11. PA. STAT. ANN. tit. 18, § 4823 (1963).

12. Penal Code § 103, PA. STAT. ANN. tit. 18, § 4103 (1963).

13. 414 Pa. at 615, 202 A.2d at 310.

14. Penal Code § 822, PA. STAT. ANN. tit. 18, § 4822 (1963).

15. Yet the court disregarded the further distinction that section 822 refers to "public money" while section 823 refers to "taxes" specifically.

16. PA. STAT. ANN. tit. 72, § 3403-601(b) (Supp. 1963).

"Embezzlement by Tax Collectors," depends on the true relationship between the vendor and the Commonwealth with respect to sales tax administration. More specifically, if the vendor's responsibilities under the Sales Tax Act are fundamentally different from or paramount to those of a tax collector, *i.e.*, if the vendor is more analogous to a *taxpayer*, then application of this section to a retail merchant would be incongruous.

A "taxpayer" has been defined as "a person chargeable with a tax; one from whom government demands a pecuniary contribution towards its support."¹⁷ Significantly, the Pennsylvania Sales Tax Act defines "taxpayer" as "any person required to pay *or collect* the tax imposed by this act."¹⁸ The act further directs that "any person liable to collect tax from another person . . . shall file reports, keep records, make payments, and be subject to interest and penalties . . . *as if* he were directly subject to the tax."¹⁹ Similarly, the Maryland statute considers persons that are required to "make returns" and "pay over" the tax collected to be "taxpayers."²⁰ The various sales tax acts, however, do not define "tax collector" even though an obligation or authority to collect may be imposed. While the functions of a taxpayer and a tax collector are nowhere described as mutually exclusive, statutory emphasis on liability of vendors as *taxpayers* magnifies the questionability of finding collateral liability under a separate "Embezzlement by Tax Collectors" section of the Penal Code.

Courts have supplemented the definition of "taxpayer" by declaring the following to be "taxpayers": persons required to pay a tax to a collector on the transportation of property, even though first required to collect it from another taxpayer;²¹ and persons collecting social security taxes.²² Even gasoline distributors considered agents for purposes of collecting and remitting a motor fuels tax were held by an Oklahoma court to be taxpayers.²³ In so holding, the court stated:

The entire statutory arrangement . . . places the . . . [distributor] in the position of the taxpayer and makes him subject to all the taxpayer's rights and liabilities. He is made primarily responsible to the state for the payment of the tax.²⁴

In comparison, the Pennsylvania statute states that "any person required

17. BLACK, LAW DICTIONARY 1630 (4th ed. 1951).

18. PA. STAT. ANN. tit. 72, § 3403-2(m) (Supp. 1963). (Emphasis added.)

19. PA. STAT. ANN. tit. 72, § 3403-581(b) (Supp. 1963). (Emphasis added.)

20. See MD. ANN. CODE art. 81, § 372(p) (Supp. 1964).

21. See, *e.g.*, John J. Casale, Inc. v. Pedrick, 72 F. Supp. 848 (S.D.N.Y. 1947).

22. Reams v. Vrooman-Fehn Printing Co., 140 F.2d 237, 240 (6th Cir. 1944). See also Fifth Ave. Bldg. Co. v. Joseph, 297 N.Y. 278, 79 N.E.2d 22 (1948).

23. Gibson Co. v. Oklahoma Tax Comm'n, 180 Okla. 53, 68 P.2d 87 (1937), construing Okla. Sess. Laws, 1933, ch. 111, § 3.

24. *Id.* at 57, 68 P.2d at 89.

. . . [to collect tax] who shall fail to collect the proper amount of such tax, shall be liable for the full amount . . ."²⁵ providing for an assessment²⁶ and, on appeal, reassessment²⁷ of the vendor's tax liability. Thus, the ultimate responsibility for paying Pennsylvania sales taxes also seems to rest with the vendor.²⁸ The purpose of the sales tax is to achieve a broad base by taxing the "consumption" of goods and services, yet, a direct levy by the state upon individual consumers would be administratively impractical, if not impossible. Hence, a tax at the time of sale is imposed with direction that it be added to the selling price, and remitted by the seller. Typical sales tax laws, including Pennsylvania, expressly prohibit vendors from advertising or holding out to the public that they will absorb the tax or that it is included in the basic selling price.²⁹ Such a provision has been considered as conclusive of intent that the consumer alone should bear the tax burden.³⁰

A California court,³¹ however, in construing a similar statute³² stated: [T]he purpose of this section is to place retailers on an equal basis since it is deemed unfair competition for the strong to absorb the tax and build up his trade at the expense of the weaker retailer.³³ Such an interpretation, combined with ultimate liability for the full tax, suggests the possibility that sales taxes are in reality imposed primarily upon the vendor, and that he is compelled to require indemnification from his purchasers in furtherance of a policy designed to equalize impact upon competition. It may also be significant that such taxes are levied specifically on "sales"³⁴ by the seller rather than "purchases" by the consumer. The effect is much the same as that of an itemized gross receipts tax.

