NEBRASKA SALES AND USE TAXES

W. GERALD O'KIEF*

I. INTRODUCTION

In 1967 the Nebraska Legislature enacted into law the sales and use tax for the purpose of providing a single, uniform tax on the sale, use, storage, or consumption of all tangible personal property sold at retail. This purpose has for the most part been accomplished, since the sales tax is imposed only on sales at retail within the state, while the use tax is imposed only on property purchased outside the state for use within the state. It is the purpose of this article to explore and discuss the various substantive aspects of the sales and use tax in Nebraska.

II. SALES TAX

Generally speaking, the sales tax is imposed on the gross re-

---

* B.S. Creighton University, 1959, J.D., 1960; LL.M., Harvard, 1961. Member of the Nebraska Bar.

1. NEB. REV. STAT. § 77-2703(1) (Supp. 1967): There is hereby imposed a tax of two and one-half per cent upon the gross receipts from all sales of tangible personal property sold at retail in this state, the gross receipts of every person engaged as a public utility, and the gross receipts from the sale of admissions in this state on or after June 1, 1967, until January 1, 1969, and on and after such date the rate shall be two per cent.

2. NEB. REV. STAT. § 77-2703(2) (Supp. 1967): A use tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased, leased or rented from any retailer on or after June 1, 1967, for storage, use, or other consumption in this state at the rate provided in subsection (1) of this section on the sales price of the property or, in the case of leases or rentals, of said lease or rental prices.

It should be noted that the sales tax is also imposed on all sales at retail of gas, electricity, sewer, water, telephone, and electric service by a public utility. NEB. REV. STAT. § 77-2703(1) (Supp. 1967). However, the Regulations set out numerous exemptions in this area. NEB. SALES & USE TAX REG. TC 1-65, -66 (1968). The Act also imposes a sales tax on the gross receipts from the sale of admissions. NEB. REV. STAT. § 77-2703(1) (Supp. 1967). However this imposition is also subject to exemptions under the Regulations. NEB. SALES & USE TAX REG. TC 1-44 (1968).

2. NEB. SALES & USE TAX REG. TC 1-3 (1968). The statute also provides that the sales tax collected by the retailer from the consumer constitutes a debt owed by the retailer to the state. NEB. REV. STAT. § 77-2703 (1)(a) (Supp. 1967). In addition, the retailer is specifically forbidden to advertise or represent that the sales tax will be assumed or absorbed by the retailer, or that it will be refunded. NEB. REV. STAT. § 77-2703(1)(b) (Supp. 1967).

3. For a complementary article on the procedural aspects of the Nebraska sales and use tax, see Peters, Nebraska Sales and Use Tax Procedures, 2 CREIGHTON L. REV. 269 (1969).
receipts of every retail sale of tangible personal property transacted in the state.  

A. RETAIL SALE

The Act defines a retail sale as a sale of tangible personal property in the ordinary course of business. Because of the broad scope given to the term "retail sale" under the Act, a person engaged in business may consumate a taxable sale in a variety of transactions. For example, the sales tax is imposed on the leasing or renting of rooms in hotels, motels, and the like, where such leasing is for a period of less than 30 days. Moreover, the leasing of motor vehicles or vending machines is considered a taxable retail sale. The scope of the term "retail sale" is also broad enough to encompass work done by printers or tire repairmen. Thus, by use of the broad language, the sales tax has been imposed on a multitude of commercial transactions.

B. GROSS RECEIPTS

The base upon which the tax rate is imposed is the "gross receipts" taken in by the retailer during the tax period. Under the Act, gross receipts means "the total amount of the sale, lease or rental of retail sales by retailers, valued in money, whether received in money or otherwise." As a general rule, this amount will be the retail selling price.

