The Categorical Definition of Tangible Personal Property Under the Pennsylvania Selective Sales and Use Tax Act

By

MARVIN GARFINKEL

Reprinted from Dickinson Law Review,
Vol. 62, Page 1, (October, 1957)

THE CATEGORICAL DEFINITION OF TANGIBLE PERSONAL PROPERTY UNDER THE PENNSYLVANIA SELECTIVE SALES AND USE TAX ACT

BY MARVIN GARFINKEL *

"A TAX attorney's dream and a tax collector's nightmare." This characterization by Pennsylvania's Governor George M. Leader [1] of certain amendments to Pennsylvania's Selective Sales and Use Tax Act [2] is equally applicable in many respects to the act itself. Although the problems of interpretation created by this law do often resemble a confused and unpleasant detachment from reality, the act may be considered a tax attorney's dream only in the sense that it must inevitably breed extensive litigation. This is particularly true of that unique aspect of the Selective Sales and Use Tax Act —the categorical definition of property the sale or use of which is subject to tax. This article will deal with the more important problems related to this feature of the act. The application of various principles of statutory interpretation will be analyzed in an attempt to interpret and correlate the relevant provisions of the law. Particular attention will be paid to basic problems of statutory construction which must be resolved before a rational and consistent approach to the act's categorical feature is possible.

I.

LEGISLATIVE BACKGROUND

The statute, officially titled the "Selective Sales and Use Tax Act", is Pennsylvania's first permanent sales tax law.[3] The basic act became effective

* B.A., 1951, Pomona College; L.L.B., 1954, University of Pennsylvania; Deputy Attorney General of Pennsylvania, 1955-1957; Member of the Philadelphia Bar and of the firm of Ehrlich, Narin and Garfinkel.

[1] On March 26, 1957, Governor Leader, appearing before an extraordinary joint session of the Pennsylvania General Assembly, asked the Legislature to recall House Bill No. 337, a sales tax amending bill which was on his desk after passing both legislative houses. The Governor criticized both the substantive and procedural provisions of the amendments and asked the Legislature to re-examine the bill and write an "honorable and workable tax bill." Later, after the Legislature failed to act on his request, House Bill No. 337 became law on April 5, 1957 as Act No. 24 of the 1957 session of the General Assembly, P. L. 34. In permitting the bill to become law without his approval, the Governor suggested to the General Assembly that it appoint its own tax study commission to immediately write a more equitable sales tax. *Philadelphia Evening Bulletin,* April 5, 1957, p. 1, col. 5 and 6, continued to p. 15, col. 1 and 2. *Philadelphia Inquirer,* April 5, 1957, p. 3, col. 6.

[2] Act of March 6, 1956, P. L. 1228, as amended by the Acts of May 24, 1956, P. L. 1707; April 5, 1957, No. 24, P. L. 34; May 9, 1957, No. 51, P. L. 114; July 8, 1957, No. 297; July 8, 1957, No. 323; July 8, 1957, No. 326; 72 P.S. § 3403 (Supp. 1956).

[3] The Emergency Relief Sales Tax Act of August 19, 1932 (Ex. Sess.), P. L. 92, 72 P.S. § 3282 (1949), was in effect for six months and imposed a one percent tax. The Consumers Sales

March 7, 1956, the confused product of an extraordinarily long legislative session dominated by a split on fiscal policy between a Democratic Governor and a Republican majority in the State Senate.[4]

As originally introduced in the General Assembly the bill, which in amended form was signed into law on March 6, 1956, was most aptly titled the "Selective Retail Tax Act".[5] In this original form the bill would have imposed a two percent excise tax upon the "sale, use, storage or other consumption of all tangible personal property purchased at retail after the effective date of this act . . .". The bill defined "Tangible Personal Property" by listing seven narrow categories.[6] Thus, under the bill as introduced transactions involving only a limited class of property would actually have been subject to tax. The seven categories of taxables included automotive and aircraft equipment, construction materials, home furnishings, office furniture, equipment and supplies, radio, phonograph and television receiving equipment, photographic equipment, sporting goods and athletic equipment, cosmetics, furs and jewelry. Although these classifications were quite arbitrary and discriminatory they were without question selective. As introduced this bill was, therefore, not apparently intended to be a broad base retail sales tax. The bill passed the House without major amendment except that luggage was added to the property subject to tax. After second reading in the Senate it was recommitted to the Finance Committee. The bill, as re-reported from committee, listed 17 categories of property subject to tax and, at this point, began to resemble the present act, thus becoming a general sales tax law in practice although possibly not in theory. The Senate committee had renamed the bill "The Selective Sales and Use Tax Act", a short title which

Tax Act of July 13, 1953, P. L. 389, 72 P.S. § 3407 (Supp. 1956), was in effect from September 1, 1953, until it expired on August 31, 1955, and also imposed a one percent tax. This act was complemented by the Use and Storage Tax Act of July 13, 1953, P. L. 377, 72 P.S. § 3406 (Supp. 1956), which was effective for the same period. The City of Philadelphia also enacted a local two percent sales tax ordinance on February 8, 1938, effective to December 31, 1938.

[4] Governor Leader favored a state income tax as the major source of critically needed additional revenue while the Senate majority held out for a sales tax. Early in the session the Governor recommended the adoption of a classified income tax law in which the tax rate progressed from one percent on wages and other non-enumerated income through two percent on business and professional income, four percent on rents and royalties, five percent on dividend income and six percent on net income from long term capital gains. House Bill No. 878, General Assembly of Pennsylvania, Session of 1955 as introduced on April 25, 1955. Administration leaders in the legislature later introduced a Manufacturers Excise Tax Bill. House Bill No. 1879, General Assembly of Pennsylvania, Session of 1955 as amended on second reading in Senate on December 12, 1955, Printer's No. 1228. After both of these proposals failed later in the session the administration backed a flat two percent income tax based on net taxable income as determined for federal income tax purposes. House Bill No. 1960, General Assembly of Pennsylvania, Session of 1955, as amended on second reading in House on January 16, 1956, Printer's No. 1373.

[5] House Bill No. 2009 (Pink), General Assembly of Pennsylvania, Session of 1955. As introduced on February 7, 1956.

[6] Section 2 (g), House Bill No. 2009 (Pink), General Assembly of Pennsylvania, Session of 1955.

failed properly to describe the bill since it had lost essentially all its selectivity, and, although it was a use tax, it was not a sales tax. It did not impose a tax upon the sale of property, but rather taxed only the use of property and imposed an obligation upon the vendor to collect the use tax. Substantial question later arose as to whether only retail transactions were subject to tax. Pennsylvania's Attorney General, who following adoption, was called upon to interpret the Act, considered it possible that the bill imposed a duplicate tax on the same property at each level of distribution.[7] After the House nonconcurred in the Senate amendments, the bill went to a joint conference committee. The only major changes made by this committee involved elimination of electricity and telephone and telegraph services from the property categories,[8] and the inclusion of the controversial stamp plan for collection of tax, which had previously been removed from the bill by the Senate committee.[9] In this form the bill was finally approved.

The need for radical amendment soon became apparent. An amending bill, which was introduced into the House twenty days after the enactment of the basic statute on March 6, 1956, expeditiously passed both houses in different form and was sent to a joint conference committee on April 10 where it remained the subject of extended discussion until a compromise bill was reported out on May 16. This bill, as finally approved on May 24, 1956, contained many features considered objectionable both by the Administration, which at this point sought a broad base general sales tax, and those who felt that this new tax should not be applicable to particular areas of commercial activities. The amendments were generally retroactive to March 7, 1956, the effective date of the original act. As amended, the Selective Sales and Use

---

[7] See *Philadelphia Evening Bulletin,* March 11, 1956, p. 10, col. 1; *Philadelphia Inquirer,* March 11, 1956, § B, p. 1, col. 6.

[8] The effect of this change was to eliminate the proposed application of tax upon the rendition of these services. It is possible, though, that the rendition of certain other public utility services is still subject to tax, since the title of the act was not also amended to eliminate reference to an imposition of tax on public utility services defined as tangible personal property.

[9] Article IV of the act of March 6, 1956, P. L. 1228, provided for the use of "prepaid tax receipts", commonly referred to as "tax stamps". This article of the act being an injection of the Ohio tax stamp system (see Revised Code of Ohio c. 5739 §§ 5739.03-5739.09 inclusive) into an act whose other procedural provisions were based on a periodic report and payment procedure. Section 604 of the March 6, 1956 act provided that Article IV should not be operative until July 1, 1956. The amending act of May 24, 1956, P. L. 1707, revised certain of the provisions of Article IV and postponed the operative date of the stamp plan to January 1, 1957, "or as soon thereafter as practicable: Provided however, That any delay in implementing the provisions of Article IV shall not affect any other provision of this act." [§ 605 as amended by P. L. 1707]. Litigation pertaining to the constitutionality of the stamp plan precluded the Commonwealth's implementing Article IV as late as April 5, 1957 when Act No. 24, P. L. 34 became effective and repealed Article IV. The Governor in permitting House Bill No. 337 to become law as the Act of April 4, 1957 stated that a significant motivating factor to him was the repeal of the undesirable stamp plan. *Philadelphia Evening Bulletin,* April 5, 1957, p. 1, col. 5 and 6, continued to p. 15, col. 1 and 2. *Philadelphia Inquirer,* April 5, 1957, p. 3, col. 6.

Tax Act imposed a tax upon the sale or use of "tangible personal property" [10] purchased other than for resale. The categorical definition of "tangible personal property" and the stamp plan, both being basic to the original act, were retained although the individual categories were somewhat expanded.[11] The articulation of specific exclusions from tax, redesignated as Section 203, was also expanded.