Reference to the vendor as a tax collector is rare. The minority view as stated by an Arkansas court is that the merchant is not taxed. He is a

25. PA. STAT. ANN. tit. 72, § 3403-546(b)(2) (Supp. 1963). See also MD. ANN. CODE art. 81, § 380 (Supp. 1964); LA. STAT. ANN. tit. 47, § 304 (Supp. 1963).

26. PA. STAT. ANN. tit. 72, § 3403-540 (Supp. 1963).

27. PA. STAT. ANN. tit. 72, § 3403-542 (Supp. 1963).

28. Although dealers are required to be licensed by the taxing authorities, failure to acquire a license does not relieve this ultimate liability for the full tax. PA. STAT. ANN. tit. 72, § 3403-301(a),(b),(d) (Supp. 1963).

29. See WISC. STAT. ANN. § 77.52 (Supp. 1964); MD. ANN. CODE art. 81, § 382 (Supp. 1964); MO. STAT. ANN. § 144.080(4) (Supp. 1964); PA. STAT. ANN. tit. 72, § 3403-573(b) (Supp. 1963); TENN. CODE ANN. § 67-3019 (1955); IOWA CODE ANN. § 422.49 (1949).

30. See Note, 87 U. PA. L. REV. 242 (1938).

31. *Livingston Rock & Gravel Co. v. DeSalvo*, 136 Cal. App.2d 156, 288 P.2d 317 (1955), where the court held that a purchaser under an option is not liable to the seller for the tax in the absence of an agreement, for there is no absolute requirement upon the vendor to collect.

32. CAL. REV. & TAX LAWS § 6052 (West 1956).

33. 136 Cal. App. 2d at 162, 288 P.2d at 320.

34. PA. STAT. ANN. tit. 72, § 3403-201(a) (Supp. 1963). "There is hereby imposed upon each separate *sale* at retail . . . a tax . . ." (Emphasis added.)

tax collector. The tax is required of the purchaser, and the merchant must collect and account for it.³⁵ There is, however, no recorded case from any other state where a merchant has been successfully charged with embezzlement of sales tax funds. Perhaps some of the confusion surrounding the vendor's status is traceable to characteristically ambiguous and contradictory language employed by draftsmen of sales tax laws. North Carolina's act provides a good example:

The tax . . . is levied as a license or privilege tax for engaging in the business of a "wholesale" or "retail" merchant . . . Retail merchants may add to the price . . . the amount of the tax . . . [and it] shall be a debt from the purchaser to the merchant . . . recoverable at law in the same manner as other debts. It is the purpose and intent of this article that the tax . . . be passed on to the consumer instead of being absorbed by the merchant.³⁶

The determination of the vendor's status, as well as the status of the tax funds in his possession, has been further influenced by the treatment of sales tax liability as a debt.³⁷ South Carolina and Rhode Island statutes³⁸ make reference to such tax as a debt. In addition, Pennsylvania's statute provides for collection from vendors by an action for debt.³⁹ It is difficult to see how a debt can be embezzled. Mr. Justice Holmes, in an opinion holding a charge of embezzlement improper where an amusement operator failed to remit federal admissions taxes collected as part of his ticket price, stated: "[I]t seems to us that under this law the person required to pay over the tax is a debtor and not a bailee."⁴⁰ He accented this distinction by adding:

We see no ground for requiring the ticket office of a theatre to create a separate fund by laying aside the amount of the tax on each ticket and to keep it apart, either in a strong box or as a separate deposit in a bank.⁴¹

35. *Wiseman v. Phillips*, 181 Ark. 63, 84 S.W.2d 91 (1935) (held an early Arkansas sales tax law unconstitutional). Compare *Cook v. Sears-Roebuck & Co.*, 212 Ark. 308, 206 S.W.2d 20 (1947), construing a later "Gross Receipts Tax," ARK. STAT. ANN. tit. 84, §§ 1901-1930 (Supp. 1963). This case tested the existence of *any* liability to pay over to the state funds already collected from purchasers, and the vendor was held a "tax collector" on ground of unjust enrichment.