   Sale shall mean and include any transfer of title or possession or segregation in contemplation of transfer of title or possession, exchange, barter, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.
6. Neb. Rev. Stat. § 77-2702(18) (Supp. 1967): "Tangible personal property shall mean personal property which may be seen, weighed, measured, felt or touched, or which is in any other manner perceptible to the senses."
C. Adjustments to Gross Receipts

The amount of “gross receipts” taken in by the seller does not include certain other amounts which are part of the contract price. Where the retailer allows a cash discount at a retail sale, the Act provides that the amount of the discount is not included in determining gross receipts.\(^\text{15}\) Moreover, finance, carrying, or interest charges are included in gross receipts, if the charges are separately stated in the contract and are determined not to be a device for avoiding tax liability on the actual sales price.\(^\text{16}\) Furthermore, no sales tax is imposed on transportation charges, where the contract price includes a transportation charge, where the charge is separately stated, and where the transportation facilities are not those of the retailer.\(^\text{17}\) However, when the property is either delivered by facilities of the retailer or sold for a delivered price, the sales tax is assessed on the total contract price, unless the transportation occurs after title to the property has passed to the purchaser, the charges are separately stated, and the property is directly transported to a place specified by the seller.\(^\text{18}\)

The Act further provides that the amount of trade-in allowance is not included in “gross receipts.”\(^\text{19}\) The distribution of trading stamps to the purchaser of tangible personal property is not included in gross receipts for sales tax purposes;\(^\text{20}\) however,


\(^{17}\) Neb. Rev. Stat. § 77-2702(4)(c)(vi) (Supp. 1967); Neb. Sales & Use Tax Reg. TC 1-7 (1968). While the statute would seem to exclude from “gross receipts” all transportation charges occurring prior to the sale, the Regulations allow the exclusion where the goods are transported via facilities other than those of the retailer. Moreover, the Regulations require that the transportation charge be separately stated on the bill in order to be excluded. Neb. Sales & Use Tax Reg. TC 1-79(a) (1968). This Regulation was apparently adopted pursuant to Neb. Rev. Stat. § 77-2703(1)(a) (Supp. 1967).

\(^{18}\) Neb. Rev. Stat. § 77-2702(4)(c)(vi) (Supp. 1967); Neb. Sales & Use Tax Reg. TC 1-7 (1968). In the instance that the goods are delivered by the facilities of the retailer prior to sale, the Regulations require that the charges be separately stated and the goods be delivered to a specific place. This appears to be an additional burden imposed on the retailer by the tax commissioner under Neb. Rev. Stat. § 77-2703(1)(k) (Supp. 1967). However, any transportation charge occurring after completion of the sale is included in gross receipts.

\(^{19}\) Neb. Rev. Stat. § 77-2702(4)(c)(v) (Supp. 1967); Neb. Sales & Use Tax Reg. TC 1-29 (1968). The Regulation provides that there is no exclusion from “gross receipts” unless the traded article is placed in stock for resale. One case which has dealt with this area is Vrontikis Bros., Inc. v. Utah State Tax Comm’n, 9 Utah 60, 337 P.2d 434 (1959).

the subsequent redemption of the stamps for merchandise by the purchaser will constitute a taxable sale.\textsuperscript{21}

If an article of tangible personal property is sold and then returned, and the purchase price and any sales tax paid is refunded, no sales tax is due on the transaction.\textsuperscript{22} Furthermore, where a sales tax has been paid on items sold on account, and the account later becomes uncollectible, the retailer is entitled to a refund of the tax paid.\textsuperscript{23}

D. Motor Vehicles

The retail sale of motor vehicles, while subject to the sales tax, receives special treatment under the Act. One distinction is that an occasional sale of a motor vehicle is not a tax-exempt sale,\textsuperscript{24} while similar sales of other tangible personal property are.\textsuperscript{25} Moreover, special treatment is made available to lessors of motor vehicles. The purchaser of a motor vehicle, which is to be rented or leased, has the option of either paying the sales tax at the time of sale, or collecting the tax on the gross receipts from every leasing of the motor vehicle.\textsuperscript{26} If the lessor chooses the latter method, he should obtain a resale exemption certificate at the time of the

\textsuperscript{21} See State Tax Comm'n v. Consumers Mkt., Inc., 87 Ariz. 376, 351 P.2d 654 (1960). See also Colonial Stores, Inc. v. Undercofler, 223 Ga. 103, 153 S.E.2d 549 (1967). While the decision in this case did not specifically consider whether the redemption was a taxable transaction, the reasoning set forth therein would seem to indicate that such redemption was tax-exempt. It should be noted that courts have repeatedly rejected the argument that the distribution of trading stamps at the time of sale constitutes a "cash discount" which should be deducted from "gross receipts" in arriving at the amount of tax due. See Benner Tea Co. v. Iowa State Tax Comm'n, 252 Iowa 843, 109 N.W.2d 39 (1961); State Tax Comm'n v. Ryan-Evans Drug Stores, 89 Ariz. 18, 357 P.2d 607 (1960).