The law remained in this form until the new Legislature which convened in January, 1957, adopted House Bill No. 337.[12] The effect of this bill on the categorical features of the Selective Sales and Use Tax Act was relatively minor.[13]

II.

Basic Structure of the Act Respecting Application of Tax

Section 201 of the Act imposes a tax at the rate of three percent of purchase price on each separate sale at retail within the Commonwealth of "tangible personal property" and also imposes a tax at the same rate upon the use within the Commonwealth of "tangible personal property" purchased at retail on or after March 7, 1956.[14] The use tax need not be paid by a person

---

[10] See appendix for full statutory provision. The imposition section of the original March 6, 1956 act levied a tax upon ". . . the use within the Commonwealth of all tangible personal property, as defined in this act, purchased after the effective date of this act." Act of March 6, 1956, P. L. 1228, § 201 (a). The phrase, "as defined in this act", was eliminated by the amending Act of May 24, 1956, P. L. 1707. This change is without significance. The draftsmen of the amending act were of the opinion that it was necessary either to eliminate the phrase "as defined in this act" at his point, or to insert it at every other point in the act where the term "tangible personal property" was used. Otherwise, it could reasonably be argued that where the phrase was not used, the common meaning of the term "tangible personal property" was intended, rather than the artificial categorical definition. One of the major defects in the original March 6, 1956 act was that the manufacturer's exemption, as incorporated in the Section 2 (j) definition of "use", applied only to property used or consumed in the manufacture of *tangible personal property*. Pennsylvania's Attorney General was of the opinion that property used in the manufacture of gasoline, for instance, might not be exempt since gasoline did not come within the categorical definition of "tangible personal property".

[11] See appendix for relevant statutory provisions.

[12] Act of April 5, 1957, No. 24, P. L. 34. During the controversy between the Governor and the Legislature over House Bill No. 337 (See note 2, *supra*), the state Justice Department prepared an analysis of this bill for the Governor. This analysis, which was published for the benefit of all interested persons, alerted the state legislature to the need for immediate and extensive amendment of the poor administrative provisions of the 1956 Act, the effectiveness of which had been further reduced by House Bill No. 337. The Act of May 9, 1957, No. 51, P. L. 114, incorporated these procedural changes into the law while the Act of July 8, 1957, No. 323, changed certain provisions regarding tax returns, refund procedures and time limitations on assessments. The Act of July 8, 1957, No. 326, reduced the offense of engaging in business without having a license as required by the Act from a misdemeanor to a summary offense.

[13] Minor changes were made to categories eleven and seventeen. A new category, including certain periodicals and other publications, was added and designated as clause eighteen of § 2(1). See appendix for relevant statutory provisions.

[14] March 7, 1956, was the effective date of the original act which was signed by the Governor at 11: 53 P. M. on March 6, 1956. Section 604 of the Act of March 6, 1956, P. L. 1228, provided that the act should take effect the day following final enactment.

who has paid the sales tax with respect to particular property.[15] The terms "purchase price", "sale at retail", "tangible personal property" and "use" are specifically and in many respects quite artificially defined in Section 2, the general definition section of the act.[16] The incidence of taxation under the act is thus nearly[17] always dependent upon the meaning of one or more of these terms[18] and, as a result, the vast majority of the problems encountered under the act involve an interpretation or application of these definitions.

It is in the definition of the term "tangible personal property" that the structure of the Pennsylvania act departs most radically from other general[19]

[15] Note the difference between the application of this use tax and that of the use tax of most other jurisdictions. For instance, § 6201 of The California Revenue and Tax Code, Act of July 1, 1943, as amended in 1948, imposes a tax upon the storage, use or other consumption of property purchased after July 1, 1935, for storage, use or other consumption in California. The expired 1% Pennsylvania Use and Storage Tax Act of July 13, 1953, P. L. 377, enacted in conjunction with the Consumers Sales Tax Act of July 13, 1953, P. L. 389, also imposed a tax only upon the use of property purchased for use in the Commonwealth. The New York City Use Tax is not applicable to the use of property purchased by a user while a non-resident of the City. A person engaged in commercial or professional activity in the City is not considered to be a non-resident with respect to the use of property in connection with such activity. N. Y. CITY ADMINISTRATIVE CODE, § M41-17.1.

The Illinois use tax imposition is similar to the present Pennsylvania imposition, and provides that where property is used outside the state prior to use in the state the tax base shall be reduced by a reasonable amount to represent out-of-state depreciation. ILL. ANN. STAT. c. 120, § 439.3 (1955). Section 2 (f) (5) of the Pennsylvania Act, as added by the amendment of May 9, 1957, provides for a similar adjustment of tax base, but only where the property was originally purchased by the user more than six months prior to the first taxable use in the Commonwealth.

[16] "A legislative body may, in a statute or ordinance, furnish its own definitions of words and phrases used therein in order to guide and direct judicial determinations of the intendments of the legislation although such definitions may be different from ordinary usage; it may create its own dictionary to be applied to the particular law or ordinance in question." Sterling v. Philadelphia, 378 Pa. 538, 106 A. 2d 793 (1954). This case held that the mercantile license tax was applicable to receipts from the practice of law under an ordinance in which the imposition section levied a tax upon annual gross volume of business transacted by persons engaged in business. Elsewhere in the act "business" was defined as including the carrying on of any trade, business, profession, or vocation.

[17] Exceptions to this statement arise where the incidence of tax is dependent upon either of the two subsidiary imposition provisions. Section 203 (i), in addition to excluding from tax the sale or use of certain wrapping supplies, also provides that ". . . any charge for wrapping or packaging shall be subject to tax at the rate imposed by section 201." Perhaps, though, the definition of "purchase price" is even of importance in interpreting this provision, since it might be argued that the rate of tax imposed by § 201 is "three percent of purchase price" rather than just "three percent". The interpretation of § 204 providing for an "Alternate Imposition of Tax", applicable to the short term use of certain property in the Commonwealth, is not dependent upon the definition of any of these terms.

[18] Each of these terms is, of course, also used elsewhere in the act other than in the imposition provisions. For instance, the unique definition of the term "tangible personal property" is of significance in determining whether a person is required to have a license under § 301 and also determining whether exemption certificates must be retained under § 546 (c). Note that the manufacturer's exemption under §§ 2 (c)(1) and 2 (j) (1) are applicable to certain property used in the manufacture of "personal property". The use of the term "tangible personal property" at this point in the original act of March 6, 1956, was one of the factors which led to the amendments of May 24, 1956, P. L. 1707. See note 10 *supra*.

[19] A general sales tax may be defined as one applicable to transactions involving a substantial portion of the corporeal or tangible personal property in general commerce. Such taxes are generally differentiated from taxes imposed upon the sale or use of such specific commodities or closely related groups of commodities, such as liquor, tobacco products, liquid fuels and motor vehicles, which somewhat traditionally have been subject to excise taxes. See Due, *The Nature and Struc-*

sales tax acts in effect in the United States. The imposition provisions of general sales tax statutes characteristically impose a tax upon transactions involving "tangible personal property." Unlike Pennsylvania's act, other statutes either fail to specifically define the term "tangible personal property" [20] and so leave the definition to general common law,[21] or define the term in a non-specific all-inclusive manner. For instance, the California statute, being of the latter type, defines the term "tangible personal property" as including:

> ". . . personal property which may be seen, weighed, measured, felt, or touched, or which is in any other manner perceptible to the senses." [22]

In contrast to the provisions of other sales tax statutes, subsection (*1*) of section 2 of the Pennsylvania act defines "tangible personal property" by setting forth eighteen clauses, often referred to as categories.[23] A major difficulty is that this subsection (*1*) does not set forth a policy of interpretation relative to the interrelationship of these categories. Note that categories four and five are particularly inclusive and non-selective in character. Category four includes "furnishings, appliances, supplies, fittings, ornaments, furniture, equipment and accessories for home, business, industrial or commercial use, for indoor or outdoor purposes" while category five includes "business, industrial, professional and commercial supplies, equipment and machines of all types, including parts and accessories purchased for or used in connection therewith". Also note that limitations or exclusions are set forth within certain categories.[24] For instance, category nine consists of "jewelry, watches, clocks, silverware, dishes, tableware, pottery and related articles, but not including religious articles". Category seven includes "all smoking and tobacco products, except cigarettes". These limitations or exclusions within categories are, however, not the only limiting or exclusionary provisions of the act. Section 203 of the act sets forth thirteen specific exclusions from tax. Ex-

ture of Sales Taxation, 9 VAND. L. REV. 123, 124 (1956). The Pennsylvania Selective Sales and Use Tax Act is properly classified as a general sales tax act. Note that the Wyoming Selective Sales Tax Act of February 24, 1937, Ch. 102 of Laws of 1937, is both in form and substance also a general sales tax act, notwithstanding its name. In the case of excise taxes on specifics, the rate of tax is usually dependent upon quantity considerations rather than upon the value of the property incident to the transaction.

[20] See, *e. g.,* ILL. ANN. STAT. c. 120, §§ 440-453 (1955); REV. CODE OF OHIO, § 5739.01 (1953); OKLA. STATS. TIT. 68, § 1251a, (1941).

[21] "Bouvier defines the term 'tangible property' as follows: 'That which may be felt or touched; it must necessarily be corporeal, but it may be real or personal.'" Crosswell v. Jones, 52 F. 2d 880 (E.D.S.C. 1931); *Cf.* Curry v. Alabama Power Co., 243 Ala. 53, 8 So. 2d 521 (1942), which holds that for the purpose of the Alabama Use Tax, electricity is tangible personal property since it has mass (electrons) and can be tasted, detected by the sense of smell and perceived by touch.

