

Spring 1980

The Retail Sales Tax: Shall the Value of Retailers' Coupons Be Included in the Basis for Computation, 13 J. Marshall L. Rev. 717 (1980)

Scott J. Horne

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Taxation-State and Local Commons](#), and the [Tax Law Commons](#)

Recommended Citation

Scott J. Horne, The Retail Sales Tax: Shall the Value of Retailers' Coupons Be Included in the Basis for Computation, 13 J. Marshall L. Rev. 717 (1980)

<https://repository.law.uic.edu/lawreview/vol13/iss3/7>

This Comments is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

THE RETAIL SALES TAX: SHALL THE VALUE OF RETAILERS' COUPONS BE INCLUDED IN THE BASIS FOR COMPUTATION

INTRODUCTION

A sales tax is a tax levied upon the sale of goods and, in some instances, services.¹ The tax is generally calculated as a percentage of the purchase price and collected by the seller.² Numerous and diverse taxes are encompassed within the single expression "sales tax."³ As a result, it is nearly an insurmountable task to attempt to reduce the term "sales tax" to a single all-inclusive definition.⁴ Generally, the element which all sales taxes have in common is that computation of the tax is based upon the gross amount of the sale or other transaction.⁵

Sales taxes are an essentially new phenomenon in the United States,⁶ although they have been imposed upon societies since ancient Egypt.⁷ The first sales tax in the United States was enacted by the West Virginia legislature in 1921.⁸ However, it was not until 1933 that a widespread movement to enact sales

1. WEBSTER'S NEW COLLEGIATE DICTIONARY 1020 (1977). *See also* BLACK'S LAW DICTIONARY 1202 (5th ed. 1979) (tax imposed on sales of goods; a percentage of the purchase price which seller must remit to the state); THE NEW COLUMBIA ENCYCLOPEDIA 2405 (4th ed. 1975) ("sometimes called a purchase tax").

2. BLACK'S LAW DICTIONARY 1202 (5th ed. 1979).

3. Most taxes upon retail sales, whether a business occupation tax, a sales tax per se or an excise tax, are categorized as sales taxes. 68 AM. JUR. 2d *Sales & Use Taxes* § 1 (1973). *See also* notes 47-79 and accompanying text *infra*.

4. *Id.*

5. *Id.*

6. J. DUE, STATE AND LOCAL SALES TAXATION 1 (1971) [hereinafter cited as J. DUE].

7. [1976] 1 ALL STATE SALES TAX REP. (CCH) ¶ 125. In Egypt a general tax was placed on all commodities at a rate of 5% of the price. After the Roman conquest of Egypt, the rate doubled. Down through history, sales taxes have been employed throughout the world. *Id.* Sales taxes have been imposed in China, India, Greece, Rome and Byzantium. N. JACOBY, RETAIL SALES TAXATION 22 (1938) [hereinafter cited as N. JACOBY]. The *alcabala* in Spain was a tax on the sale of *every* item and was imposed *every* time the item was resold. *Id.* at 23.

8. *Id.* *See also* 68 AM. JUR. 2d *Sales & Use Taxes* § 2 (1973); *see generally* J. DUE, *supra* note 6, at 2; R. HAIG & C. SHOUP, THE SALES TAX IN THE AMERICAN STATES 7 (1934) [hereinafter cited as R. HAIG].

taxes occurred.⁹ The single greatest impetus behind the creation of early sales taxes was the Depression, which had a devastating effect on state and local revenues.¹⁰ The Depression tended to reduce state reliance upon the property tax, and the decline in personal incomes made the income tax an inadequate source of revenue.¹¹ With its low rate, high yield, and relatively painless collection, the sales tax provided a particularly attractive means for the states to raise revenues.¹² It is safe to say that were it not for the Depression, very few states would have enacted sales taxes in the 1930's.¹³

Between 1933 and 1938, twenty-seven states imposed a sales tax; after 1938, no other state imposed one until 1947.¹⁴ The primary reason for the imposition of sales taxes after 1947 was the tendency for revenues from other state taxes to lag behind increased demand from state expenditures.¹⁵ To date, forty-five states and the District of Columbia have imposed a sales tax.¹⁶

9. Eleven states enacted the sales tax in 1933: Arizona, California, Illinois, Indiana, Michigan, New York, North Carolina, Oklahoma, South Dakota, Utah, and Washington. R. HAIG, *supra* note 8, at 7.

10. *Id.* at 8. See also J. DUE, *supra* note 6, at 2.

11. J. DUE, *supra* note 6, at 3-4.

12. *Id.* at 4.

13. R. HAIG, *supra* note 8, at 8.

14. See J. DUE, *supra* note 6, at 3 (Table 1.1 showing date of introduction of state sales taxes); [1977] STATE TAX CAS. REP. (CCH) ¶ 60-002.

15. J. DUE, *supra* note 6, at 4. The increased demand for state expenditures was attributable, in part, to a rise in the number of services the states were providing for their citizens. *Id.*