\textsuperscript{22} Neb. Sales & Use Tax Reg. TC 1-25 (1968).

\textsuperscript{23} Neb. Sales & Use Tax Reg. TC 1-28 (1968). It should be noted that the refund is allowed only for that part of the account not collected, and thus no refund is allowed for amounts paid to a third person for collecting the account. The Regulations also allow a credit on the retailer's current liability in an amount equal to the unpaid balance of the purchase price, where the retailer repossesses an article sold on account. Neb. Sales & Use Tax Reg. TC 1-27 (1968).

\textsuperscript{24} See Neb. Rev. Stat. § 77-2702(6) (Supp. 1967). This section specifically excludes the sale of a motor vehicle from the definition of an occasional sale. See also Neb. Sales & Use Tax Reg. TC 1-22 (1968).

\textsuperscript{25} Neb. Sales & Use Tax Reg. TC 1-22 (1968).

SALES AND USE TAX

Another unique aspect of the treatment of motor vehicles under the Act is that the retailer does not collect the sales tax at the time of sale, as is done in sales of other kinds of goods. A distinctive approach is also taken by the Act in regard to gifts of motor vehicles. Generally speaking, a donor of tangible personal property pays a sales tax on the property when purchased, and thus at the time of the gift no sales tax is assessed. However, a donor of a motor vehicle does not pay a sales tax at the time of purchase and presumably a donor could make a gift of the motor vehicle prior to applying for a certificate and thereby avoid any sales tax. In an attempt to reach this type of transaction, the Regulations provide that a purchaser of a motor vehicle may not be subject to the sales tax if “[t]he motor vehicle is a gift to the applicant and sales or use tax was previously paid by the donor.” The difficulty with the Regulation, however, is that if read literally, it indicates that the gift of a motor vehicle is subject to taxation unless the donor has already paid the tax, thereby imposing a tax on a gratuitous transfer by either a person inheriting a motor vehicle or a person acquiring a motor vehicle prior to the enactment of the Act. If this conclusion is correct, the Regulation is clearly invalid.

III. USE TAX

The use tax is imposed on the storage, use, or consumption in the state of tangible personal property, purchased at retail in another state. The use tax can also be applied to tangible personal property sold at retail in the state, where the disposition of

the property was unascertainable at the time of retail sale. The Act specifically provides that the use tax shall not apply where the sale out-of-state would have been exempt had it taken place within the state. The amount of the use tax is determined in the same manner as the sales tax, however, the consumer is allowed a credit for any sales tax paid in the state of purchase.

**IV. EXEMPTIONS—SALES AND USE TAX**

Transactions which are specifically exempt from the sales and use tax can be classified into three general categories:

A. Transactions exempt because of the nature of the purchaser or seller;

B. Transactions exempt because of the nature of the property sold, leased, or rented;

C. Transactions exempt because of the intended use by the purchaser of the property purchased, leased, or rented.

**A. EXEMPTION BECAUSE OF THE NATURE OF THE PURCHASER OR SELLER**

1. **Sales Exempt Under the Laws of the United States**

The first important exemption under the sales and use tax concerns retail sales which the state is prohibited from taxing by the Constitution or laws of the United States, or the state constitution.

Retail sales to the United States Government and its agencies and wholly owned corporations are exempt from the sales tax under the Act. However, the question arises whether purchases by a person or firm contracting with the federal government share the mantle of governmental immunity and thus are exempt from the sales and use tax. The cases that have dealt with this question have made the determination on the basis of whether the contractor is an independent contractor or an agent of the federal government. If the contractor is deemed to be a purchasing

---

39. Id. For a complete list of exempt corporations, see Neb. Sales & Use Tax Reg. TC 1-72 (1968).
40. The importance of this distinction was discussed in United States v. Township, 355 U.S. 484 (1958). In considering the status of firms con-
agent of the Government, the sales are exempt,\textsuperscript{41} whereas if the contractor is himself the actual purchaser of the materials, the sale is not exempt, even though the materials are later incorporated into a Government project and even though the burden of paying the tax rests with the Government.\textsuperscript{42}

Another area which has evoked much litigation concerns sales to national banks. Whether or not such sales are subject to the sales and use tax involves a consideration of two questions:

A. Are the national banks such instrumentalities of the federal government as to make them exempt from the state sales and use tax?