[22] CAL. REVENUE AND TAXATION CODE § 6016, (1943). *Cf.* FLORIDA STATS., C. 212, § 212.02 (12); N. Y. CITY ADMIN. CODE, § N41-1.6.

[23] Subsection *(1)* of § 2 is set forth in the appendix.

[24] Categories 2, 6, 7, 8, 9, 10, 15, 17, 18.

clusions are also incorporated into the definitions of both "sale at retail" and "use".

To take a positive approach, there are three distinct criteria upon which the taxability of a transaction is dependent. First, a transaction is subject to tax only if the property involved comes within the categorical definition of "tangible personal property" set forth in section 2 (*1*). On this basis, transactions involving exclusively [25] either real property, intangible personal property (in the common sense), or the rendition of a service are not included within any taxable category and are, therefore, not subject to tax. Likewise, transactions exclusively involving corporeal personal property which is not included in any category are not taxable since, for the purpose of the Selective Sales and Use Tax Act, such property is not considered to be "tangible personal property". Second, a transaction is subject to tax only if considered under the act to be either a "sale at retail" or a "use". A "sale at retail" under the act includes also certain rental [26] and quasi-service transactions.[27] A "use" is subject to tax only if the property being used was "purchased at retail" on or after March 7, 1956.[28] The transfer of property for the purpose of resale is not subject to tax, such transaction being specifically excluded

---

[25] Transactions involving both "tangible personal property", as defined by the act, and other property, may entail rather complex problems. This is especially true where the consideration incident to the transfer of the "tangible personal property" is not both separately stated and reasonable. Consider for instance the lease of an equipped commercial facility such as a restaurant. In these situations the Department of Revenue generally takes the position that where the parties have failed to separately state the purchase price incident to the transfer of the "tangible personal property", the tax is based upon the consideration incident to the entire transaction. More often than not, this position may be legally valid, although each fact situation demands a consideration of various provisions of the act. A detailed analysis of this problem is beyond the scope of this article.

[26] Section 2 (j) defines "sale at retail" as including "Any transfer for a consideration of the ownership, custody or possession of tangible personal property. . .". A rental is a transfer of possession or custody. The title of the act as amended by the Act of May 24, 1956, P. L. 1707, imposes a tax upon the ". . . sale, use, storage, rental or consumption of certain tangible personal property. . .". Section 2 (e) of the act defines "purchase at retail" as including the acquisition for a consideration of the ownership, custody or possession of tangible personal property. The § 2 (f) definition of "purchase price" includes the consideration incident to a lease. A person using rented property within the Commonwealth must therefore pay either a sales tax on the rental transaction or a use tax with respect to the use. The tax base is generally dependent upon the rental payments except as otherwise provided by clause (4) of this subsection which sets forth a distinct tax base applicable to rental transactions. A retention after March 7, 1956 of the possession, custody or a license to use or consume property pursuant to a rental or lease arrangement is considered a transfer subject to tax (§§ 2 (e) and 2 (j)).

[27] *E. g.* linen rentals. See § 2 (f) (4) of the Act as amended on May 24, 1956, P. L. 1707, 72 P.S. 3403-2 (f) (4) (Supp. 1956).

[28] See note 14 *supra.* A rational interpretation of this limitation is that property is subject to tax only when the user purchased it on or after March 7, 1956. Although the § 2 (e) definition of "purchase at retail" requires consideration, the Commonwealth might, in a proper case, reasonably contend that the purchase at retail on or after March 7, 1956, by one who donated the property to the actual user satisfies this requirement. If this were not so, then the transfer of property in a bona fide gift transaction might exempt such property from tax although otherwise, upon being used in the Commonwealth, such property would be subject to tax. A liberal husband, contemplating a move to Pennsylvania, may find it advantageous, taxwise, to give his automobile to his wife, son or daughter prior to it being brought into the Commonwealth.

from the definition of "sale at retail". In like manner, the use of property acquired for resale is not subject to tax. The various so-called productive exemptions [29] are incorporated into the act by excluding the transfer of property to be used directly in the exempt productive operations from the definition of "sale at retail" and the use of such property in these productive operations from the definition of "use". The third criterion prerequisite to a transaction being subject to tax is that such transaction is not included within one of the specific exclusions from tax provided for by Section 203 of the act. For instance, subsection (g) of section 203 specifically excludes from tax "The sale at retail or use of motion picture film rented or licensed from a distributor for the purpose of commercial exhibition". The "credit against tax" provision of Section 205 may, as a practical matter, also provide an exemption where tax has previously been paid to another state [30] with respect to the specific property involved. It is not the purpose of this article to examine these various exemption provisions in any further detail except in so far as they relate to the categorical definition of tangible personal property and the interpretation thereof.

III.

Application of Principles of Statutory Interpretation

Principles of statutory interpretation need be considered, of course, only where a statute is confused, unclear or ambiguous. Where statutory language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion to resorting to rules of statutory construction and interpretation.[31] Unfortunately, the categorical definition of tangible personal property is anything but clear and unambiguous. For this reason, most every problem of application of tax under the Selective Sales and Use Tax Act requires constant consideration of almost every basic principle of statutory interpretation and construction. More often than not, in navigating these muddy waters, the significant problems involve the applicability of particular principles rather than the manner of application thereof.

---

[29] The exemptions applicable to certain property used in manufacturing, agriculture, and public utility activities, as incorporated into the § 2 (j) definition of "Sale at retail" and the § 2 (n) definition of "use", are referred to generally as the "productive exemptions."

[30] This relief provision is usually not applicable where a *use* tax was paid in another state since § 205 requires that such other state must grant ". . . substantially similar tax relief by reason of the payment of tax under this act", and use tax statutes do not generally have provisions for reciprocal tax relief. There is also some question as to the applicability of this provision where a credit against Pennsylvania sales tax (as distinguished from use tax) is sought since most other states grant the credit only against *use tax*, and such relief is probably not substantially similar to a credit against *sales tax*. Note also that § 205 is applicable only when the property was originally purchased for use outside of Pennyslvania, and then only when the tax was paid to another state, rather than a political subdivision or other governmental unit.

[31] Commonwealth v. Przychodski, 177 Pa. Super. 203, 110 A. 2d 737 (1955).

1. *Rules of Strict Construction*

It has been stated to be a basic rule of statutory construction that where the intent or meaning of a statute levying taxes is doubful, such statute is to be construed most strongly against the government and in favor of the taxpayer.[32] This rule would, of course, be applicable only where there is no contrary legislative intention expressed in the particular statute being interpreted or in an applicable general statutory construction act. In brief the rule generally is that revenue laws should be strictly construed.[33] This is clearly the Pennsylvania law in so far as tax imposition, application or coverage provisions are involved.[34] The Pennsylvania Statutory Construction Act specifically so provides.[35] The Statutory Construction Act also provides, as did prior case law,[36] that tax exemption provisions should be strictly construed.[37] In this case strict construction would restrict the exemption, that is, require an interpretation against the exemption and the taxpayer. Perhaps within these two rules of statutory construction lies the motivation behind the categorical feature of the Pennsylvania Sales Tax. By limiting the transactions subject to tax by means of a selective imposition provision,[38] the architects of the original statute might have sought the application of the rule of strict construction in the interest of the taxpayer. There is, as will be developed later in this article, substantial question whether this purpose was actually achieved.

These two rules of strict construction of imposition and exemption lead to complications when applied to the structure of the Selective Sales and Use

---

[32] Hasset v. Welch, 303 U. S. 303, 314 (1938); Gould v. Gould, 245 U. S. 151, 153 (1917); Breitinger v. Philadelphia, 363 Pa. 512, 515, 70 A. 2d 640 (1950); see Commonwealth v. Allied Building Credits, Inc., 385 Pa. 370, 377, 123 A. 2d 686 (1956), where the Court applied the principal of strict construction in favor of the taxpayer to a procedural provision limiting tax assessment.

[33] Pennsylvania Company's Appeal, 337 Pa. 321, 323, 11 A. 2d 160 (1940); Curtis' Estate, 335 Pa. 414, 418, 6 A. 2d 283 (1939).

[34] Girard Trust Company's Case, 343 Pa. 434, 23 A. 2d 454 (1942); In re Appeal of Pittsburgh Terminal Coal Co., 83 Pa. Super. 535 (1924). *But cf.* Commonwealth v. Mack Brothers Motor Car Company, 359 Pa. 636, 59 A. 2d 923 (1948). For an extreme application of the principle of strict construction, see Lee v. Wood, 126 Fla. 104, 170 So. 433 (1936).

[35] Section 58 of the Pennsylvania Statutory Construction Act of May 28, 1937, P. L. 1019, 46 P.S. 558 provides that "All provisions of a law of the classes herein enumerated shall be strictly construed . . . . (3) provisions imposing taxes . . . (5) provisions exempting persons and property from taxation . . .".

[36] Commonwealth v. Densten Felt and Hair Co., 304 Pa. 536, 537, 156 Atl. 164 (1931); Commonwealth v. Lowry-Rodgers Co., 279 Pa. 361, 366, 123 Atl. 855 (1924); Academy of Fine Arts v. Philadelphia County, 22 Pa. 496 (1854); Saxe v. Board of Revision of Taxes, 107 Pa. Super. 108, 163 Atl. 317 (1932).

[37] See note 35 *supra.*

[38] There doesn't seem to be any real question that the effect of the categorical definition of "tangible personal property" is to create a selective imposition provision, in as much as § 201 imposes tax upon transactions involving "tangible personal property". For an interesting explanation of the reason for the categorical feature, see 35 Pa. Legislative Journal—Senate 935 (March 26, 1957).