16. ALA. CODE §§ 40-23-1 to 40-23-50 (1975 & Supp. 1979); ARIZ. REV. STAT. ANN. §§ 42-1301 to 42-1347 (1956 & Supp. 1979); ARK. STAT. ANN. §§ 84-1901 to 84-1949 (1960 & Supp. 1979); CAL. [REV. & TAX] CODE §§ 6001-7176 (West 1970 & Supp. 1979); COL. REV. STAT. §§ 39-26-101 to 39-26-126 (1973 & Supp. 1978); CONN. GEN. STAT. ANN. §§ 12-406 to 12-432a (West 1972 & Supp. 1980); D.C. CODE ANN. §§ 47-2601 to 47-2629 (1973 & Supp. 1978); FLA. STAT. ANN. §§ 212.01-212.22 (West 1971 & Supp. 1979); GA. CODE ANN. §§ 92-3401a to 92-3451a (1974 & Supp. 1979); HAWAII REV. STAT. §§ 237-1 to 237-49 (1976 & Supp. 1978); IDAHO CODE §§ 63-3601 to 63-3638 (1976 & Supp. 1979); ILL. REV. STAT. ch. 120, §§ 440-453 (1977); IND. CODE §§ 6-2-1-37 to 6-2-1-40 (1978); IOWA CODE ANN. §§ 422.42-422.59 (West 1971 & Supp. 1979-80); KAN. STAT. ANN. §§ 79-3601 to 79-3639 (1969 & Supp. 1978); KY. REV. STAT. §§ 139.010-139.990 (1971 & Supp. 1978); LA. REV. STAT. ANN. §§ 47:301-47:323 (West 1970 & Supp. 1980); ME. REV. STAT. ANN. tit. 36, §§ 1751-1814 (1964 & Supp. 1979-80); MD. ANN. CODE art. 81, §§ 324-371 (1975 & Supp. 1979); MASS. ANN. LAWS ch. 64H, §§ 1-32 (Law Co-op 1978 & Supp. 1980); MICH. STAT. ANN. §§ 7.521-7.549 (1978 & Supp. 1979-80); MINN. STAT. ANN. §§ 297A.01-297A.44 (West 1972 & Supp. 1980); MISS. CODE ANN. §§ 27-65-1 to 27-65-111 (1972 & Supp. 1978); MO. ANN. STAT. §§ 144.010-144.510 (Vernon 1976 & Supp. 1980); NEB. REV. STAT. §§ 77-2701 to 77-2713 (1976); NEV. REV. STAT. §§ 372.010-372.795 (1979); N.J. STAT. ANN. §§ 54:32B-1 to 54:32B-29 (West 1970 & Supp. 1979-80); N.M. STAT. ANN. §§ 7-9-1 to 7-9-81 (1978); N.Y. TAX LAW §§ 1101-1148 (McKinney 1975 & Supp. 1979-80); N.C. GEN. STAT. §§ 105-164.1 to 105-164.44 (1979); N.D. CENT. CODE §§ 57-39.2-01 to 57-39.2-27 (1972 & Supp. 1979); OHIO REV. CODE ANN. §§ 5739.01-5739.99 (Page 1973 & Supp. 1978); OKLA. STAT. ANN. tit. 68, §§ 1301-1327 (West 1966 & Supp. 1979-80); PA. STAT. ANN. tit. 72, §§ 7101-7282 (Purdon 1968 & Supp. 1979-80).

Those states which have not enacted sales taxes¹⁷ comprise only 2.2 percent of the United States population.¹⁸ It is interesting to note that since 1933 the Oregon legislature has enacted the sales tax several times only to have it repealed by the general electorate before it was imposed. As a result, Oregon's income taxes and property taxes are among the highest in the nation.¹⁹

General sales taxes have always been levied exclusively by the states.²⁰ The idea of imposing uniform federal sales tax can be traced as far back as the Civil War; however, no action has been taken to date.²¹ The sales tax, like most other taxes in the United States, has proven somewhat unpopular. Since it is a regressive tax, one which is "levied across the board without regard to ability to pay,"²² it takes a disproportionately larger percentage of a poor man's income than that of a wealthy individual.²³ Even though it places an unfair burden on the poor, it is somewhat more palatable than other taxes because it is paid out in relatively small amounts.²⁴ Consequently, no sales tax

80); R.I. GEN. LAWS §§ 44-18-1 to 44-18-38, 44-19-1 to 44-19-39 (1956 & Supp. 1979); S.C. CODE §§ 12-35-10 to 12-35-180, 12-35-510 to 12-35-640 (1976 & Supp. 1979); S.D. COMP. LAWS ANN. §§ 10-45-1 to 10-45-53 (1967 & Supp. 1979); TENN. CODE ANN. §§ 67-3001 to 67-3056 (1976 & Supp. 1979); TEX. STAT. ANN. tit. 122A, arts. 20.01-20.17 (Vernon 1969 & Supp. 1980); UTAH CODE ANN. §§ 59-15-1 to 59-15-22 (1953 & Supp. 1979); VT. STAT. ANN. tit. 32, §§ 9701-9818 (1970 & Supp. 1979); VA. CODE §§ 58-441.1 to 58-441.51 (1974 & Supp. 1979); WASH. REV. CODE ANN. §§ 82.08.010-82.08.170 (1962 & Supp. 1978); W. VA. CODE §§ 11-15-1 to 11-15-32 (1974 & Supp. 1979); WIS. STAT. ANN. §§ 77.51-77.77 (West 1957 & Supp. 1979-80); WYO. STAT. §§ 39-6-401 to 39-6-417 (1977 & Supp. 1979).

17. Alaska, Delaware (has some business taxes which are not true retail sales taxes), Montana, New Hampshire, and Oregon. *J. DUE, supra* note 6, at 5.

18. *J. DUE, supra* note 6, at 5 (based on 1970 figures).

19. *Id.*

20. [1976] 1 ALL STATES SALES TAX REP. (CCH) ¶ 125.

21. *Id.* The movement for a national sales tax was revived after World War II. However, by that time the pattern of national taxation had changed. *Id.* There have been several selective applications of federal sales taxes on an *ad valorem* basis. N. JACOBY, *supra* note 7, at 26. The discussion concerning a general federal sales tax is not dead, as evidenced by two articles written within the last year: Goddard, *U.S. Sales Tax Has a Drawback*, Wall St. J., Nov. 5, 1979, at 25, col. 2; Krauss, *U.S. Sales Tax is Preferable to VAT System*, Wall St. J., Oct. 24, 1979, at 22, col. 3.

22. [1976] 1 ALL STATE SALES TAX REP. (CCH) ¶ 125.

23. *Id.*; THE NEW COLUMBIA ENCYCLOPEDIA 2405 (4th ed. 1975).