B. If not, is there federal legislation forbidding the imposition of a state sales or use tax on purchases by national banks?

The case of \textit{McCulloch v. Maryland},\textsuperscript{43} was a landmark case holding that a national bank was an instrumentality of the federal government and therefore immune from a state tax on its operations.\textsuperscript{44} However, there has been specific federal legislation passed which permits certain taxation of federal banks by the several states.\textsuperscript{45} Thus, certain courts have held that purchases by

tracting with the Atomic Energy Commissioner, the Supreme Court has held such firms to be independent contractors and thus not exempt from state taxation. United States v. Boyd, 378 U.S. 39 (1964). See also Carbide & Carbon Chemicals Corp. v. Carson, 192 Tenn. 150, 239 S.W.2d 27 (1951). In an earlier Supreme Court case, a firm had purchased two tractors for use in connection with a contract to build an ammunition depot. The Court, noting that the contract between the Government and the contractor provided that the firm was merely a purchasing agent of the Government and that both the request for bids and the purchase order provided that "this purchase is made by the Government," held the sale to be exempt from the state sales tax. Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954).

41. Id.

42. James v. Dravo Contracting Co., 302 U.S. 134 (1937); Hallett Constr. Co. v. State, 80 S.D. 68, 119 N.W.2d 117 (1963). See also Alabama v. King & Boozer, 314 U.S. 1 (1941). In this case the defendants sold supplies to a cost-plus-fixed-fee Government contractor for use in the performance of a Government contract. The contractor purchased the supplies in his own name, but had a right to be reimbursed by the Government. The Supreme Court upheld the imposition of a sales tax, rejecting the argument that the economic burden of the tax was really shifted to the Federal Government by reason of its obligation to reimburse the contractor.

43. 17 U.S. (4 Wheat.) 315 (1819).


The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or
national banks are exempt from the state sales and use taxes, either on the theory that they are such instrumentalities of the federal government as to be exempt from tax, or on the theory that the specific federal legislation precludes the imposition of state sales and use taxes on federal banks. However, where the tax is imposed upon either the seller, consumer, or customer, and not upon the bank, the imposition of the state sales or use tax has been upheld.

A further problem in this area is whether a sales or use tax can be imposed on retail sales to servicemen. A recent case, now on appeal to the Supreme Court of the United States, has raised the question whether section 514 of the Soldiers and Sailors Relief Act exempts servicemen from the payment of state sales and use taxes. The court of appeals in the case of United States v.
Sullivan,49 ruled that the language of the Relief Act is sufficiently broad to prohibit the state in which the serviceman is stationed from imposing a sales or use tax upon his purchases. To date, the Regulations issued by the Nebraska State Tax Commissioner’s office recognize no exemption from the state sales or use tax for purchases by servicemen stationed in Nebraska. Ultimately, the Court’s decision in the Sullivan case will determine whether such an exemption should be recognized under the laws of the United States.

2. **Sales Exempt Under the Laws of Nebraska**

The Nebraska Revenue Act provides an exemption for purchases by any state, county, township, city, or village when the item purchased is used in a governmental capacity; for public and private schools, colleges, and universities; licensed hospitals; orphanages and licensed child placement agencies; nonprofit organizations providing services exclusively to the blind; and organizations created exclusively for religious purposes; provided, however that the consideration in any single transaction is in excess of $100.50 These purchasers, other than governmental units, must pay the sales tax on any transaction if the consideration is $100 or less, but may apply for a refund.51 Moreover, meals and food products sold by churches at church functions, or served to patients by hospitals or other licensed institutions, or served to students by schools or qualified organizations during the school day or at an approved function are exempt from the sales or use tax,52 as are rooms, lodging, and accommodations in certain hospitals.53

3. **Sales Not Made in the Regular Course of Business**

The Act provides that an occasional sale of tangible personal property, other than a motor vehicle, is not a sale at retail and is therefore not subject to the tax.54 An occasional sale can be made

