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Taxation—Sales Tax

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as deductions the amount paid by him to the arrangers and members of the orchestra. The State Tax Commission determined him liable for the Unincorporated Business Tax.

The Court of Appeals in reversing (4-3) the Commission and the Appellate Division *held*: (1) that Mr. Voorhees' occupation as musician and orchestra conductor constituted a "profession" within the exclusion clause of the statute; (2) that income reported by him on his tax return included income not his own, and (3) that 80% of his true gross income came from personal services.

The court had previously defined "profession" as requiring knowledge of an advanced type in a given field of science or learning gained by a prolonged course of specialized instruction and study.¹⁴ It was felt by the Court that Mr. Voorhees' training and experience in the field of music entitled him to recognition as a professional musician.¹⁵ Judge Froessel, speaking for the majority, also held that the money paid Mr. Voorhees by his sponsor over and above his own fixed guest fee was a "wash" transaction and not part of his true income.

The dissenters, speaking through Judge Dye, felt that the findings of the State Tax Commission ought not be disturbed unless shown to be "clearly erroneous" and so lacking in support by the evidence as to be "arbitrary and capricious."¹⁶ In the instant case, however, the facts were not in dispute, thereby laying the question open for judicial review.¹⁷

The decision of the majority seems to effectuate the policy of the taxing statute *i. e.*, to exempt that type of activity which is incapable of being carried on in corporate form; Mr. Voorhees' occupation seems clearly to fall within this category.

Sales Tax

The Administrative Code of the City of New York, ch. 41, tit. N, imposes a local retail sales tax on the purchaser, but makes the vendor, the trustee of the city for its collection and liable therefor.¹⁸ As the incidence of the tax is intended to be placed upon the ultimate consumer, provision is made for resale

14. *People ex rel. Tower v. State Tax Commission*, 282 N. Y. 407, 26 N. E. 2d 955 (1940).

15. *People v. Kelly*, 255 N. Y. 396, 175 N. E. 108 (1931) held the teaching of singing or music to be a profession for purposes of the zoning law.

16. *Calder v. Graves*, 261 App. Div. 90, 24 N. Y. S. 2d 797. (3rd Dep't. 1941), *aff'd*. 288 N. Y. 643, 36 N. E. 2d 688 (1941).

17. *Good Humor Corp. v. McGoldrick*, 289 N. Y. 452, 46 N. E. 2d 881 (1943).

18. Administrative Code, § N 41-2.0.

certificates to be issued by the vendee to the vendor, as evidence that the goods are being purchased for subsequent resale.¹⁹

In *American Cyanamid and Chemical Corp v. Joseph*²⁰ the vendor was engaged in selling acids and chemicals to numerous customers in various businesses. In many of these transactions the vendor had, in good faith, received resale certificates from its customers. In fact, these customers were using these chemicals in such a manner that they could in no way become an identifiable component of a product later to be resold. Due to the corporate names of some of the customers and the advice of its own chemist, the vendor had reason to believe, but no definite knowledge, that some of these sales were not in fact for resale.

Judge Desmond, speaking for a unanimous court, held that the vendor's possession of such notice or information did not make it liable for the tax, in the absence of bad faith. The law, which places upon the vendor the burden of being an unpaid tax collector for the city, does not place upon him a duty of policing his own customers.²¹ The court also gave further emphasis to the principle that taxing statutes of doubtful meaning are to be construed in favor of the taxpayer and against the taxing authority, and the burdens they impose are not to be extended by implication.²²

The City of New York imposes the sales tax upon "the amount of the receipts from every sale of tangible personal property sold at retail."²³ Sale is defined as "any transfer of title or possession or both, exchange or barter, license to use, license to consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor."²⁴ In *American Locker Co. v. City of New York*,²⁵ the comptroller attempted to apply this tax to the receipts from coin-operated baggage lockers.

The Court of Appeals, in unanimously reversing the Appellate Division and Special Term, held that the purpose of the sales tax law is not to impose a tax on all transactions, but only on those which involve the transfer of title or the

19. Administrative Code, § N 41-2.0, subd. i.

20. 308 N. Y. 259, 125 N. E. 2d 247 (1955).

21. For a discussion of the problem of the resale of chemicals used in manufacturing processes see *Mendoza Fur Dyeing Works v. Taylor*, 272 N. Y. 275, 5 N. E. 2d 818 (1936).

22. *Dun and Bradstreet v. City of New York*, 276 N. Y. 198, 11 N. E. 2d 728 (1937), CRAWFORD, CONSTRUCTION OF STATUTES, § 257.

23. Administrative Code of the City of New York, § N 41-2.0 subd. a, par. 1.

24. *Ibid* § N 41-1.0 subd. 5.

25. 308 N. Y. 264, 125 N. E. 2d 421 (1955).

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transfer of actual exclusive possession.²⁶ The City here attempted to impose the tax under a theory that constructive possession of the locker passed to its user. However, the Court felt that the limited right of the patron to open and close the door once during a twenty-four hour period hardly constituted such real, exclusive possession.

Previous cases which had imposed a tax upon the transfer of motion picture films for use by an exhibitor²⁷ and the rental of automobiles²⁸ were distinguished by the court. In these cases the licensee had actual corporeal and exclusive possession of the property in question for a specified period of time.

26. Personal Property Law § 82 defines sale as "an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price."

27. *United Artists Corp. v. Taylor*, 273 N. Y. 334, 7 N. E. 2d 254 (1937).

28. *Buckley Funeral Home v. City of New York*, 199 Misc. 195, 105 N. Y. S. 2d 478, *aff'd*. 277 App. Div. 1096, 100 N. Y. S. 2d 1023 (1st Dep't. 1950).