24. *J. DUE, supra* note 6, at 3-4; THE NEW COLUMBIA ENCYCLOPEDIA 2405 (4th ed. 1975). Sales tax rates are generally no more than 5%. The rates for the forty-five states and the District of Columbia as of January, 1980 are: Alabama—4%, Arizona—4%, Arkansas—3%, California—4.75%, Colorado—3%, Connecticut—7%, District of Columbia—5%, Florida—4%, Georgia—3%, Hawaii—4%, Idaho—3%, Illinois—4%, Indiana—4%, Iowa—3%, Kansas—3%, Kentucky—5%, Louisiana—3%, Maine—5%, Maryland—5%, Massachusetts—5%, Michigan—4%, Minnesota—4%, Mississippi—5%, Missouri—3.125%, Nebraska—3%, Nevada—3%, New Jersey—5%, New Mexico—3.75%, New York—4%, North Carolina—3%, North Dakota—3%,

that was in force for at least two years has ever been eliminated.²⁵

Although sales taxes have survived legislative attack,²⁶ there has been a great deal of litigation in the sales tax area, yielding many terms which have been judicially defined or clarified.²⁷ Litigation has most often resulted from taxpayers' attempts at avoiding the impact of the sales tax.²⁸ Despite the mass of litigation, sales taxes are relatively new,²⁹ and consequently there are still some issues which remain unsettled. One unresolved issue of particular importance is whether the value of a retailer's coupon is taxable.³⁰

A retailer's coupon³¹ is one which is distributed by the retailer and redeemable only by him; the retailer does not receive any reimbursement for the coupon from an outside source.³² These coupons have become a common promotional scheme for many different types of merchants.³³ The coupons generally

Ohio—4%, Oklahoma—2%, Pennsylvania—6%, Rhode Island—6%, South Carolina—4%, South Dakota—4%, Tennessee—4.5%, Texas—4%, Utah—4%, Vermont—3%, Virginia—3%, Washington—4.5%, West Virginia—3%, Wisconsin—4%, Wyoming—3%. Source: [1980] STATE TAX GUIDE (CCH) 6021.

25. J. DUE, *supra* note 6, at 4. Sales tax statutes have been allowed to lapse, but in no event were they ever repealed after having been in force for at least two years. *Id.*

26. *Id.*

27. *E.g.*, Vause & Streigel, Inc. v. McKibbin, 379 Ill. 169, 39 N.E.2d 1006 (1942) ("selling price"); Aurora Country Club, Inc. v. Department of Revenue, 50 Ill. App. 3d 756, 365 N.E.2d 229 (1977) (what constitutes a sale); Terrace Carpet Co. v. Department of Revenue, 46 Ill. App. 3d 84, 360 N.E.2d 153 (1977) (what is included in gross receipts); Standard Oil Co. v. State, 283 Mich. 85, 276 N.W. 908 (1937) (discounts).

28. The constitutionality of sales taxes is well settled. *See, e.g.*, Hornof v. Kroger, 35 Ill. 2d 125, 219 N.E.2d 512 (1966) (specifically as to trading stamps); Reif v. Barrett, 355 Ill. 104, 188 N.E. 889 (1934) (the Illinois Retailer's Occupation Tax Act (ROTA) generally). *See also* notes 75-77 and accompanying text *infra*.

29. *See* notes 6-19 and accompanying text *supra*.

30. This issue was recently raised in Saxon-Western Corp. v. Mahin, 78 Ill. App. 3d 125, 396 N.E.2d 1185 (1979).

31. These coupons are also referred to as trade coupons or discount coupons. Common examples are the coupons found in grocery stores' newspaper advertisements and those offered by fast food restaurants.

32. It is imperative that the retailer not receive any reimbursement for redemption of the coupon. If he is reimbursed, his gross receipts should reflect the value of the coupon since it constitutes part of the consideration for the sale. *See* notes 86-94 and accompanying text *infra*.

33. Although statistics are not readily available, manufacturers' coupons (those which are redeemed by the retailer, for which he is reimbursed by the manufacturer) offer consumers millions of dollars worth of savings annually. A look at any newspaper will show that these coupons are quite prevalent. So far as retailers' coupons are concerned, groceries, restaurants, department stores and others are all "asking" the consumer to clip their (the retailer's) coupon and bring it in for "discount prices." For a dis-

serve a twofold purpose; first, they lure customers into the store with lower prices and, second, they provide the retailer with statistical data which is valuable to him in determining the effectiveness of marketing channels.³⁴

Until recently no one has challenged the states' right to tax the value of retailers' coupons,³⁵ primarily because most states have, either by law or rules, stated that such coupons shall not be taxed.³⁶ However, in 1971, the Illinois Department of Reve-

cussion of coupons as "discount prices," see notes 86-94 and accompanying text *infra*.

34. *Saxon-Western Corp. v. Mahin*, 78 Ill. App. 3d at 127, 396 N.E.2d at 1186. Many retailers tabulate the coupons received by them in order to provide valuable information for future promotions. *Id.*

35. *Saxon-Western Corp. v. Mahin*, 78 Ill. App. 3d 125, 396 N.E.2d 1185 (1979), is a case of first impression.

36. States have expressed various opinions concerning taxing retailers' coupons. For example, North Dakota has taken the position that "[w]hen a *discount coupon* is redeemed at the checkout counter and subtracted directly from the cost of the groceries, *the discount must be subtracted before application of the sales tax*. The sales tax law imposes the retail sales tax at the sales price less any allowable discount." *Guidelines*, North Dakota Tax Department (July 1973), *reprinted in* [1978] 1 ALL STATE SALES TAX REP. (CCH) ¶ 4-025.40 (emphasis added).

Similarly, the State of Washington has declared:

The retail sales tax applies to coupons issued by manufacturers or distributors but not to coupons issued by retail stores. Coupons issued by retail stores offer a reduced price for a specific item. Since the retail merchant absorbs the loss resulting from the discount, *the sales tax is applicable only to the amount actually paid by the customer*. Coupons issued by manufacturers or distributors, however, are redeemable by the manufacturer . . . usually at full face value. The retailer receives the full retail price for the article sold and thus must pay sales tax on the full retail price.

Washington Excise Tax Bulletin—ETB 408.08.116 (July 24, 1970), *reprinted in* [1970] 4 ALL STATE SALES TAX REP. (CCH) ¶ 75-164 (emphasis added).

In Indiana, "[i]f the certificates are issued and redeemed by the retailer; that is, if they are sponsored by him and not subject to redemption by a manufacturer, distributor or other person, then the coupons are "cash discounts" and not taxable in the first place." 1 ALL STATE SALES TAX REP. (CCH) ¶ 4-025.19 (Indiana).