---

49. 398 F.2d 672 (2d Cir. 1968), aff’g, 270 F. Supp. 236 (D. Conn. 1967).
50. NEB. SALES & USE TAX REG. TC 1-12(3) (c),(d) (1968).
51. NEB. REV. STAT. § 77-2704(1) (i) (Supp. 1967).
52. This exemption, however, does not apply to any facility or function open to the general public, except concession sales by elementary and secondary schools at events open to the general public. See NEB. SALES & USE TAX REG. TC 1-12 (1) (a), (b), (c) (1968).
54. NEB. REV. STAT. § 77-2702(6) (Supp. 1967); NEB. SALES & USE TAX REG. TC 1-22 (1968).
to more than one purchaser, as for example, where a person liquidates his entire business in a single transaction.\textsuperscript{55} Purchasers of property in another state are also apparently exempt from the sales tax as an occasional sale, if the sale would be exempt under Nebraska law.\textsuperscript{56}

B. Exemption Because of the Nature of the Property Sold

Certain retail sales are specifically exempt from the sales or use tax because of the nature of the property. Thus, aircraft fuels;\textsuperscript{57} oil, gas, and minerals;\textsuperscript{58} and motor vehicle fuels\textsuperscript{59} have been exempted. Moreover, sales of animals, the products of which ordinarily constitute food for human consumption, are exempt,\textsuperscript{60} as are weekly newspapers containing matters of general interest.\textsuperscript{61} Use of coin operated machines for laundry or cleaning and sales of property through vending machines for a sum less than 15 cents are also exempt.\textsuperscript{62} Prescription medicine and prosthetic devices\textsuperscript{63} are exempt, as is lodging rented or leased for a period of 30 days or longer.\textsuperscript{64}

\textsuperscript{55} NEB. REV. STAT. § 77-2702(6) (Supp. 1967); NEB. SALES & USE TAX REG. TC 1-22 (1968). However, the Regulations provide that a sales tax will be imposed on the liquidation "when the purchaser of any part of such inventory is the ultimate consumer as such a liquidation is considered a continuation of the retail business."

\textsuperscript{56} NEB. REV. STAT. § 77-2704(3) (b) (Supp. 1967). See note 32 supra.

\textsuperscript{57} See NEB. REV. STAT. § 77-2704(1) (b) (i) (Supp. 1967); NEB. SALES & USE TAX REG. TC 1-12(2) (a) (1968), exempting airplane fuels, as defined in NEB. REV. STAT. § 3-148 (Supp. 1967).

\textsuperscript{58} NEB. REV. STAT. § 77-2704(1) (b) (ii) (Supp. 1967); NEB. SALES & USE TAX REG. TC 1-12(2) (b) (1968), exempting mineral oils and gas, as defined in NEB. REV. STAT. § 57-903 (Reissue 1968).

\textsuperscript{59} NEB. REV. STAT. § 77-2704(1) (b) (iii) (Supp. 1967); NEB. SALES & USE TAX REG. TC 1-12(2) (c) (1968), exempting motor vehicle fuels, as defined in NEB. REV. STAT. § 66-401 (Reissue 1966).

\textsuperscript{60} NEB. REV. STAT. § 77-2702(11) (b) (i) (Supp. 1967); NEB. SALES & USE TAX REG. TC 1-62 (1968).

\textsuperscript{61} NEB. REV. STAT. § 77-2704(1) (d) (Supp. 1967); NEB. SALES & USE TAX REG. TC 1-54 (1968). See also NEB. SALES & USE TAX REG. TC 1-12 (2) (d) (1968).

\textsuperscript{62} NEB. REV. STAT. § 77-2704(1) (j), (1) (Supp. 1967); NEB. SALES & USE TAX REG. TC 1-31 (1968). See also NEB. SALES & USE TAX REG. TC 1-12(2) (f), (1) (1968).

\textsuperscript{63} NEB. REV. STAT. § 77-2704(1) (f) (Supp. 1967); NEB. SALES & USE TAX REG. TC 1-50 (1968). See also NEB. SALES & USE TAX REG. TC 1-12 (2) (e) (1968).

\textsuperscript{64} NEB. REV. STAT. § 77-2702(13) (f) (Supp. 1967); NEB. SALES & USE TAX REG. TC 1-46 (1968). See also NEB. SALES & USE TAX REG. TC 1-12 (2) (h) (1968).
C. Property Exempt Because of Its Intended Use

The policy of the sales and use tax law is that property should be taxed, insofar as possible, when it reaches the hands of the ultimate consumer. In order to effectuate this policy, the Act exempts certain transactions because of the intended use of the property sold at retail.