Tax Act. It seems clear that where the question is simply whether particular property is included within any category, doubts should be resolved in favor of the taxpayer and a determination made that the property is not subject to tax.[39] Sales Tax Regulation No. TR-237(b), providing that caskets are not subject to tax,[40] is one of the few simple determinations of this sort that have been made under the act. Caskets, as such, are not listed in any of the categories. Since the Pennsylvania Supreme Court, in a mercantile license case,[41] has held that an undertaker is a vendor of caskets, the sale of the caskets to the undertaker must be considered exempt as a sale for resale. Were this not the case, there might be some validity to a contention that the caskets were a commercial supply to the undertaker. But, difficulties arise with respect to articles, such as "direct mail advertising literature",[42] "religious articles",[43] and "food and beverages . . . purchased at or from a school, church or hospital in the ordinary course of the activities of such organizations",[44] which are included within the limitations or exclusions applicable to particular categories. A different rule of strict construction would be applicable if these articles were considered not subject to tax by reason of being exclusions rather than outside of the tax orbit by reason of not being within the scope of the act. The question often arises whether particular on-premises sales of food and beverages are considered to be within the ordinary course of the activities of a school, church or hospital and, therefore, considered transactions involving "tangible personal property" under category seventeen. For instance, is the sale of food in a hospital luncheonette open to all persons, a sale in the ordinary course of a hospital's activities? If it is, the hospital need not collect tax. Otherwise it must. The institution may claim that the provision regarding transactions in the ordinary course of hospital activities is not an exemption but rather is a limit upon the category and should be liberally con-

[39] Note that in the text it was stated that "the property is not subject to tax", rather than that the property is "exempt" from tax. A failure to include is involved rather than an actual exemption.

[40] The regulation is technically inarticulate in stating that the sale and use of caskets is *exempt*. See note 39 *supra*.

[41] Commonwealth v. Dinnien, 320 Pa. 257, 182 Atl. 542 (1936). See also Auman, Inc. v. City of Reading, 73 Pa. D. & C. 416 (1949); Jordan Undertaking Co. v. State, 235 Ala. 516, 180 So. 99 (1938).

[42] Category 10. Pennsylvania legislation passes through the Legislature in unpunctuated form, the official print being later punctuated by the Secretary of State. *Cf.* Act of April 9, 1929, P.L. 177, § 804 (b), 71 P.S. 274 (b); Act of May 28, 1937, P.L. 1019, § 23, as amended, 46 P.S. 523. For this reason, § 53 of the Pennsylvania Statutory Construction Act of May 28, 1937, P.L. 1019, 46 P.S. 553 provides that statutory punctuation is not to be considered in interpreting a statute. A few unofficial reprints of the Selective Sales and Use Tax Act have placed a period in front of the word "Bible" in Category ten. Perhaps this is because the word "Bible" was capitalized as it always is regardless of position in a sentence. This interpretation with a period instead of a comma must be erroneous as there would be no reason to specifically itemize Bibles as "Tangible Personal Property," since all Bibles are books.

[43] Category 9.

[44] Category 17.

strued. The Department of Revenue, on the other hand, may take the position that what is involved is an exemption subject to a strict interpretation in favor of the Commonwealth. Academically, one may question whether the same rule of interpretation is applicable to those limiting or exempting provisions within the categories introduced by the word "except" and those introduced by the phrase "but not including". It is doubtful though, that a court would conclude that the Legislature was so articulate in drafting this act as to express an intention, for instance, that the restriction in category six, regarding prescription drugs, be considered an *exemption,* since it is introduced by the word "except", while the restriction on religious articles in category nine is to be considered a *limitation of scope* since it is introduced by the phrase "but not including". There are a great many ambiguities inherent in these categorical restrictions. A determination as to taxability of many items may well depend upon which rule of strict construction is applicable. An analysis of the Departmental rulings and regulations leads one to conclude that the Department has universally considered these categorical restrictions to be exemptions and thus has resolved the various ambiguities against the taxpayer probably on the premise that any other rationale leads to subtlety of reasoning not warranted by the statute.

2. *Expressio Unius Est Exclusio Alterius—Ejusdem Generis*

In interpreting the provisions of the Selective Sales and Use Tax Act, an important preliminary issue that the courts will have to resolve is the pertinence of the related maxims, *expressio unius est exclusio alterius* and *ejusdem generis,* to the various provisions of the act, particularly the categorical definition of tangible personal property. The first maxim, that express mention excludes that which is omitted, has on occasion been applied by Pennsylvania's appellate courts.[45] This maxim is not one of universal application and is generally not considered to be conclusive.[46] It is at best merely an auxiliary rule often, when properly applied where there is uncertainty as to the correct meaning of words, a useful guide to actual legislative intent.[47] It is particularly inapplicable where it appears that matter is expressly mentioned merely because of caution,[48] or where, ". . . the supposed specific words are sufficiently

[45] Irish v. Rosenbaum Company of Pittsburgh, 348 Pa. 194, 199, 34 A. 2d 486, 488 (1943); Fidelity Trust Co. v. Kirk, 344 Pa. 455, 457, 25 A. 2d 825, 827 (1942); Commonwealth ex rel., Maurer v. Witkin et al., 344 Pa. 191, 25 A. 2d 317 (1942); Lemoyne Borough Annexation Case, 176 Pa. Super 38, 50, 107 A. 149 (1954); Dixon's Case, 138 Pa. Super. 385, 390, 11 A. 2d 169 (1939).

[46] United States v. Barnes, 222 U. S. 513, 519 (1912); Fazio v. Pittsburgh Railways Company, 321 Pa. 7, 11, 182 Atl. 696 (1936); Crancer v. Lowden, 121 F. 2d 645, affirmed 315 U. S. 631 (1941); Commonwealth v. Kramer, 146 Pa. Super. 91, 103, 22 A. 2d 46, 52 (1941).

[47] Gooch v. United States, 297 U. S. 124, 128 (1936). See generally SUTHERLAND STATUTORY CONSTRUCTION (Horack, 3rd Ed.) Vol. 2, Par. 4915.

[48] United States v. Katz, 78 F. Supp. 21 (M. D. Pa. 1948).

comprehensive to exhaust the genus and leave nothing essentially similar upon which the general words may operate".[49] The rationale behind *ejusdem generis* is an attempt to reconcile an apparent incompatibility between specific and general words, in view of the rules of construction that all words in a statute are to be given effect, if possible; that parts of a statute are to be considered together; and that the Legislature is presumed not to have used superfluous words.[50]

There are a number of variations in the application of the second maxim, *ejusdem generis.* The Pennsylvania Supreme Court has often depended on this principle in applying the rule that where the same statute contains specific provisions relating to a particular subject such provisions must govern, even though there are also general provisions in other parts of the statute, which, if they stood alone would be broad enough to include that subject.[51] This principle is probably most often applied where general words are found in the same statutory enumeration as specific words.[52] Section 33 of the Pennsylvania Statutory Construction Act[53] provides that "General words shall be construed to take their meaning from and be restricted by preceding particular words". The Dauphin County Court of Common Pleas once defined the principle of *ejusdem generis,* within this context, as meaning that ". . . general and specific words capable of analogous meaning take color from each other, so that the general words may be restricted to a sense analogous to those less general . . .".[54] This rule does not, of course, override all other rules of construction, and must never be applied to defeat the real purpose of a statute. It is not a device for confining the operation of a statute within narrower

[49] Mason v. United States, 260 U. S. 545, 554 (1923); in Knoxtenn Theatres, Inc., v. McCanless, 177 Tenn. 497, 151 S. W. 2d 164 (1941), a tax was imposed upon the use of liquid carbonic acid gas or substitutes therefor, "used in the preparation and/or mixing and/or sale of soft drinks or other beverages, or for any other purpose. . . ." It was argued that gas used as a refrigerant was not subject to the tax since under the principle of *ejusdem generis* the general designation, "or for any other purpose," must refer only to other uses like that specially designated. The court rejected this position on several grounds, one of which was that the words, "soft drinks or other beverages," exhaust the kind or class, and therefore the general words following "or for any other purpose," by necessity, show an intent to go beyond the field of soft drinks and beverages.

[50] SUTHERLAND STATUTORY CONSTRUCTION, (Horack 3rd Ed.) Vol. 2, p. 398, Sec. 4909.

[51] Appeal of Davis, 314 Pa. 357, 172 Atl. 399 (1934); *Cf.* Commonwealth v. Lehigh and New England Railroad Co., 286 Pa. 271, 110 Atl. 725 (1920), affirming per curiam an opinion below, 47 Pa. C. C. 388, 22 Dauph. 91.

[52] "Thus, where the words employed in a statute were 'tradesman, workman, laborer or other person whatsoever,' it was held they did not include a farmer; Rex v. The Inhabitants of Whitnash, 7 Barn. & Cress., 596; nor the drivers and proprietors of stage coaches; Sandiman v. Breach, 7 Barn. & Cress., 96, as these were not *ejusdem generis.*" Bradon for use of Dull v. Davis, 2 Legal Record Reports 142, 143 (Pa. 1883). *Cf.* Jones' Case, 341 Pa. 329, 19 A. 2d 280 (1941); Morris v. Coal Mining Co. of Graceton, 164 Pa. Super. 220, 227, 63 A. 2d 449, 451 (1949) and cases cited therein; Philadelphia v. Goldfine, 151 Pa. Super. 59, 63, 29 A. 2d 233, 235 (1942); Bell Telephone Co. v. Public Service Comm., 119 Pa. Super. 292, 181 Atl. 73 (1935).