The Texas Comptroller of Public Accounts has stated that "[w]here a retailer accepted coupons or certificates as part of its sales price for tangible personal property and received no reimbursement for the amount of the coupons or certificates, the retailer's receipts for sales and use tax purposes do not include the amount represented by the coupons or certificates." Decision of the [Texas] Comptroller of Public Accounts, Hearing No. 8040, July, 1977, *reprinted in* [1978] 1 ALL STATE SALES TAX REP. (CCH) ¶ 15-1700.

In response to a taxpayer's inquiry, the New York Department of Taxation and Finance determined that when a coupon is issued by a retailer, only the reduced selling price is subject to tax. "A coupon issued by the retailer is merely a method of advertising or a method used for establishing the retail selling price." Department of Taxation and Finance, Sales Tax Bureau (Dec. 5, 1969), *reprinted in* [1970] 3 ALL STATE SALES TAX REP. (CCH) ¶ 55-634.

Missouri's Regulations provide that if the coupon is not reimbursed to the seller, "sales tax is due on the regular price of the item *less the amount*

nue promulgated Rule 46 which declared that the value of retailers' coupons is taxable.³⁷ Saxon-Western Corporation, a retail paint and home supply chain in Illinois, brought suit challenging the Illinois rule.³⁸ It sought to enjoin the Department of Revenue from collecting sales taxes computed on the stated value of retailers' coupons and a declaratory judgment that Rule 46 is

of the coupon." Missouri Sales and Use Tax Regulations, S.T. Reg. 010-65 (Jan. 10, 1976), *reprinted in* [1976] 3 ALL STATE SALES TAX REP. (CCH) ¶ 47-571 (emphasis added).

On the other hand, the Massachusetts Commissioner has stated that: In Massachusetts, the sales tax statute is clear and unambiguous in this regard [discount coupons] and the sales tax is imposed on the list price before the allowance for the redeemed coupon. . . . [The Massachusetts statute] defines "sales price" as "the total amount paid by the purchaser . . . as consideration for a retail sale, valued in money or otherwise." Simply stated, the coupon is the "otherwise" . . . and is part of the consideration for the retail sale. The result would be the same whether or not the retailer is reimbursed by the distributor. . . . Letter from the Massachusetts Comm'r of Corporations and Taxation to Commerce Clearinghouse, Inc. (Oct. 5, 1977), *reprinted in* [1978] 1 ALL STATE SALES TAX REP. (CCH) ¶ 15-638.

Somewhere in between these divergent views is the State of Maryland's position. Maryland maintains that "[w]here the seller has issued the coupon himself, the seller shall record the regular price and charge the tax thereon as described above, *unless he can establish* by clear and convincing evidence *that the coupon was not required* to be presented in order to obtain the reduced price, i.e., that the coupon was *of no value to the customer.*" Maryland Sales Tax Bulletin 77-4 (Dec. 1977), *reprinted in* [1978] 1 ALL STATE SALES TAX REP. (CCH) ¶ 15-711 (emphasis added).

37. Illinois Retailers' Occupation Tax Rule 46 (Aug. 20, 1971), *reprinted in* [1977] 2 ALL STATE SALES TAX REP. (CCH) ¶ 34-596:

Persons who engage in the business of transferring tangible personal property upon the redemption of trading stamps shall be deemed to be engaged in the business of selling such property at retail and shall be liable for and shall pay the tax imposed by the Retailers' Occupation Tax Act on the basis of the retail value of the property transferred upon redemption of such stamps. When merchandise is paid for partly in cash and partly by surrendering a trading stamp valued at a specific amount, the total amount (including the value of the surrendered trading stamp) is subject to retailers' occupation tax.

The same principles apply to trading coupons. Also, it does not matter how or where the consumer obtained the coupon in the first place (i.e., from a manufacturer or other supplier of the retailer, from the retailer himself or from an advertisement placed in a newspaper by such retailer or his supplier). The measure of the tax in trading coupon redemptions is the value of the merchandise transferred for the surrendered coupon, which value would normally be presumed to be the stated value of the coupons plus whatever cash receipts the retailer receives in the transaction. This is true even if the retailer absorbs all of the cost, or if the retailer absorbs part of the cost, as where a manufacturer only partially reimburses the retailer for the value of the merchandise transferred. (emphasis added).

38. Saxon-Western Corp. v. Mahin, 78 Ill. App. 3d 125, 396 N.E.2d 1185 (1979).

both illegal and unconstitutional.³⁹ The Illinois Appellate Court held that the state may not tax the stated value of retailers' coupons.⁴⁰ The case, *Saxon-Western Corporation v. Mahin*,⁴¹ is one of first impression in the United States. If the Illinois Supreme Court decides that the value of retailers' coupons is not taxable, the effect could be a substantial reduction in state sales tax revenues.⁴² The purpose of this article is to determine whether a retailer's coupon should be included in the sales tax basis and taxed accordingly.

DISCUSSION

The Illinois Retailer's Occupation Tax Act (ROTA)⁴³ provides that the basis for computation of the sales tax shall be the retailer's "gross receipts" from sales.⁴⁴ The Act states that "gross receipts . . . means the total selling price." Therefore, "gross receipts" is the total consideration for all sales which is to be "valued in money *whether received in money or otherwise*,"⁴⁵ including cash, credits, [and] property . . . and shall be determined *without any deduction* on account of the cost of the property sold, the cost of the materials used, labor or service cost or *any other expense whatsoever*.⁴⁶ In this sense, the Illinois statute is similar to sales tax statutes of the other states;

39. *Id.*

40. In support of its decision, the appellate court relied upon *Martin Oil Serv., Inc. v. Department of Revenue*, 30 Ill. App. 3d 927, 334 N.E.2d 227 (1975), for the proposition that since a retailer never receives the cash in a trading coupon transaction, he should not have to pay the tax on the value of the coupon. It is puzzling that the *Saxon* court cited *Martin Oil*. *Martin Oil* relied on the ILLINOIS DEPARTMENT OF REVENUE, SALES TAX REGULATIONS, Art. III, § 4(b) (1962), wherein it states that when a seller allows a discount, and a purchaser avails himself of it, the amount of such discount is not subject to tax and is properly deducted from gross receipts. However, this regulation was not applicable to the facts presented in *Martin Oil*. *Martin Oil* involved a trading stamp transaction, and the ROTA, ILL. REV. STAT. ch. 120, § 440, expressly provides that sales tax shall be collected on a trading stamp redemption.