1. Property Intended for Resale

Tangible personal property purchased for resale in the ordinary course of business is specifically exempt from the sales and use tax, for the reason that such property will be taxed when it is subsequently resold to the ultimate consumer. However, if a retailer removes tangible personal property from stock or inventory for his own personal use or for consumption, he must pay a sales or use tax on that property. Likewise, a motor vehicle dealer who withdraws a motor vehicle from inventory for demonstration or personal or executive use becomes subject to a tax on such use.

2. Property Used in the Industrial Process

Sales of tangible personal property for use in what can be loosely phrased the "industrial process" are exempt from the tax imposed by the Act. This exemption is allowed to persons "engaged in the business of manufacturing, processing, or fabricating for sale, which tangible personal property (1) [i]s actually used in the production; (2) [e]nters into the processing of; and (3) [b]ecomes an ingredient or component part of the product produced for sale or for services rendered . . . ." If the tangible personal property remains after completion of the manufacturing or processing or is consumed during the manufacturing or processing, without becoming an ingredient and component part, it is subject to tax.

65. Since a "retail sale" does not include a sale for resale, see Neb. Rev. Stat. § 77-2702(10) (a) (Supp. 1967), and since the sales tax is imposed only on sales at retail, see Neb. Rev. Stat. § 77-2703(1) (Supp. 1967), such a sale is tax-exempt. Neb. Sales & Use Tax Reg. TC 1-13 (1968).
66. Neb. Sales & Use Tax Reg. TC 1-35 (1968). See also Montgomery Aviation Corp. v. State, 275 Ala. 266, 154 So. 2d 24 (1963), holding that limited leasing of airplanes held for resale is not such a removal as to constitute a use subject to tax, where the leasing was primarily for the purpose of keeping them working, and the sale was not affected by the limited use thereof.
69. Neb. Sales & Use Tax Reg. TC 1-23 (1968) provides that "the
The rationale here is clear; if the property is consumed or remains, the manufacturer is the ultimate consumer and should pay the tax; however, where the tangible personal property becomes an ingredient or component part of the manufactured product, the ultimate purchaser is the consumer or user of that property and should pay the tax.

In addition, water used in manufacturing,\textsuperscript{70} and fuels such as electricity, coal, gas, fuel oil, diesel fuel, tractor fuel, propane, gasoline and oil, and coke for use in processing, manufacturing, mining, refining, irrigation, farming, and the like, are given exempt status.\textsuperscript{71} However, this type of exemption would appear to be contrary to the rationale of the industrial processing exemption, since these fuels are consumed when used and do not become ingredient or component parts of the manufactured product.\textsuperscript{72}

3. Property Used in the Agricultural Processes

A relatively broad exemption is granted under the Act for sales of various agricultural items which are used in the production of food or crops.\textsuperscript{73} For example, food for any form of animal life, the products of which ordinarily constitute food for human consumption or the pelts of which are ordinarily used for human apparel, are exempt.\textsuperscript{74} Moreover, seeds and annual plants, the products of which constitute food for human consumption and which are sold to commercial producers of such products; and seed legumes, seed grasses, and seed grains when sold for agricul-

\textsuperscript{70} Cf. Neb. Rev. Stat. § 77-2702 (11)(a),(14) (Supp. 1967); Neb. Sales & Use Tax Reg. TC 1-23 (1968), providing that tangible personal property which becomes an ingredient or component part of tangible personal property manufactured, processed, or fabricated for ultimate sale at retail is exempt. See also Columbia Quarry Co. v. Department of Revenue, 34 Ill. 2d 46, 237 N.E.2d 525 (1968), holding that, under a statute similar to Nebraska’s, the purchase of limestone used in the production of steel is subject to the sales tax to the extent that the limestone is completely consumed in the production process. However, that part of the limestone which becomes slag and is resold is exempt from taxation.