[53] Act of May 28, 1937, P.L. 1019, 46 P.S. 533.

[54] As quoted by the Pennsylvania Supreme Court in Commonwealth v. Klucher, 326 Pa. 587, 589, 193 Atl. 28 (1937).

limits than actually intended by the Legislature.[55] For instance, in *Commonwealth v. Klucher,*[56] the question before the Court was whether a "pin ball machine" was subject to tax under a statute taxing every ". . . shooting-gallery, shuffle-board, billiard or pool-table, or bowling alley, nine or ten pin or other alley, or other game played with the use of balls or pins, or other objects . . .". The Dauphin County Court applied *ejusdem generis* in determining that pin ball machines were not subject to tax under the statute since they were a "far cry" from bowling alleys or nine or ten pin alleys. The Pennsylvania Supreme Court in reversing on appeal was of the opinion that the words "other objects" as used in the tax statute should not be given a narrow interpretation in deference to the *ejusdem generis* rule. The Court thought that the Legislature in using the words "or other objects" intended to give the taxing statute wide application.[57]

Two United States Supreme Court cases aptly point up the restraint a court must display in applying the principle of *ejusdem generis.* In *Gooch v. United States,*[58] the defendant had, for the purpose of avoiding arrest, kidnapped two police officers and transported them across a state line. He had been convicted of a Federal offense which consisted of transporting across state lines, a kidnapped person ". . . held for ransom or reward or otherwise". The Court rejected the defense contention that *ejusdem generis* was applicable and that the general phrase "or otherwise" must be limited to some kind of monetary reward. Such an interpretation, the Court held, would defeat the obvious purpose of the legislation. *United States v. Alpers,*[59] involved a conviction for violating a statute prohibiting the interstate shipment of ". . . any obscene, lewd, or lascivious, or any filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character. . . ." The Court refused to limit the term "other matter of indecent character" to objects comprehensible by sight only, and upheld the conviction under the statute of one who shipped obscene phonographic records in interstate commerce. The Court stated that the statute was comprehensive and should not be constricted by a mechanical rule of construction.

3. Rules Against Interpretations Implying Duplicity of Expression or Surplusage of Language

Courts have often stated that a construction of a statute that relegates some words to a position of surplusage is not permissible, unless no other con-

[55] Commonwealth v. Klucher, 326 Pa. 587, 590, 193 Atl. 28 (1937); In re Frederick's Estate, 333 Pa. 327, 5 A. 2d 91 (1939); Girard Trust Co. v. City of Philadelphia, 369 Pa. 499, 87 A. 2d 277 (1952).

[56] 326 Pa. 587, 193 Atl. 28 (1937).

[57] *Cf.* Commonwealth v. Saitz, 335 Pa. 526, 6 A. 2d 819 (1939).

[58] 297 U. S. 124 (1936).

[59] 338 U. S. 680 (1950).

struction is reasonably possible.[60] This principle is probably derived from the doctrine codified in Section 51 of the Pennsylvania Statutory Construction Act[61] that "every law shall be construed if possible to give effect to all its provisions".[62] Although the more common application of the principle that words should not be relegated to surplusage has been to avoid statutory provisions being considered to be without meaning, on occasion the principle has been applied as a rule against duplicity of expression. On this basis, courts have on occasion given different interpretations to two similar provisions of a statute in order to avoid a construction that would result in one provision being considered surplus.[63]

In applying these principles, it is often quite important to study the legislative developments of particular statutory language in order to determine whether apparently redundant language was inserted into the statute either out of an abundance of caution or for the purpose of expressing differentiable concepts. Under the former circumstance neither maxim is applicable. For instance, in an Alabama case,[64] that state's Supreme Court was called upon to interpret a provision of its sales tax act[65] exempting ". . . the sale of newspapers and agricultural or religious publications and magazines or . . . the sale of advertising space in said newspapers or publications". The question before the court was whether the exemption of magazines referred to all magazines or only to agricultural or religious magazines. The Court looked at the historical legislative development of the exemption provision and noted that when the bill was reported by committee the provision read ". . . newspapers and agricultural and religious publications . . ." In the House the words "and magazines" were added after "religious publications". The Court observed that since publications include magazines the House amendment was unnecessary unless it was read to expand the exemption. Since there was no

[60] Allentown v. Pennsylvania Public Utility Comm., 173 Pa. Super. 219, 222, 96 A. 2d 157 (1953); Commonwealth v. Daly, 147 Pa. Super. 545, 551, 24 A. 2d 91 (1942); Lemoyne Borough Annexation Case, 176 Pa. Super. 38, 51, 107 A. 2d 149 (1954); Commonwealth v. Mack Bros. Motor Car Co., 359 Pa. 636, 640, 59 A. 2d 923 (1948).

[61] Act of May 28, 1937, P.L. 1019, 851, 46 P.S. 551.

[62] Commonwealth v. Hubbs (No. 1), 137 Pa. Super. 229, 239, 8 A. 2d 611 (1939).

[63] Commonwealth v. Stingel, 156 Pa. Super. 359, 361, 40 A. 2d 140 (1944); Lemoyne Borough Annexation Case, 176 Pa. Super. 38, 51, 107 A. 2d 149 (1954); West v. Lysle, 302 Pa. 147, 152, 153 Atl. 131 (1931). In Southwestern Gas and Electric Co. v. State, 190 S.W. 2d 132, 140 (Tex. Civ. App. 1945), *aff'd*, 145 Tex. 24, 193 S.W. 2d 675 (1946), the court refused to assume that the legislature did not use unnecessary verbiage. Here, the imposition provision of the statute being considered assessed a tax upon chain stores selling "equipment or appliances", while the relevant exclusion provision exempted certain stores operated by utility companies and selling "appliances". The court held that property considered under the act to be electrical equipment is also properly classified as an appliance and that the legislature did not intend to distinquish between the two terms. It thus considered the term "equipment", in the imposition provision, surplusage.

[64] Long v. Poulos, 234 Ala. 149, 174 So. 230 (1937).

[65] Alabama Sales Tax Revenue Act of February 1937 (Acts 1936-1937) [Ex. Sess] p. 125, § 4 (i).

ambiguity in the bill prior to the House amendment, the Court reasoned that that amendment must have been intended to add something rather than to clarify. It concluded that the only intention could have been to add to the exemption all magazines in addition to those that were included within the term "agricultural and religious publications".

It is important to observe that these principles of statutory construction and interpretation must be used with discretion and only where they are an aid to a determination of actual legislative intent. In interpreting the Selective Sales and Use Tax Act one must be careful to avoid mechanical application of these principles. Otherwise, the result might well be an exaggeration of the inequities already existent in the Act and possibly even an actual perversion of legislative intent with a resultant economically undesirable shift of tax incidence.

IV.

Problems of Intracategorical and of Intercategorical Interpretation

As a matter of convenience, problems pertaining to the categorical definition of "tangible personal property" may be divided into two classes. The first class consists of problems involving an interpretation of the provisions of an individual category where there is no need to consider the relationship of the particular category under consideration to any other category. We may designate these problems as ones involving intracategorical interpretation. Most problems arising under the act are of the second class that necessitate attention being paid not only to the language of a particular category but also to the language of one or more other categories and the interrelationships of the various categories. This class involves what we may term problems of intercategorical interpretation. Both the problems of intracategorical interpretation and of intercategorical interpretation do, of course, often necessitate reference to provisions of the act extraneous to the section 2 (*1*) definition of "tangible personal property".

A consideration of general principles of intracategorical interpretation is a convenient first step to developing an overall interpretative approach to the categorical features of the Selective Sales and Use Tax Act. Another approach would be to first develop basic principles regarding the interrelationship of the categories in order to understand the significance of a determination that a specific item of property is included within a particular category. The first approach has been chosen for present purposes although, in the solution of actual problems, it is probably most expeditious to consider intracategorical and intercategorical problems simultaneously.

1. Problems of Intracategorical Interpretation

In considering problems of intracategorical interpretation we are concerned only with the question of whether a specific item of personal property is included within a particular individual category. In arriving at such determinations, we shall not consider the provisions of any category other than the particular one under consideration.

Previous general consideration has been given to certain of the principles of statutory construction and interpretation which are important tools in the solution of problems of intracategorical interpretation. These include the principles of strict interpretation of inclusionary and exclusionary provisions, the maxims *expressio unius est exclusio alterius* and *ejusdem generis,* and the rules relevant to apparently surplus verbiage.

A somewhat typical problem involving the maxims is whether the term "sprays" in category twelve includes anti-mosquito chemicals or only sprays *ejusdem generis* with the other items enumerated in the category. A more important question is whether home appliance repair parts are included within category four. This latter category does not specifically include the term "parts" although this term is used elsewhere in categories one, five, eleven and sixteen. Considering the history and purpose of the act this was clearly a legislative oversight. At only one point in the act did the Legislature appear to intentionally exempt a part or component and, at the same time, tax the unit in conjunction with which the part is used. This point is the Section 203 (e) exclusion for tubes and replacement parts directly used in broadcasting radio and television programs by licensed stations. The rationale behind this latter exclusion for broadcasting tubes and parts is apparently that competing mediums of entertainment, advertisement, and information dissemination are afforded tax relief in that certain of their operations are considered to be manufacturing and they are, therefore, entitled to the productive exemptions provided for in the definitions of "sale at retail" and "use".[66] In both the case of the productive exemptions and the broadcasting exclusion, only a limited tax relief is afforded for certain property used directly in the function involved. The application of tax under the act does follow a relatively rational although confused pattern, and the failure to include home appliance repair parts within the definition of "tangible personal property" would not be consistent with this pattern. Nevertheless, a legislative oversight might well result in an item not being subject to tax regardless of the subjective intent of the legislators. But it is probable that home appliance repair parts are considered to be "tangible personal property" under the act

[66] See note 29 *supra.*

since the term "fittings" in category four might well include most, if not all, replacement parts.