The *Saxon* court rejected the idea that a retailer's coupon may be thought of as part of the consideration for the sale. For a general discussion of this issue, see notes 86-105 and accompanying text *infra*.

41. 78 Ill. App. 3d 125, 396 N.E.2d 1185 (1979).

42. Sales taxes are expected to provide 21% of the fiscal 1981 budget revenues for the State of Illinois. *Chicago Sun-Times*, March 6, 1980, at 6, col. 1. There are no statistics available on the dollar amount of retailers' coupon transactions, however, estimates are that there is a substantial amount involved.

43. ILL. REV. STAT. ch. 120, §§ 440-453 (1977).

44. *Id.* § 441: "[A] tax is imposed upon persons engaged in the business of selling tangible personal property at retail at the rate of [4]% of the gross receipts from such sales. . . ."

45. *Id.* § 440, para. 10.

46. *Id.* para. 8 (emphasis added).

the primary difference is that most states have a per se sales tax whereas Illinois levies an occupation tax.⁴⁷ Sales taxes are either implicitly or explicitly expected to be passed on to a purchaser, whereas occupation taxes are a levy on the business per se, without such an expectation, although the retailer is generally allowed to pass on the tax.⁴⁸ The difference is not in legal liability or actual shifting, but merely in legislative intent.⁴⁹ Therefore, from the consumer's standpoint, there is no difference between the two taxes.

The consumer ultimately bears the burden of a sales tax or an occupation tax.⁵⁰ Whether the value of a retailer's coupon is taxable or not is of great importance to the consumer, because he is the one who will have to pay the additional cost. No section of the ROTA refers to retailers' coupons, although section 440 does make reference to trading stamps.⁵¹ Rule 46⁵² was promulgated by the Illinois Department of Revenue pursuant to statutory authority⁵³ in an attempt to clarify section 440. It states that "the measure of the tax on trading coupon redemptions is . . . the stated value of the coupon plus whatever cash receipts the retailer receives in the transaction."⁵⁴ The Department of Revenue is essentially treating the trading coupon as if it were a trading stamp.⁵⁵ In its suit against the Department of Revenue, Saxon-Western Corporation sought to have Rule 46, specifically the treatment of trading coupons as though they were trading stamps, declared illegal and unconstitutional.⁵⁶ The remainder of this article will be devoted to a discussion of three theories upon which arguments could be propounded for both sides. Discussion will focus on whether (1) Rule 46 is illegal and unconstitutional;⁵⁷ (2) coupons constitute consideration, under the statute, for the sale;⁵⁸ and (3) coupons are "cash discounts" and therefore deductible from the tax basis.⁵⁹

47. J. DUE, *supra* note 6, at 5.

48. J. DUE, *supra* note 6, at 7; *see* ILL. REV. STAT. ch. 120, § 441 (1977) (retailer authorized to collect sales tax from consumer).

49. J. DUE, *supra* note 6, at 7.

50. *See* note 48 *supra*.

51. ILL. REV. STAT. ch. 120, § 440 (1977).

52. Illinois Retailers' Occupation Tax Rule 46 (Aug. 20, 1971), *reprinted in* [1977] 2 ALL STATE SALES TAX REP. (CCH) ¶ 34-596.

53. ILL. REV. STAT. ch. 120, § 451 (1977).

54. Illinois Retailers' Occupation Tax Rule 46 (Aug. 20, 1971). For text of Rule 46, *see* note 37 *supra*.

55. *Id.*

56. Saxon-Western Corp. v. Mahin, 78 Ill. App. 3d 125, 126, 396 N.E.2d 1185, 1186 (1979).

57. *See* notes 60-85 and accompanying text *infra*.

58. *See* notes 86-105 and accompanying text *infra*.

59. *See* notes 106-17 and accompanying text *infra*.

Is Rule 46 Illegal or Unconstitutional?

"Taxing statutes are to be strictly construed,"⁶⁰ and their language is "not to be extended or enlarged by implication beyond its clear import."⁶¹ Where the language of a statute is ambiguous, judicial construction may be required to determine legislative intent.⁶² Courts may in a proper case supply words in a statute which the legislature omitted, but an act of the legislature will not be construed in a manner which would lead to absurd, unjust, or inconvenient circumstances.⁶³ Where there is doubt, however, taxing statutes should be construed most strongly against the government.⁶⁴

It is a settled principle of statutory construction that "the act controls and not the rules."⁶⁵ The Department of Revenue may not limit or extend statutory definitions by rules and regulations;⁶⁶ thus, the Department of Revenue rules and regulations are not binding upon the courts, although they may be considered as persuasive authority.⁶⁷

The Illinois legislature did not make specific reference to retailers' coupons in the sales tax statute.⁶⁸ Accordingly, an argument could be made that the statute should be strictly construed. Insofar as the statute makes reference to trading stamps but not to coupons, it is arguable that the legislature did not intend to tax the value of retailers' coupons.

60. Mahon v. Nudelman, 377 Ill. 331, 335, 36 N.E.2d 550, 552 (1941). See also Caterpillar Tractor Co. v. Department of Revenue, 29 Ill. 2d 564, 567, 194 N.E.2d 257, 259 (1963).

61. Mahon v. Nudelman, 377 Ill. 331, 335, 36 N.E.2d 550, 552 (1941). See also Caterpillar Tractor Co. v. Department of Revenue, 29 Ill. 2d 564, 567, 194 N.E.2d 257, 259 (1963); J.M. Jones Co. v. Department of Revenue, 74 Ill. App. 3d 374, 378, 392 N.E.2d 949, 953 (1979); Terrace Carpet Co. v. Department of Revenue, 46 Ill. App. 3d 84, 90, 360 N.E.2d 153, 157 (1977).