\textsuperscript{72} See note 69 supra.


tural purposes are also exempt,\textsuperscript{75} as are agricultural chemicals which are applied to land or crops,\textsuperscript{76} and water used for irrigation of agricultural lands.\textsuperscript{77}

4. \textit{Property Transported in Interstate Commerce}

The Act provides an exemption for retail sales to purchasers located outside the State of Nebraska, where delivery of the goods takes place outside the state.\textsuperscript{78} However, where the delivery takes place within the state, the retail sale to one other than a common carrier is a completed transaction and subject to tax even though an interstate movement of the goods is contemplated.\textsuperscript{79} This exemption, however, is not so broad as to exempt all transactions which have any connection with interstate commerce,\textsuperscript{80} but rather each transaction must be analyzed to determine whether the exemption applies.\textsuperscript{81}

\textsuperscript{75} \textit{NEB. REV. STAT.} § 77-2702(11)(b)(iii) (Supp. 1967); \textit{NEB. SALES \& USE TAX REG. TC 1-60} (1968).

\textsuperscript{76} \textit{NEB. REV. STAT.} § 77-2702(11)(b)(iv) (Supp. 1967); \textit{NEB. SALES \& USE TAX REG. TC 1-61} (1968).

\textsuperscript{77} \textit{NEB. REV. STAT.} § 77-2702(4)(b)(iii) (Supp. 1967); \textit{NEB. SALES \& USE TAX REG. TC 1-12(4)(1)} (1968).

\textsuperscript{78} \textit{NEB. REV. STAT.} § 77-2704(1)(h) (Supp. 1967); \textit{NEB. SALES \& USE TAX REG. TC 1-64} (1968). This section further provides the manner in which delivery to out-of-state purchasers can be made.

\textsuperscript{79} \textit{NEB. SALES \& USE TAX REG. TC 1-64} (1968). See International Harvester Co. v. Department of Treasury, 322 U.S. 340 (1944), expressly approving taxation of such a completed transaction.

\textsuperscript{80} Thus, it has been held that the imposition of a use tax on a radio transmitter does not violate the Federal Constitution, even though the signals are ultimately used in interstate commerce. See Southern Pac. Co. v. Gallagher, 306 U.S. 167 (1939); Tri-City Broadcasting Co. v. Bowers, 169 Ohio St. 126, 158 N.E.2d 203, \textit{appeal dismissed}, 361 U.S. 97 (1959). Nor is a tax on the sale of advertising services an undue burden on interstate commerce, even though the advertisements which result from the service are placed in a magazine subsequently circulated in interstate commerce. See Lee Enterprises, Inc. v. Iowa State Tax Comm'n, — Iowa —, 162 N.W.2d 730 (1968). It should be noted that Nebraska does not impose a tax upon the sale of advertising and advertising services. \textit{NEB. SALES \& USE TAX REG. TC 1-56} (1968).

\textsuperscript{81} For example, \textit{NEB. SALES \& USE TAX REG. TC 1-52} (1968) provides that the sales tax applies to amounts charged to customers by florists who receive orders for flowers to be delivered outside the State of Nebraska. However, the sales tax does not apply to amounts received by Nebraska florists who make deliveries within the state, pursuant to instructions received from out-of-state florists. It would appear that in the former case, the sale occurs in Nebraska, since delivery takes place within the state and hence is subject to tax, whereas in the latter case, the florist in Nebraska is merely an agent of the buyer, and the sale actually occurs out-of-state and is not subject to tax. Ultimately, the validity of this Regulation may have to be determined by the courts. See also O'Brien v. Isaacs, 32 Ill. 2d 105, 203 N.E.2d 890 (1965), upholding the validity of a sales tax
There does seem to be a problem as to whether tangible personal property purchased in another state, used there, and subsequently brought into Nebraska is subject to the use tax. A careful examination of the language of the use tax statute indicates that the transaction is not subject to the use tax unless the property was purchased for storage, use, or consumption in this state.\(^2\) This conclusion is buttressed by the treatment accorded the owner of a motor vehicle, who must establish as a fact that he purchased the vehicle outside the state and actually used it there for the purpose for which it was acquired.\(^3\) However, the burden of establishing that the property was not purchased for storage, use, or consumption within the state is on the one claiming the exemption.\(^4\)

5. \textit{Property to be used by a common carrier}

Property purchased for use in the manufacture or repair of vehicles used as common carriers, or purchasers of vehicles which are subsequently to be used as common carriers, are exempt from the sales or use tax.\(^5\) Other purchases by a common carrier for use in multistate operations are also exempt;\(^6\) however, all other sales to common carriers are taxable.\(^7\)

V. \textbf{SALE vs. SERVICE}

Some commercial transactions involve both a retail sale of tangible personal property and the furnishing of services. Since a tax is imposed on a retail sale but not upon services, it is