The principle that a limiting clause or phrase following more than one expression to which it might be applicable should generally be restricted to the last antecedent [67] is relevant to certain problems of intracategorical interpretations. For instance, is fuel oil for other than heating purposes included within category thirteen? The problem of whether, even if not included within this category, such fuel oil is considered under the act to be tangible personal property will be dealt with when we later take up the problems of intercategorical interpretation.[68] Substantial quantities of fuel oil used to propel ocean going vessels are sold in Pennsylvania port areas. The basic act, as amended on May 24, 1956, did not specifically exempt such sales. As a matter of taxation policy, competition between adjacent marketing areas makes unilateral taxation of these sales impractical. The application of a tax by Pennsylvania on port deliveries of fuel would divert a substantial portion of such business to nearby out-of-state ports where such a tax is not imposed. For this reason, most jurisdictions in areas where there are competing sources of ships' stores and supplies do not impose a sales tax on such property.[69] The amendment of April 4, 1957,[70] recognized this problem and specifically exempted from tax the sale or use of tangible personal property to be used or consumed as fuel, supplies, ship's equipment, ships' stores or sea stores on vessels to be operated principally outside the limits of the Commonwealth. This amendment affects only transactions occurring on or after its effective date and, as a result, it is still an important question whether sales of ships' fuel between March 7, 1956, and April 4, 1957, were subject to tax. In examining this problem it must first be determined whether such fuel is included within category thirteen. If it is not, then a further problem is whether such fuel is nevertheless included within the definition of "tangible personal property" by reason of one of the other less specific categories. Category thirteen includes "fuel oil and petroleum products for heating purposes steam and natural manufactured and bottled gas". This quotation from the act is here unpunctuated because all Pennsylvania legislation is adopted in unpunctuated form and, under the Pennsylvania Statutory Construction Act, punctuation

[67] United States v. Hughes, 116 F.2d 613 (3rd Cir. 1940); Commonwealth v. Brady, 35 Pa. D. & C. 184 (1939); 2 SUTHERLAND STATUTORY CONSTRUCTION § 4921 (Horack 3rd ed.). *But cf.* Fisher v. Connard, 100 Pa. 63 (1882); Kuntz v. Alliance Sand Company, 156 Pa. Super. 563, 40 A. 2d 864 (1945); Morris v. Glen Alden Coal Company, 136 Pa. Super. 132, 7 A. 2d 126 (1939).

This rule is quite weak and the slightest indication of a contrary intent will usually be sufficient to extend the application of the relative term.

[68] See text at note 87 *infra.*

[69] See N. Y. CITY ADMINISTRATIVE CODE § N 41-2.0 (c).

[70] Act No. 24, P.L. 34.

cannot be considered as an aid in determining legislative intent.[71] Does the term "for heating purposes" modify only "petroleum products" or does it also modify "fuel oil"?

If the heating purpose limitation was meant to modify the term "fuel oil", then actually this term would be unnecessary surplusage since all fuel oils are petroleum products. The arguments that the Legislature here used duplicitious language either for reasons of caution or because of failure to notice a shift of terms are obviously without merit. The Pennsylvania Department of Revenue has concluded that "for heating purposes" does not modify "fuel oil".[72] The amendment of April 4, 1957, exempting tangible personal property used or consumed as fuel on certain vessels may be of aid in solving this problem since, if the Legislature did not consider such fuel oil to be tangible personal property, it should have used the general term "property" rather than the term "tangible personal property" in setting forth the exemption in the amendment of April 4, 1957.

The general non-specific nature of certain categories has previously been noted. Category five, as an example, includes "business, industrial, professional and commercial supplies, equipment and machines of all types, including parts and accessories purchased for or used in connection therewith". A critical issue relevant to a systematic interpretation of the act is how broad a scope should be given to such general terms as "commercial supply". An analysis of the various regulations and rulings issued by the Pennsylvania Department of Revenue leads to the conclusion that the Department generally considers every item of personal property purchased by a commercial organization to be a commercial supply to such organization, unless such property either has an extended useful life, in which case it is considered to be "commercial equipment",[73] or is incorporated into a product or real estate, in which case it is considered to be "material".[74] All consumables [75] purchased by com-

[71] See Kuntz v. Alliance Sand Company, 156 Pa. Super. 563 (1944). See also note 42 *supra.*

[72] See Selective Sales and Use Tax Legal Ruling No. 143, issued by the Pennsylvania Department of Revenue.

[73] The department does not consider the term "supplies" to include replacement parts. This distinction is particularly significant with respect to the § 203(c) exclusion of "supplies and materials" to be used in the fulfillment of fixed price construction contracts entered into prior to March 7, 1956. Significantly the original Act of March 6, 1956 provided an exemption for "tangible personal property" used in the fulfillment of such contracts and the amending act of May 24, 1956 replaced the broad term with the narrower one "supplies and materials". See Selective Sales and Use Tax Regulation TRa 204(d) which provides that the exemption is not applicable to construction equipment or parts and accessories therefore. Note that the § 203(e) exclusion for certain property used directly in broadcasting is limited to "tubes and replacement parts".

[74] The act uses the term "material" in § 203(c). See note 73 *supra.* Personal property referred to in § 2(h) (2) which is incorporated as an "ingredient or constituent" into other personal property is also generically "material". As a result such "material" probably does not come within the property to which the productive exemptions are applicable. See note 29 *supra.*

[75] The test used by the regulations of the Department of Revenue under the Consumers Sales

mercial organizations are, therefore, considered to be commercial supplies. The Department regards such items as bottled water,[76] ice, [77] linens, towels, industrial wipers,[78] and rubber gloves [79] when purchased by commercial organizations to be "commercial supplies". The Department also appears to be of the opinion that the four terms "business", "industrial", "professional" and "commercial", as used in categories four and five, overlap in many cases. For the sake of simplicity, therefore, we shall use the term "commercial" in a sense that includes the other three terms on the premise that all four terms were included in the statute to avoid contentions that the term "commercial" was used in a restricted sense.[80]

An analysis of the legislative history of the Selective Sales and Use Tax Act lends a great deal of weight to the validity of the broad meaning the Department has ascribed to such general terms as "commercial supplies" used in the categorical definition of tangible personal property. It was through the insertion of these obviously broad terms that the Legislature sought to convert what was an excise tax of limited application into a general sales and use tax.[81] If these general terms had initially appeared in the bill as introduced and then the Legislature had added the terms of limited application, it might have been validly argued that the legislative intent was to limit the application of tax by characterizing the general terms with specifics. But this was not the case. It is also perhaps significant that simultaneously with the addition of the general terms to the definition of "tangible personal property", the Legislature added quite a number of Section 203 specific exclusions. Often, particular exclusions in Section 203 have meaning only when a broad significance is given to general terms used in the definition of "tangible personal property". For instance, the Section 203 (f) exemption for gasoline is, of

---

Tax Act, see note 3 *supra.*, was whether the property was capitalized or expended for Federal Income Tax purposes. Although from an accounting point of view this test results in simplicity of application, there is substantial question as to whether it does not confuse the issue. The question in many cases is whether or not tax is due, while the federal test only determines when a deduction shall be allowed. With respect to items having intermediate useful lives, the simplicity in the administration of the federal tax resulting from considering such property to be consumed, and thus expended probably outweighs the slight shift of tax liability into future periods. These considerations are not here relevant.

[76] Pa. Dept. of Revenue Selective Sales and Use Tax Legal Unit Ruling No. 151.

[77] Pa. Dept. of Revenue Selective Sales and Use Tax Legal Unit Rulings, Nos. 10a and 30.

[78] See Table 102-A of Pa. Dept. of Revenue Selective Sales and Use Tax Regulation No. TRa. 102.

[79] Pa. Dept. of Revenue Selective Sales and Use Tax Legal Unit Ruling No. 37.

[80] *But cf.* State v. Kansas City Power and Light Co., 342 Mo. 75, 111 S.W.2d 513 (1938), where the sales tax act imposed tax upon, "sales of electricity or electrical current, water, sewer service, gas (natural and artificial), to domestic, commercial or industrial consumers". The court held that sales of the enumerated items to transportation companies and municipalities were not subject to tax. It reasoned that the term "commercial" was used in a limited sense since otherwise the term "industrial" would not have been used in a duplicitious sense.

[81] See text at note 6 *supra.*

course, of significance only if gasoline is considered to be "tangible personal property" under the act. The possible categories which would include gasoline are categories one (supply used in operation of motor vehicles), three (supply used in construction or maintenance of real estate), four (commercial supply), and five (commercial supply). Similarly, the Section 203 (g) exemption for certain motion picture film rentals implies that motion picture film is either considered to be a "commercial supply" under categories three or four, or else is a projection supply under category eleven.