36. N.C. GEN. STAT. § 105-165 (Supp. 1963).

37. See Note, 29 CAN. B. REV. 87 (1951), for an interesting discussion of the problem in Canada. The author considers the status of withheld payroll taxes and notes that they are trust funds which belong to the Crown from the moment they are deducted; sales tax collected by a licensed manufacturer or wholesaler, however, may be used in his business until the end of the month following its receipt; it is a mere liability to account for a debt.

38. R.I. GEN. LAWS ANN. § 44-18-19 (Supp. 1963).

39. PA. STAT. ANN. tit. 72, § 3403-548(c) (Supp. 1963).

40. *United States v. Johnston*, 268 U.S. 220, 226-27 (1925).

41. *Id.* at 227.

Congress followed this decision with a new law declaring such persons "trustees" of funds so accumulated.⁴² While Pennsylvania, unlike the other states, has incorporated a similar protective device into its sales tax act by declaring monies collected thereunder to be "a trust fund for the Commonwealth . . .,"⁴³ it does not require segregation of tax money except under certain circumstances at the Department of Revenue's discretion.⁴⁴

Assuming the statutory trusteeship to be valid and the vendor's status as a "tax collector" to be less than clear, a prosecution for embezzlement might be pursued most appropriately under the Penal Code provision for embezzlement by trustee.⁴⁵ No cases appear, however, testing liability under this provision.

An interesting corollary to the trusteeship question, which likewise has not been tested in Pennsylvania courts, is the effect upon vendor liability of loss or destruction of sales tax money without fault. Authority in other jurisdictions is divided; Florida has decided that the merchant is an involuntary trustee and not liable without fault,⁴⁶ whereas a Georgia court has sustained the vendor's continuing liability as a taxpayer, fault notwithstanding.⁴⁷

There are other elements of the Sales Tax Act which suggest that the vendor is not a tax collector. They include provision for filing "returns,"⁴⁸ establishment of liens against his assets in cases of non-payment,⁴⁹ and a lien priority over other classes of creditors.⁵⁰ There is also a provision for prepayment of the tax by the seller with a reimbursement on his own account where the law or government regulations prevent compliance with a requirement to collect the tax on credit sales within thirty days.⁵¹

42. 48 Stat. 768 (1934), 26 U.S.C. § 3661 (1946).

43. PA. STAT. ANN. tit. 72, § 3403-535 (Supp. 1963). A vendor was held to be a constructive trustee under a city sales tax law in *Philadelphia v. Heinel Motors*, 142 Pa. Super. 493, 16 A.2d 761 (1940). In that case, the court said: "[I]t will be seen that the defendant's liability to pay the tax is absolute even though the tax is primarily on the consumer. . . ." *Id.* at 504, 16 A.2d at 766.

44. See PA. STAT. ANN. tit. 72, § 3403-581(e) (Supp. 1963).

45. PA. STAT. ANN. tit. 18, § 4830 (1963). The statute defines "trustee" as meaning "trustee on some express trust created by deed, will or instrument in writing . . . also [to] include all executors, guardians and assignees." The statute does not refer specifically to trustees declared to be such by another statute, and the precise point appears not to have been adjudicated.

46. See *Spencer v. Mero*, 52 So. 2d 679 (Fla. 1951).

47. See *Williams v. Baer's Den, Inc.*, 214 Ga. 240, 104 S.E.2d 230 (1958).

48. PA. STAT. ANN. tit. 72, § 3403-501 (Supp. 1963).

49. PA. STAT. ANN. tit. 72, § 3403-548(a) (Supp. 1963).

50. PA. STAT. ANN. tit. 72, § 3403-548(d) (Supp. 1963).

51. PA. STAT. ANN. tit. 72, § 3403-549 (Supp. 1963), directs that "the taxpayer shall require the purchaser to pay . . . [the tax] at the time the sale is made, or within thirty days thereafter . . ." (Emphasis added.) Under PA. STAT. ANN. tit. 72, § 3403-546.2 (Supp. 1963), one purchasing for resale may prepay the tax to his vendor and limit

Thus, even though the vendor in Pennsylvania is required to collect the sales tax, there is substantial evidence to support a conclusion that he is fundamentally a taxpayer with direction and authority to be indemnified by his customers in furtherance of sound commercial policy. Yet, the vendor in *Shafer* was prosecuted under a statute which previously applied solely to tax collectors in the more formal sense of the word.