\(^{82}\) \texttt{NEB. REV. STAT. § 77-2703(2) (Supp. 1967); NEB. SALES & USE TAX REG. TC 1-2 (1968). See Western Contracting Corp. v. Iowa State Tax Comm'n, 253 Iowa 365, 112 N.W.2d 326 (1961), holding that a company was not liable for the Iowa use tax on equipment purchased in Iowa with no intent to use it there.}

\(^{83}\) \texttt{NEB. SALES & USE TAX REG. TC 1-20 (1968). However, in George v. Scent, 346 S.W.2d 784 (Ky. 1961), the Kentucky court held that under such circumstances a motor vehicle was exempt from taxation only if a sales and use tax had been paid in another state.}

\(^{84}\) \texttt{NEB. REV. STAT. §§ 77-2702(11) (f), 77-2704(3) (a) (Supp. 1967); NEB. SALES & USE TAX REG. TC 1-15 (1968).}

85. \texttt{NEB. REV. STAT. § 77-2703(1),(2) (Supp. 1967); NEB. SALES & USE TAX REG. TC 1-15 (1968).}

86. \texttt{NEB. REV. STAT. § 77-2703(1),(2) (Supp. 1967); NEB. SALES & USE TAX REG. TC 1-15 (1968).}

87. Sales which are not subject to any common carrier exemption are subject to the sales and use tax under \texttt{NEB. REV. STAT. § 77-2703(1),(2) (Supp. 1967). For an in-depth study in this area, see Peters, Nebraska Sales and Use Tax Procedures, 2 CREIGHTON L. REV. 269, 274 (1969).}
important to discuss the treatment given under the Act to transactions involving both retail sales and services.

One area given special treatment by the Act concerns the activities of contractors and repairmen. Generally speaking, a contractor or repairman supplies both parts and services. Under the Act the contractor or repairman is considered the ultimate consumer of parts and supplies, unless the billing to the customer separately states the price for the parts and the cost of the services.\(^8\) If the price of the materials used is separately stated in the billing, the sale to the contractor or repairman is exempt; however, the contractor or repairman is required, as a retailer, to collect and remit the tax due on the material supplied.\(^9\)

Similar treatment is accorded the activities of funeral directors. The Regulations provide that if the billing for the funeral states the charges for the services rendered separately from the cost of the casket and flowers, the latter are subject to the sales tax and the former are exempt.\(^9\) However, if the bill is not divided between the services and the tangible personal property, the funeral director is required to collect and report sales tax on 50 per cent of the total funeral charge.\(^9\) Likewise, where a firm furnishes burglar protection for a monthly charge and installs an alarm in connection therewith, there would seem to be an option available to the firm to treat the alarm as a sale of tangible personal property or to include it in the service.\(^9\) If the latter alternative is adopted, the purchaser must pay a sales tax at the time of sale.\(^9\)

In other areas the Regulations treat a transaction as involving services only, even though a part of the transaction consists of a sale of tangible personal property. For example, barbers and beauticians, dentists, and launderers are all considered to be

\(^9\) Id.
\(^9\) Id.
\(^9\) This problem was recently considered in American Dist. Tel. Co. v. Porterfield, 15 Ohio St. 2d 92, 238 N.E.2d 782 (1968). The court held that if the firm merely installed the alarm but did not answer the signal or perform services in connection therewith, the transaction constituted a lease of tangible personal property subject to tax. However, where the alarm merely alerted the firm, which then notified the police to dispatch personnel to the scene, the monthly charge was really for personal services and was therefore exempt.
\(^9\) Id.
performing services by the Regulations, thereby making any purchases of materials used in their work taxable. Moreover, persons who furnish uniforms to professional people and launder them under a continuing agreement are deemed to be suppliers of services under the Regulations. Thus, in any area where the transaction is one involving retail sales and services, the author suggests that a close check of the Regulations be made.

VI. CONCLUSION

This concludes the analysis of the Nebraska Sales and Use Tax. The application of this Act to particular transactions is extensive and cannot be exhausted in an article such as this. An attempt has been made to alert the practicing attorney of the over-all scope of the Act and to provide an indication of the particular problems which appear in the Nebraska legislation and Regulations or which have arisen in other jurisdictions with similar legislation.