The various exemptions set forth in Section 203 (i), added by the amending act of April 4, 1957, also imply a broad legislative interpretation of the general terms used in the categorical definition of "tangible personal property". The Section 203 (m) exemption for coal as added by the amending act of May 9, 1957, is particularly significant in its strong implication that, prior to this amendment, coal was subject to tax as a home, industrial, professional, business or commercial supply.[82]

Clause (4) of the Section 2 (f) definition of "purchase price" is another aid in determining how broad an interpretation the Legislature intended for the term "commercial supply" and its kindred terms. This clause deals with the determination of a tax base with respect to certain rental transactions. By its terms this clause is applicable to transactions involving a "transfer or retention of possession or custody whether it be termed a rental, lease, service or otherwise, of tangible personal property, including but not limited to linens, aprons, motor vehicles, trailers, tires, industrial office and construction equipment and business machines . . .". Although the provisions of this clause, in so far as they set forth a tax base applicable to rental transactions, are not relevant to our present discussion, the clause is of substantial significance for present purposes in so far as it contains a list of certain property which the Legislature considered to be "tangible personal property" when it approved the amended act of May 24, 1956, which readopted in fortified form the categorical definition of "tangible personal property". This clause is surely a legislative acknowledgement that by reason of some other provision of the act linens and aprons are "tangible personal property". Linens and aprons could only be considered "tangible personal property" under Section 2 (*l*) if they are included within the term "supplies" as used in categories four and five.

[82] A change of statutory language is generally considered to indicate a change of legislative intent. For instance in Dixon's case, 138 Pa. Super. 385, 11 A. 2d 169 (1940), where the original statute did not expressly impose the personal intangible property tax upon equitable interests, the Court considered the addition of such interests by the amending act a clear implication that they were not subject to tax prior to the amendment.

2. Problems of Intercategorical Interpretation

Once an initial or tentative determination has been arrived at that the property under consideration is possibly included within one or more particular categories, it is necessary to consider whether such determination is affected by the interrelationship of such category or categories and other categories within the definition of "tangible personal property". This further intercategorical analysis is unnecessary after a determination has been made that the property being considered is not included within any category, since intercategorical analysis, if it has any significance at all, can only limit rather than broaden the scope of a particular category.

The basic problem of intercategorical interpretation is whether a particular article of property comprehended within one of the more general categories is considered under the act to be "tangible personal property", notwithstanding that such article is not included within a more specific category which includes other similar articles. For example, is firewood, by reason of being a home supply under category four, considered to be "tangible personal property" for the purposes of the act although it is not included within category thirteen? This latter category includes property which could generally be characterized as being fuels or more properly, since "steam" is included in the category, "heat producing substances". The maxims *expressio unius est exclusio alterius* and *ejusdem generis* which have previously been discussed [83] are, of course, relevant to this problem. The reasoning of the latter maxim has been considered applicable by the Arkansas Supreme Court in a somewhat analogous situation [84] where one section of a sales tax act imposed upon "all sales of tangible personal property",[85] while another section taxed "all retail sales of electric power and light, natural gas, water, telephone use and messages and telegrams".[86] The Arkansas court held that under the statute artificial gas was not subject to tax. It reasoned that where in the same statute there is a particular and a general enactment, and the latter includes that which is also embraced within the former, only the particular enactment is effective within its area, while the general enactment affects only that which within its general language is not within the provisions of the particular enactment.

Difficulties arise in attempting to apply this principle to the Selective Sales and Use Tax Act's categorical definition of "tangible personal property". First, it is not clear how specific a category must be in order to be

[83] See text at notes 45 through 57 *supra.*
[84] Wiseman v. Arkansas Utilities Co., 191 Ark. 854, 88 S.W.2d 81 (1935).
[85] Arkansas Sales Tax Act of 1935, § 4(a).
[86] Arkansas Sales Tax Act of 1935, § 4(d).

considered a particularization of all property of a certain character that is subject to tax. Although many of the section 2 (*1*) categories are obviously narrow while others are patently broad, certain of the categories do shade together. An article may be comprehended within each of the two broadest categories (four and five) and also within a number of the more particular categories. For instance, a bolt would be included not only within categories four and five but also possibly within categories one, three, eleven, fourteen and sixteen. A category which may be considered particular with respect to one article is possibly general with respect to certain other articles. As an example, category fourteen is generally more specific than category three. But with respect to an item such as a bolt, which may always be considered to be "hardware", category fourteen is more inclusive than category three, which would only include bolts used in conjunction with real estate. Another problem is how inclusive must a category be in order that it be assumed that the Legislature intended that only the items of the general class that are included in the category shall be subject to tax, even though such items may be embraced within a more general category. More general, that is, with respect to the item involved. Category thirteen is a good example of this point. First of all, like most of the other categories, this one is not pure in the sense that all the items included therein are comprehended within a general commercial category that has an independent significance other than for the purposes of this act. Even though each of the items in category thirteen is commonly used as a source of heat, one does have other uses. Included within the term "fuel oil", as used in this category, is probably also fuel oil used for propulsion purposes.[87] A great many substances, such as coal, coke, peat, kindling wood, compressed carbon products and artificial fuels, which are commonly the source of heat, are not included within this category. To this list might also possibly be added liquified petroleum products that are normally used in a vaporized state, since the term "bottled gas" might not be considered to cover these products.[88]

A second argument against interpreting the specific categories as limiting the general categories is the previously mentioned legislative history of the act. The specific categories came first and the general were added in order to convert a limited excise tax into a broad base general sales tax act.[89]

---

[87] See text at note 68 *supra.*

[88] In Lee v. Wood, 126 Fla. 104, 170 So. 433 (1936), where the statute imposed a tax upon the sale of ". . . natural or manufactured gas for light, heat or power . . .", the court held that tax was not due upon the sale of a bottled product called "Protane" in liquid state which, under pressure, was easily converted into a gas, in which state, it was used as a fuel.

[89] See text at note 6 *supra.*

A third consideration involves other provisions of the act which in some cases strongly imply, and in other cases actually declare, that certain items which would be excluded from the definition of "tangible personal property" by a rationale that specific categories limit general categories are, in fact, considered to be "tangible personal property" under the act.

It was previously pointed out[90] that section 2 (f) (4) treats aprons as a form of "tangible personal property", yet they can only be such if they come within categories four or five as a "commercial supply". It might be argued that category two precludes aprons, a form of wearing apparel, from being considered tangible personal property on the premise that wearing apparel is subject to tax only if included in category two. This reasoning does not consider that within certain of the other categories there is evidence that it was not intended that category two should be the exclusive wearing apparel category. For instance, the Legislature felt it necessary in category eight, which includes "leather goods and related articles", to exclude from the category ". . . leather wearing apparel not elsewhere in this section defined as tangible personal property . . .". If the Legislature meant that the only wearing apparel subject to tax was that set forth in category two, it could have clearly limited the category eight exception to "leather wearing apparel defined in clause two as tangible personal property". By not doing so, might not the Legislature have considered that there are many categories under which leather wearing apparel may be subject to tax. The amendment of April 4, 1957, to category eleven, which refers to sporting goods and athletic equipment normally not used or worn except when engaged in a particular sport, clearly indicates that the Legislature considered that sporting apparel is "tangible personal property" by reason of being either "sporting goods" or "athletic equipment". This would not be so if category two were the only articulation of wearing apparel considered to be tangible personal property.

Another reference to certain of the Section 203 exclusions is of aid in attempting to solve this problem of whether the specific categories limit the general categories. If category thirteen includes all the fuels subject to tax, then why is gasoline specifically excluded from tax by subsection (f)? The same holds true for the exemption for coal added by the amendment of May 9, 1957.[91] If the exclusion of drugs and medical supplies sold on prescription from category six precluded such items from being considered a "professional supply" to a physician, why did the Legislature specifically ex-

---

[90] See text following note 82 *supra.*

[91] Section 203 (m) added by Act No. 51, P.L. 114. See text at note 82 *supra.*

clude such transactions from tax in clause (*1*) added by the April 4, 1957, amendment?

The use, eccentrically throughout the categories, of broad adjectives and adjectival phrases, such as "all",[92] "of all types",[93] and "for indoor or outdoor purposes",[94] seems to strengthen the conclusion that the Legislature, in covering the same item in both the general and the specific categories, was doing so, not with the intention of limiting the general by the specific, but rather in order to insure that all general items of commerce were somehow considered under the act to be "tangible personal property" except for food sold for off-premises consumption, clothing purchased for personal use and a few specific items, such as caskets,[95] which it was desired to indirectly exempt.

An interesting question subsidiary to this main issue, but which may eventually turn out to involve the only problems of intercategorical interpretation recognized by the courts as having any significance, is whether there is a distinction between an item being specifically excluded from a category or merely not being included in a particular statutory enumeration. For instance, mail order catalogues and direct mail advertising literature are specifically excluded from category ten. Clearly, if the sale or use of these items were set forth as a specific exclusion from tax in Section 203, there would be no question that transactions involving them were not subject to tax. A preliminary issue to this specific problem is what the Legislature intended to include as books, stationery and stationery supplies. Probably a broad interpretation was intended or, otherwise, there would be no reason to determine that direct mail advertising literature came within this class at all. Possibly, though, the Legislature intended that only such direct mail advertising literature as could be considered to be books was exempt from tax. If this be so, then the new category eighteen added by the amendment of April 4, 1957, would subject to tax all other direct mail advertising literature not considered to be books. The problem is why the Legislature chose to place certain limitations or exemptions within the categories and others in Section 203. The only plausible answer is that it was not intended that the limitations and exclusions within the categories should be general, but only that they should limit the individual categories.[96] If this be so, then the articulated exclusion within a category should plausibly be no more significant than the failure of a category to include an item.

---

[92] Categories 1, 3 and 7.
[93] Category 5.
[94] Category 4.
[95] See text at note 40 *supra.*
[96] Pa. Dept. of Revenue Selective Sales and Use Tax Legal Unit Ruling No. 54, provides that the limitation within category nine only exempts from tax religious articles which are otherwise included within the category.