There exists a need for further consideration of the holding in *Shafer* in view of Pennsylvania's prior adherence in *Commonwealth v. Brown*,⁵² to the doctrine that courts should not permit prosecution under the general provisions of a penal code where special penal provisions are available. The court in *Brown* emphasized the desirability of letting each citizen know what acts will subject him to a penalty. The court supported its view with a quotation from Blackstone: "To know with certainty what the laws of our country have forbidden, and the deplorable consequences to which wilful disobedience may expose us, is a matter of universal concern."⁵³ The Sales Tax Act, however, goes beyond the imposition of interest,⁵⁴ tax additions,⁵⁵ and penalties⁵⁶ for failure to fully comply with its many requirements; specific penal sanctions are prescribed where vendors file fraudulent returns,⁵⁷ or represent that they will absorb the tax, refuse to collect and remit the same, refuse to file returns, refuse to pay the tax or any additions, fail to keep records and make full disclosure, or issue false exemption certificates.⁵⁸

Considered alone, the presence of special criminal provisions in the act would seem to bring *Shafer* within the scope of the doctrine prohibiting the application of general penal law. However, the legislature adopted a saving clause which stated that nothing in the act should repeal, modify, suspend or render inoperative any provision of the general laws, and that the criminal offenses and penalties specified should be in addition to the application of the general laws arising from any transaction.⁵⁹ The extent to which this clause allows or directs resort to general criminal law is nowhere defined;

his liability to the state to any amount received as tax in excess of the amount prepaid. In the *Shafer* case, the court noted that in states where a dealer may prepay his entire tax liability, and credit receipts against prepaid tax receipts, he is clearly collecting on his own rather than the state's account. 414 Pa. at 619 n.5, 202 A.2d at 311 n.5. See OHIO REV. CODE ANN. § 5739.05 (1964).

52. 346 Pa. 192, 29 A.2d 793 (1943). Here, a conviction under the general laws was reversed where the offense involved primary election irregularities and election laws provided specific penalties.

53. *Id.* at 197, 29 A.2d at 796.

54. PA. STAT. ANN. tit. 72, § 3403-570 (Supp. 1963).

55. PA. STAT. ANN. tit. 72, § 3403-571 (Supp. 1963).

56. PA. STAT. ANN. tit. 72, § 3403-572 (Supp. 1963).

57. PA. STAT. ANN. tit. 72, § 3403-573(a) (Supp. 1963).

58. PA. STAT. ANN. tit. 72, § 3403-573(b) (Supp. 1963).

59. PA. STAT. ANN. tit. 72, § 3403-601(b) (Supp. 1963).

it is therefore subject to interpretation in light of competing policy factors. Such factors are the need to protect the public revenue, and the universal concern for predictability of consequences to life and liberty resulting from proscribed conduct.

The *Shafer* court interpreted the saving clause as removing the case from the special penalty doctrine's control. The court further noted that while the Sales Tax Act made failure to pay over the tax a mere misdemeanor, the character of the defendant's conduct was more in the nature of a felony. Absent from the *Shafer* opinion, however, is any speculation as to why the legislature which so thoroughly articulated the act's many complex provisions, criminal and otherwise, failed to make its own distinction in this critical area. If it had wished to make any violation a felony, it could easily have done so; or else have incorporated by reference section 823 of the Penal Code. Notably, it did neither.

A more limited view of the saving clause was taken by a county court in *Commonwealth v. Grace*.⁶⁰ In *Grace* the court quashed an indictment brought under section 823 on facts similar to *Shafer*, stating:

The permissive addition of criminal offenses prescribed by the general laws of the Commonwealth . . . must be limited to its authorized scope. It may not be interpreted to extend to indictments under the general provisions of the Penal Code which are inapplicable, inappropriate and improper.⁶¹

The same court further observed that "the gravamen of the offense . . . is the violation of . . . [the vendor's] obligation to properly handle and dispose of monies collected in the operation of his business."⁶²

Also an important element in construing these statutes, which the *Shafer* court never mentioned, is the chronological interrelationship between laws. There is reason to question whether in strictly construing section 823 of the Penal Code, enacted in 1939, a court could conclude with certainty that the legislative intent was to apply said section to so large a class of persons as *all* vendors who are subjected to different responsibilities, by the passage of a sales tax law sixteen years later. The same policy favoring maximum protection of life and liberty and calling for a strict construction would seem to uphold the position that "while remedial laws may extend to new things not *in esse* at the time of making the statute, penal laws will not."⁶³ The Pennsylvania Supreme Court phrased the proposition similarly, stating that

60. 52 Luz. L.R. 286 (Pa. C.P. 1962) (presumably reversed by the instant case).

