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Taxes—New York Sales Tax—Sales for Resale

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pleading in dismissing the complaint, since the plaintiff alleged as a separate transaction the sale of blood to her by the hospital for a price, and should have been entitled to prove the existence of the sale at the trial if such allegations were to be accepted as true, the usual method of testing the sufficiency of a complaint.

At common law,[35] a transaction in which personal services predominated did not preclude a warranty from attaching if title in goods had passed for a price. However, the Court in the instant case has interpreted the Uniform Sales Act, adopted in New York,[36] to require a technical contract of sale for purposes of finding an implied warranty. Although the decision, in adopting an "essence" test to find the required contract of sale, restricts the operation of warranties, the restriction would seem justified in view of the plain import of the words of the statute, and if found to run counter to legislative policy underlying warranties may be removed by proper amendment. It should also be noted that this decision may have been promoted largely by the particular facts of the case (the potential liability of the hospital as an insurer); therefore the distinction between a contract of sale and a contract for services, and the adoption of the "essence" test may be restricted to similar cases.

TAXES

New York Sales Tax—Sales for Resale

The New York City Retail Sales Tax applies to receipts from every sale of tangible personal property sold to any person for any purpose other than for resale in the form of tangible personal property.[1] In *Colgate-Palmolive Peet Co. v. Joseph*,[2] petitioner sold certain products, mostly soaps and toilet articles, encased in corrugated cardboard cartons, to various retail grocers and druggists in the City of New York. Whether petitioner is subject to the retail sales tax upon these cartons, which as a general rule are not resold, was the principal issue; the Court held, that he was. The cartons are not "inseparable from their contents" and are not sold "for the sole purpose of resale." The order of the Appellate Division[3] annulling the determination of the comptroller assessing such tax on petitioner was reversed.

The rule that containers of articles are separable from their contents for the

35. *Samuel v. Davis*, [1943] 1 K. B. 526 (contract to make dentures).
36. N. Y. PERSONAL PROPERTY LAW § 82-158.

1. Administrative Code of the City of New York, Sec. N 41-2.0, subd. a, par. 1; Sec. N 41-1.0, subd. 7.
2. 308 N. Y. 333, 125 N. E. 2d 857 (1955).
3. *Colgate-Palmolive-Peet Co. v. Joseph*, 283 App. Div. 55, 126 N. Y. S. 2d 9 (1st Dep't 1953).

purpose of determining the applicability of retail sales tax laws has been applied to burlap "sacks" or "envelopes" holding smaller cotton bags filled with sugar,[4] steel drums and wooden barrels used as containers for molasses and syrup,[5] wooden packing boxes and crates,[6] and to corrugated cardboard cartons in the instant case.

Theatre Admissions Tax

In New York State, municipalities are authorized by state law to levy a 5% tax on theatre admissions.[7] Under this enabling act New York City imposed a 5% tax. This resulted in some patrons' paying more than the 5% because of the "breakage."[8]

Plaintiffs in this case[9] sought a judgment declaring the local law invalid since the city can collect tax only if power is conferred by the state enabling act, "or such as is necessarily implied therefrom."[10]

The Court in a unanimous decision,[11] reversing the Appellate Division,[12] held, the city can collect breakage in imposing a 5% tax. The city can collect the tax only if the power is conferred by the State enabling act, or such as is necessarily implied therefrom.[13] The majority believed that the power to collect the fraction over the stipulated 5% was implied from the fact that the legislature had reenacted the statute in exactly the same language as the original enactment under which, to the knowledge of the legislature, at least two cities had administered the tax in the manner of which the plaintiff here complains.[14] Also, the court considered the de minimis doctrine as pertinent here; the effect of the extra half penny on the theatre patron is minimal. It was argued that the amount involved in the city's revenue was considerable, but the Court preferred to consider it only from the patron's point of view.

4. *Sterling Bag Co. v. New York,* 281 N. Y. 269, 22 N. E. 2d 369 (1939).
5. *American Molasses Co. v. McGoldrick,* 281 N. Y. 269, 22 N. E. 2d 369 (1939).
6. *Wood Packing Box Co. v. McGoldrick,* 286 N. Y. 665, 36 N. E. 2d 698 (1941).
7. L. 1947, c. 278.
8. N. Y. LOCAL LAW §37: "Where the tax to be paid by a patron includes a fraction of one cent, the fraction shall not be paid where it is less than one-half cent and a full cent shall be paid when the fraction is one-half cent or more." Administrative Code of City of New York, §G46-2.0(d).
9. *RKO-Keith-Orpheum Theatres v. City of New York,* 308 N. Y. 493, 127 N. E. 2d 284 (1955).
10. *City of Johnstown v. Wells,* 242 App. Div. 103 (1934), *aff'd* 275 N. Y. 623 (1937).
11. Note 9, *supra.*
12. 285 App. Div. 374, 137 N. Y. S. 2d 736 (2d Dep't 1955).
13. Note 10, *supra.*
14. If the practical construction of a statute is well known the legislature is charged with knowledge and its failure to interfere indicates acquiescence therein. *People v. Charbineau,* 115 N. Y. 433, 22 N. E. 271 (1889).