Possibly there is one limitation on this principle, and that is that where an article is specifically excluded from a category, it should only be considered to be defined as tangible personal property by reason of its being included within a general category where, consistent with such inclusion in a general category, significance can be given to the limitation within the specific category. This would be the case where all the property of the particular type involved does not come within the general category. For instance, drugs sold on prescription would, on this principle, not be considered tangible personal property by reason of the category six articulation. Nevertheless, the sale of drugs to a private hospital, for purposes other than resale, would be a transaction involving tangible personal property in the form of a commercial supply under either category four or five. Such reasoning does not leave the prescription drug limitation of category six without significance since sales of drugs on prescription to private individuals would not be included in any of the other categories and would, therefore, by reason of the category six limitation, not be considered to be tangible personal property.

V.

CONCLUSION

Pennsylvania's major broad base revenue measure, the Selective Sales and Use Tax Act, is expected to yield approximately 236 million dollars per year.[97] Inevitably the economic well being of the Commonwealth, its commercial and industrial community, and its citizens must, to a significant extent, be related to the incidence of this tax. It is particularly important that the economic effect of the tax upon current and projected activity within the Commonwealth be readily ascertainable with reasonable certainty by industrial and mercantile interests.

Under the Act a vendor is personally liable for tax he is required to but fails to collect. This is probably true even though the failure results from a mistake of law as to the taxability of a particular transaction or series of transactions. As a result an erroneous determination by a vendor that transactions of a particular nature are not subject to tax might well result in the accruing of substantial vendor liability. With the passage of time the possibility of reimbursement from the purchaser who was primarily liable for the tax becomes negligible, while the Commonwealth has over three years in which to make assessments.[98] Liability of this nature often results in vendors

[97] See 18th Biennial Budget of the Commonwealth of Pennsylvania for the fiscal biennium June 1, 1957 to May 31, 1959—General Fund. (Harrisburg 1957), p. 7.

[98] Section 560 as amended by the Act of July 8, 1957, Act No. 297, permits the Department of Revenue to assess tax due under the act within three years after the date the periodic return is filed or the end of the year in which the tax liability arises whichever shall last occur.

following the safest course and demanding payment of tax in all doubtful situations. Competitive considerations where other vendors are not collecting tax on similar transactions often lead to complications. A purchaser confronted by what he believes to be an improper demand by a vendor that tax be paid has only a limited number of remedies, all of which lead to inconveniences and none of which are wholly satisfactory. He may either purchase elsewhere, pay the tax and petition the Commonwealth for a refund, or pay the tax and suppress his irritation. Where the amount of tax is insubstantial, more often than not the purchaser follows the latter course and pays a tax he considers not due. Where the Commonwealth's position is not consistent with that of the taxpayer, the refund procedure may entail rather extensive accounting and legal expenses.

For these reasons it is essential that this sales and use tax act set forth the incidence of tax clearly and unambigously. This the Pennsylvania Act fails to do. The very nature of the tax is ill defined. Although structurally it appears that a selective excise tax is imposed, as a practical matter we have a general sales and use tax. Unfortunately, at the present time and probably for at least one more year,[99] no one can be certain how general or how selective the law actually is. Tax is imposed only upon transactions involving "tangible personal property" as defined by the act by reason of being included within the ambiguous categorical definition. The major principles of statutory interpretation fail to rationalize these categories. On the contrary, any attempt to apply these principles generally creates insurmountable internal inconsistencies and chaotic patterns of tax application. The courts must inevitably untangle the jumble. This will be a time consuming process since the administrative review procedures, generally prerequisite to judicial action, require approximately one year in a typical case.[100]

One may conclude that the categorical structure of the Pennsylvania statute is ill suited to a general sales and use tax measure. Possibly the original concept of a selective excise tax had merit if the categories had been sharply defined and basic principles of interpretation respecting the categories were included in the act. The limitations and exclusions presently incorporated within specific categories should either have been placed in the general ex-

[99] The application of tax may be judicially tested either by the reassessment procedures or through the refund procedures. Except where by stipulation between the taxpayer and the Department the disposal time is extended, it is the duty of the department to dispose of the issue raised by a reassessment petition within six months (§ 542). A similar provision is applicable to the department's disposition of refund petitions (§ 553). In either case the taxpayer may have the Board of Finance and Revenue review the Departmental action (§§ 543, 554). The Board must act within six months. Either a taxpayer or the Commonwealth may appeal the Board's determination to the Court of Common Pleas of Dauphin County (§§ 544, 555).

[100] See note 99 *supra.*

clusive section or clearly made applicable only to exclude the specified property from the particular category. Even with these changes the law could probably not be considered a good broad base tax measure. There is no immediately apparent reason why a broad base sales and use tax measure should have a categorical structure unless all transactions for consumption involving the enumerated property are to be subject to tax without regard to the identity of the purchaser or the use to which the purchaser subjects the property.

The more exclusions and exemptions incorporated into an excise tax, the greater the enforcement and administrative problems and expense. Certain exemptions do serve a genuine economic or social purpose. The desirability of each such exemption should be weighed against the problems it creates. There is no apparent economic or social basis for the categorical feature of the Pennsylvania act in its present form. It is strongly recommended that the next session of the Pennsylvania legislature do what this session failed to do and follow Governor Leader's suggestion [101] by writing a rational broad base tax measure for the Commonwealth. If Pennsylvania is to have a sales tax, the statute should be simple in both application and administration and readily understandable. The present law might well be characterized as an unsuccessful experiment in chaos.

Appendix

Section 2. Definitions.—The following words, terms and phrases when used in this act shall have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:

. . . .

(1) "Tangible Personal Property."

(1) Motor vehicles, trailers, semi-trailers and aircraft and all accessories, supplies, parts, lubricants and equipment used in the maintenance, operation or repair of such motor vehicles, trailers, semi-trailers and aircraft;

(2) Formal day or evening apparel and articles made of fur on the hide or pelt, or any material imitative of fur and articles of which such fur, real, imitation or synthetic, is the component material of chief value, but only if such value is more than three times the value of the next most valuable component material;

(3) All materials, supplies and equipment used in the construction, reconstruction, remodeling, repair and maintenance of any real estate;

[101] See note 1, *supra*. Although both the majority and the minority legislative leaders were apparently in favor of a general sales tax with exemptions, the legislative majority assumed the responsibility for postponing consideration of such general revision of the act until the 1959 session of the General Assembly. See Legislative Journal, Commonwealth of Pennsylvania, Vol. 35, pp. 781, 806, 935.

(4) Furnishings, appliances, supplies, fittings, ornaments, furniture, equipment and accessories for home, business, industrial or commercial use, for indoor or outdoor purposes;

(5) Business, industrial, professional and commerical supplies, equipment and machines of all types, including parts and accessories purchased for or used in connection therewith;

(6) Cosmetics, toilet preparations, toilet articles, drugs and medical supplies, except when sold on prescription;

(7) All smoking accessories and tobacco products, except cigarettes;

(8) Luggage, handbags, wallets, billfolds, pocketbooks, umbrellas, leather goods and related articles, except leather wearing apparel not elsewhere in this section defined as tangible personal property, but including fittings and accessories;

(9) Jewelry, watches, clocks, silverware, dishes, tableware, pottery and related articles, but not including religious articles;

(10) Books, stationery and stationery supplies, but not including religious publications sold by religious groups, Bibles, mail order catalogues and direct mail advertising literature;

(11) Toys, games, hobby supplies, photographic and projection equipment, and supplies, sporting goods and athletic equipment and supplies therefor, *designed for a particular sport and which normally are not used or worn when not engaged in that sport,* bicycles and parts, accessories and supplies therefor, pleasure boats and equipment parts, accessories and supplies used in connection therewith, regardless of the use made of such property;

(12) Flowers, plants, shrubbery, trees, fertilizer, sprays and insecticides, bulbs and seeds, and supplies and equipment used in connection therewith;

(13) Fuel oil and petroleum products for heating purposes; steam and natural, manufactured or bottled gas;

(14) Hardware, tools, paint and painting materials, and equipment;

(15) Live animals, fish and birds (except when purchased as food for human consumption), and supplies, food and equipment used in connection therewith;

(16) Radios, television, receiving sets and receiving equipment, phonographs, sound recorders, musical instruments or any combination of the foregoing, and parts, components and accessories for the same, and records and sheet music;

(17) *Food and beverages (except when purchased at or from a school, church or hospital in the ordinary course of activities of such organization) when the purchase price of the total transaction is more than fifty cents (50c), when purchased (i) from persons engaged in the business of catering, or (ii)*

*from persons engaged in the business of operating restaurants, cafes, lunch counters, private and social clubs, taverns, dining cars, hotels and other eating places; when, in the latter case, the purchase is for consumption on the premises of the vendor, or when furnished, prepared or served for consumption at tables, chairs or counters or from trays, glasses, dishes or other tableware provided by the vendor. For the purposes of this clause (17), beverages shall not include malt and brewed beverages and spirituous and vinous liquors.**

(18) *Periodical and other publications, but not including publications which are published at regular intervals not exceeding three months, circulated among the general public and containing matters of general interest and reports of current events which are sold on a subscription or single copy basis.*

. . . .

Italicized provisions were added by the amendment of April 5, 1957, Act No. 24, P. L. 34.

* Prior to the amendment of April 5, 1957, Act No. 24, P. L. 34, clause (17) included: "(17) Food and beverages when purchased for consumption on the premises and when the purchase price of the total transaction is more than fifty cents (50¢) from (i) persons engaged in the business of operating restaurants, cafes, lunch counters, private and social clubs, taverns, hotels and other eating places, except when purchased from a school, church or hospital in the ordinary course of the activities of such organization, or (ii) persons engaged in the business of catering."