61. *Id.* at 288.

62. *Ibid.*

63. ENDLICH, INTERPRETATION OF STATUTES § 333 (1888).

"it was long ago ruled that a penal act of Parliament cannot be extended to things that did not exist when the statute was made."⁶⁴

Although Pennsylvania had no general sales tax in effect when section 823 of the Penal Code became law in 1939, the legislature was not *wholly* unfamiliar with the problem of tax collection by other than public officials. It had previously enacted⁶⁵ and reenacted⁶⁶ a tax on liquid fuels requiring dealers and distributors respectively to collect the tax. Furthermore, the act was twice amended⁶⁷ to delete reference to the distributor as a taxpayer, specifying that the consumer was to absorb the levy. The liquid fuels tax was a tax on a single commodity, collected by a limited class of vendors. In contrast, the general sales tax applies to nearly all goods and services marketed for consumption and is administered by the broadest possible class of merchants and tradesmen. By analogy it might be argued that the problem of tax collecting vendors did exist and was contemplated in 1939. In view of the fuels tax history, the question then arises as to why the legislature failed to clarify both section 823 and the subsequent Sales Tax Act with respect to vendor status and criminal liability.

The extent to which public policy considerations influenced the *Shafer* decision is not certain, but the effect appears substantial. As the fiscal demands of modern society multiply, so does the strain upon legislative ingenuity to find broader sources of public revenue and secure its collection. No small responsibility lies with the courts in protecting this revenue within the framework of sound jurisprudence and legislative decree. Insofar as *Shafer* reflects regard for the importance of sales tax receipts to Pennsylvania's state budget⁶⁸ and a determination to protect public funds from wrongful dissipation, the result cannot be criticized; but as a study in strict statutory construction and retrospective criminal liability, it is not altogether satisfactory.

Penal laws are to be strictly construed⁶⁹ in favor of the accused⁷⁰ and "when a criminal statute calls for construction, it is not the construction which is supported by *greater* reason that is to prevail but one which, if reasonable, operates in favor of life and liberty."⁷¹ Tax laws are also restricted

64. *Commonwealth v. Wells*, 110 Pa. 463, 1 Atl. 310 (1885).

65. Pa. Laws, 1929, at 1037.

66. Pa. Laws, 1931, at 149.

67. Pa. Laws, 1937, at 2774; Pa. Laws, 1937, at 248.

68. In the Governor's Budget Message for fiscal 1964-65 it was estimated that 45.2% of all Commonwealth revenue would be collected from the sales and use tax, and that 50.9% of all Commonwealth expenditures would be for public education.

69. See PA. STAT. ANN. tit. 46, § 558 (1952).

70. See *Commonwealth v. Glover*, 397 Pa. 543, 156 A.2d 114 (1960).

71. *Id.* at 546, 156 A.2d at 116. (Emphasis added.)

in scope, at least to the extent that their words are not to be extended by implication.⁷² Therefore, to meet these construction requirements, the statutes in *Shafer* had to be construed in favor of the defendant. It is submitted that they were not so construed, for the additional factors of the vendor's status in relation to the state and the special penal provisions were not considered.

As a landmark in the field of sales tax administration, the *Shafer* case has significant implications. The retailer who deals in small items on a cash-and-carry basis and handles sales tax money by what is characterized as the "tin cup" method will be little affected; whereas the merchant making credit sales of items with larger unit prices may be wise to review his accounting practices. For example, a vendor who treats the sales tax as an accrued liability payable out of general business funds may be technically guilty of embezzlement if he defaults in his tax remittance because payments for merchandise may have reduced his available cash below the amount of the accrued tax liability. Indictment could similarly result from miscalculation or failure of anticipated receipts. Even in the absence of specific direction to segregate sales tax funds, the merchant would be well advised to establish a special trust account, notwithstanding the inconvenience and added expense.

The need is apparent for prompt and conclusive action by the legislature to clarify both the scope of section 823 and the status of vendors under the Sales Tax Act. The business community, which bears an extraordinary and selective burden of intermediary tax responsibility, deserves protection from such surprise criminal liability as *Shafer* represents.

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72. See *Commonwealth v. Allied Bldg. Credits, Inc.*, 385 Pa. 370, 123 A.2d 686 (1956).