62. See, e.g., Jewel Cos. v. Department of Revenue, 58 Ill. App. 3d 393, 396, 374 N.E.2d 733, 736 (1978).

63. People v. Hudson, 46 Ill. 2d 177, 181, 263 N.E.2d 473, 476 (1970).

64. Caterpillar Tractor Co. v. Department of Revenue, 29 Ill. 2d 564, 567, 194 N.E.2d 257, 259 (1963); Mahon v. Nudelman, 377 Ill. 331, 335, 36 N.E.2d 550, 552 (1941); Lee Lumber & Bldg. Material Corp. v. Department of Revenue, 79 Ill. App. 3d 1015, 1018, 398 N.E.2d 933, 935 (1979).

65. J. M. Jones Co. v. Department of Revenue, 74 Ill. App. 3d 374, 377-78, 392 N.E.2d 949, 952 (1979). See also ILL. REV. STAT. ch. 120, § 451 (1977).

66. J. M. Jones Co. v. Department of Revenue, 74 Ill. App. 3d 374, 378, 392 N.E.2d 949, 953 (1979); Terrace Carpet Co. v. Department of Revenue, 46 Ill. App. 3d 84, 90, 360 N.E.2d 153, 157 (1977); Gapers, Inc. v. Department of Revenue, 13 Ill. App. 3d 199, 202, 300 N.E.2d 779, 781 (1973).

67. J. M. Jones Co. v. Department of Revenue, 74 Ill. App. 3d 374, 392 N.E.2d 949 (1979); Aurora Country Club, Inc. v. Department of Revenue, 50 Ill. App. 3d 756, 365 N.E.2d 229 (1977); Terrace Carpet Co. v. Department of Revenue, 46 Ill. App. 3d 84, 360 N.E.2d 153 (1977); Pierce v. Pacini, 127 Ill. App. 2d 1, 261 N.E.2d 515 (1970).

68. See notes 51-55 and accompanying text *supra*.

Notwithstanding the fact that courts may supply a word which it is thought the legislature omitted,⁶⁹ they may not do so when the result would be absurd or unjust.⁷⁰ If the argument is accepted that a coupon, itself, has no value to the retailer, although the stated value of the coupon will be taxed anyway, the absurd result is that the retailer will be taxed for value which he does not receive. Assuming the legislature had no intention to tax the value of retailers' coupons,⁷¹ the Department of Revenue may not, by means of its rules and regulations, extend statutory definitions and cause a tax to be collected upon the retailers' coupons.⁷² Thus, it appears that Rule 46 might well be illegal.⁷³

Whether or not Rule 46 is illegal, it is arguably unconstitutional. In Rule 46, the Department of Revenue treats trading coupons in exactly the same manner as trading stamps.⁷⁴ While a legislative classification which has some reasonable basis is not unconstitutional because it results in some inequality,⁷⁵ the constitutional guarantee of equal protection, under the fourteenth amendment, prohibits discriminations which are purely arbitrary.⁷⁶ Although the Department of Revenue was acting pursuant to statutory authority in promulgating Rule 46,⁷⁷ it failed to address the fundamental differences between trading stamps and coupons.

When a retailer deducts from gross receipts the amount of retailers' coupons tendered to him, he is merely trying to avoid paying tax on monies he did not receive. When a retailer seeks to deduct from gross receipts the cost of trading stamps given to

69. See, e.g., *People v. Hudson*, 46 Ill. 2d 177, 181, 263 N.E.2d 473, 476 (1970).

70. *Id.* "It is an inescapable conclusion that the Legislature did not intend to tax the retailer on money he did not receive; but on the other hand, the Legislature did not intend to allow the retailer to pay tax on something less than that which he did receive." *State Tax Comm'n v. Ryan-Evans Drug Stores*, 89 Ariz. 18, 23, 357 P.2d 607, 610-11 (1960) (quoted in *Benner Tea Co. v. Iowa State Tax Comm'n*, 252 Iowa 843, 849, 109 N.W.2d 39, 42 (1961)).

71. See note 82 and accompanying text *infra*.

72. *Central Television Serv. v. Isaacs*, 27 Ill. 2d 420, 180 N.E.2d 333 (1963); *J. M. Jones Co. v. Department of Revenue*, 74 Ill. App. 3d 374, 392 N.E.2d 949 (1979); *Terrace Carpet Co. v. Department of Revenue*, 46 Ill. App. 3d 84, 360 N.E.2d 153 (1977); *Gapers, Inc. v. Department of Revenue*, 13 Ill. App. 3d 199, 300 N.E.2d 779 (1973).

73. Rule 46 was declared illegal insofar as it purports to tax retailers' coupons in *Saxon-Western Corp. v. Mahin*, 78 Ill. App. 3d 125, 396 N.E.2d 1185 (1979).

74. For full text of Rule 46, see note 37 *supra*.

75. *City of Chicago v. Vokes*, 28 Ill. 2d 475, 480, 193 N.E.2d 40, 44 (1963). "[A] classification which has some reasonable basis is not unconstitutional because it is not made with mathematical nicety or because in practice it results in some inequality." *Id.*

76. *Id.*

77. See ILL. REV. STAT. ch. 120, § 451 (1977).

customers, he is trying to deduct his advertising and promotional expenses.⁷⁸ Trading stamps, however, are a bonus to the consumer and should be considered an expense of advertising.⁷⁹ In computing gross receipts, the ROTA expressly prohibits the deduction of any expenses.⁸⁰ Therefore, trading stamps are not discounts and should not be deducted from gross receipts.⁸¹ By failing to distinguish between trading stamps and coupons, it is arguable that the Department of Revenue was acting in an arbitrary manner, and therefore, Rule 46 is unconstitutional insofar as it pertains to coupons.

Moreover, there is no statutory basis for treating a coupon in the same manner as a trading stamp.⁸² The Illinois Appellate Court recognized that the "operative provisions of the ROTA do not expressly provide for the taxation of the stated value of trading coupons."⁸³ The legislature certainly did not intend to tax a retailer for money which he never received.⁸⁴ Even so, the Department of Revenue maintains that the coupon, itself, constitutes part of the consideration for the sale.⁸⁵ Resolution of this issue is dispositive of whether trading stamps and coupons should be treated the same.

Is the Coupon Consideration for the Sale?

There is no definition of consideration in the ROTA, therefore resort must be made to the common law. Consideration has been defined at common law as "the *price* bargained for and paid for a promise, . . . a benefit to the party promising, or a det-

78. See *State Tax Comm'n v. Ryan-Evans Drug Stores*, 89 Ariz. 18, 357 P.2d 607 (1960); *Colonial Stores, Inc. v. Undercoffer*, 223 Ga. 105, 153 S.E.2d 549 (1967).

79. Trading stamps were considered an expense of advertising in *State Tax Comm'n v. Ryan-Evan Drug Stores*, 89 Ariz. 18, 357 P.2d 607 (1960) and *Benner Tea Co. v. Iowa State Tax Comm'n*, 252 Iowa 843, 109 N.W.2d 39 (1961).

80. The definition of "selling price" under the ROTA, ILL. REV. STAT. ch. 120, § 440, para. 8 (1977), does not permit any deduction, from gross receipts, "on account of the cost of the property sold, the cost of materials used, labor or service cost or any other expense whatsoever."

81. See *State Tax Comm'n v. Ryan-Evan Drug Stores*, 89 Ariz. 18, 357 P.2d 607 (1960); *Benner Tea Co. v. Iowa State Tax Comm'n*, 252 Iowa 843, 109 N.W.2d 39 (1961).

82. See ILL. REV. STAT. ch. 120, §§ 440-453 (1977).

83. *Saxon-Western Corp. v. Mahin*, 39 Ill. App. 3d 100, 107, 349 N.E.2d 591, 596 (1976) (first appeal by Saxon-Western following trial court's dismissal of complaint; appellate court reversed and remanded).

84. See *Benner Tea Co. v. Iowa State Tax Comm'n*, 252 Iowa 843, 109 N.W.2d 39 (1961).

85. *Saxon-Western Corp. v. Mahin*, 78 Ill. App. 3d at 130, 396 N.E.2d at 1188.

ment to the party to whom the promise is made.”⁸⁶ The Illinois Department of Revenue takes the position that price is narrower in meaning and far more restricted in its scope than the word consideration.⁸⁷ It argues that whenever the legislature desired to broaden the meaning of price, it used the term consideration and defined consideration to include such things as money, labor, or services actually performed.⁸⁸ The definition of consideration is crucial to a full interpretation of the ROTA.

Computation of the sales tax imposed by the Illinois ROTA is based upon “gross receipts” from sales;⁸⁹ gross receipts are determined by the selling price of the property.⁹⁰ “Selling price” is defined by the ROTA as “the *consideration* for a sale *valued in money whether received in money or otherwise.*”⁹¹ Two things are clear from these statutory provisions. First, the legislature intended that all consideration be taxed.⁹² Second, consideration is not limited to cash.⁹³ Under the rules of statutory construction, it is assumed that the legislature intended that “consideration” be given its normal meaning⁹⁴ *i.e.*, “the price bargained for and paid for a promise.”⁹⁵ The question remains what is meant by price.

For the purposes of computing sales taxes, price has been held to be the *cost to the buyer*.⁹⁶ Price has also been defined as “*the value which a seller places upon his goods* for sale. It is not a fixed and unchangeable thing. It may be one thing today and another tomorrow, and one valuation to one customer and a different one to another, on the same day or hour.”⁹⁷

86. 15A C.J.S. *Consideration* § 583 (1967) (emphasis added).

87. Additional Brief for Defendants-Appellees at 1, *Saxon-Paint & Home Care Centers, Inc. [sic] v. Mahin*, 78 Ill. App. 3d 125, 396 N.E.2d 1185 (1979), *appeal docketed*, No. 52703 (Ill. Sup. Ct.).

88. *Id.* (citing *Bowman v. Armour & Co.*, 17 Ill. 2d 43, 47, 160 N.E.2d 753, 758 (1959), wherein the court stated: “[w]hen the legislature makes reference to the payment of money it uses the word ‘price.’ When it is concerned with a broader definition it found adequate words to express its intention.”).

89. ILL. REV. STAT. ch. 120, § 441 (1977).

90. *Id.* § 440, para. 10.

91. *Id.* para. 8 (emphasis added).

92. *See* note 74 *supra*.

93. The words “valued in money whether received in money or otherwise.” ILL. REV. STAT. ch. 120, § 440 (1977), indicates an intent to tax all forms of consideration.

94. *Mahon v. Nudelman*, 377 Ill. 331, 335-36, 36 N.E.2d 550, 552 (1941).

95. 15A C.J.S. *Consideration* § 583 (1967). *See generally* notes 86-7 and accompanying text *supra*.

96. *E.g.*, *Klickitat County v. Jenner*, 15 Wash. 2d 373, 382, 130 P.2d 880, 884 (1942).

97. *Scott v. People*, 62 Barb. 62, 72 (N.Y. App. Div. 1872) (emphasis added).

Since consideration is not limited to cash,⁹⁸ is the retailer's coupon part of the consideration for the sale? Under the first definition of consideration,⁹⁹ the cost to the buyer is the price, which in turn is merely the amount of cash tendered. However, by applying the second definition of consideration,¹⁰⁰ it is arguable that the coupon is part of the selling price. The consumer must present the coupon in order to get the lower price. The coupon is also used by the retailer to determine the effectiveness of his advertising. Therefore, it may be said that the coupon represents a portion of the value which the seller places upon his goods. In *Saxon*,¹⁰¹ the Illinois Appellate Court determined that, for coupon transactions, cost to the buyer is the proper definition of "price."¹⁰² The court stated that, "because [the retailer] actually receives only the discounted price, in its coupon transactions, and because the legislature has expressed the *intent to tax* a retailer *only on the amount actually received*,"¹⁰³ the value of retailers' coupons do not constitute part of the consideration for the sale and should not be taxed.¹⁰⁴ Their decision is in accord with the majority of states which have promulgated rules, regulations, or opinions on the subject of retailers' coupons.¹⁰⁵

Are Retailers' Coupons "Cash Discounts"?

Having determined that coupons do not constitute part of the consideration for a sale, the question of whether retailers' coupons are "cash discounts" is moot because the value of the coupons need not be included in gross receipts.¹⁰⁶ For the sake of discussing the viability of a coupon being considered a "cash discount," assume *arguendo* that the coupon does constitute consideration for the sale and therefore may not be deducted from the gross receipts.

A discount is merely an abatement in price.¹⁰⁷ When a

98. See notes 86-93 and accompanying text *supra*.

99. See note 96 and accompanying text *supra*.

100. See note 97 and accompanying text *supra*.

101. *Saxon-Western Corp. v. Mahin*, 78 Ill. App. 3d 125, 396 N.E.2d 1185 (1979).

102. *Id.* at 131, 396 N.E.2d at 1189.

103. *Id.* at 131, 396 N.E.2d at 1189, (citing *Goldfarb v. Department of Revenue*, 411 Ill. 573, 104 N.E.2d 606 (1952)) (emphasis added).

104. *Saxon-Western Corp. v. Mahin*, 78 Ill. App. 3d at 130, 396 N.E.2d at 1198.

105. See, e.g., sources cited in note 35 *supra*.

106. The Illinois Retailers' Occupation Tax Act, ILL. REV. STAT. ch. 120, §§ 440-453 (1977), only taxes the "consideration" received.

107. See *Benner Tea Co. v. Iowa State Tax Comm'n*, 252 Iowa 843, 846, 109 N.W.2d 39, 40 (1961).

merchant offers an item at a discounted price to any and all takers, that item is commonly referred to as being "on sale." No state's sales tax statute purports to tax an item at its full retail value when such item is "on sale."¹⁰⁸ It is not the intent of most legislatures to tax a retailer for money which he did not receive.¹⁰⁹ Conversely, legislatures do not intend to permit a retailer to pay tax on something less than that which he actually did receive.¹¹⁰

Because the retailer allows the discounted price to only those customers who present the coupon, an argument could be made that the item is not really "on sale." But keep in mind that "price is the value which a seller places upon his goods for sale."¹¹¹ "It is not a fixed and unchangeable thing. It may be one thing today and another thing tomorrow, and *one valuation to one customer and a different one to another*, on the same day or hour. . . ."¹¹²

Finally, it may be argued that the discount may not be deducted because the coupon program is merely a promotional scheme, differentiating the coupons from an item "on sale" because of the requirement that the purchaser present the coupon.¹¹³ The essence of this argument is that a promotional scheme is a cost of doing business; deductions for costs of doing business are expressly prohibited by the ROTA.¹¹⁴ The only tangible costs involved in the coupon program are printing and distribution of the coupons. These costs may not be deducted from gross receipts because they are costs of doing business.¹¹⁵ However, where the retailer receives only the discounted price, he should be taxed only on that amount.¹¹⁶ The legislature has expressed the intent to tax retailers only on the amount actually received.¹¹⁷

108. *Id.* at 849, 109 N.W.2d at 42.

109. *See* note 70 *supra*.

110. *Benner Tea Co. v. Iowa State Tax Comm'n*, 252 Iowa 843, 849, 109 N.W.2d 39, 42 (1961) (quoting *State Tax Comm'n v. Ryan-Evans Drug Stores*, 89 Ariz. 18, 23, 357 P.2d 607, 610-11 (1960)) *quoted at* note 70 *supra*.

111. *Scott v. People*, 62 Barb. 62, 72 (N.Y. App. Div. 1872). *See* note 97 and accompanying text *supra*.

112. *Id.* (emphasis added).

113. *See* Brief for Defendants-Appellees at 13, *Saxon-Western Corp. v. Mahin*, 78 Ill. App. 3d 125, 396 N.E.2d 1185 (1979).

114. *Leslie Car Wash Corp. v. Department of Revenue*, 69 Ill. 2d 488, 491, 377 N.E.2d 653, 655 (1978).

115. *Id.*

116. *Saxon-Western Corp. v. Mahin*, 78 Ill. App. 3d at 131, 396 N.E.2d at 1189; *accord*, *Goldfarb v. Department of Revenue*, 411 Ill. 573, 104 N.E.2d 606 (1952).

117. *Saxon-Western Corp. v. Mahin*, 78 Ill. App. 3d at 131, 396 N.E.2d at 1189.

CONCLUSION

Thus far it has been shown that (1) a rule, promulgated without an explicit statutory foundation, which purports to tax the face value of a retailers' coupon, is probably illegal and unconstitutional;¹¹⁸ (2) a coupon is not part of the consideration for a sale;¹¹⁹ and (3) the coupon could be considered a "cash discount."¹²⁰ For all these reasons, the face value of a retailer's coupon should not be part of the sales tax basis; the value of the coupon should not be subject to sales tax.

The net result of coupons not being taxable would be a reduction in the amount of sales tax which consumers must pay, and a corresponding reduction in state revenues.¹²¹ Revenues from sales taxes comprise one-fifth of the total revenues for the State of Illinois.¹²² Thus, it follows that any substantial reduction in sales taxes can have a serious effect on state revenues. Who really loses? Obviously the consumer is the ultimate loser; he may be benefitting from reduced tax payments, but he will suffer from reduced state services. The retailer has very little concern, since he passes on any increases in tax to the consumer.¹²³

Saxon-Western Corporation v. Mahin,¹²⁴ is currently on appeal to the Illinois Supreme Court.¹²⁵ The supreme court's affirmation of the Illinois Appellate Court's decision will bring Illinois in line with the majority of states which recognize that the retailer's coupon does not constitute part of the consideration for the sale.¹²⁶ If the Illinois Supreme Court reverses the appellate court and allows the Department of Revenue to continue to tax the value of retailers' coupons, the decision will probably go unheralded for it will maintain the status quo. In the long run, the consumer will still pay taxes in one form or another. If the Department of Revenue is forbidden to tax the value of coupons, it will have to make up a revenue deficit; most likely that deficit will be counteracted by some other form of taxation less palatable than a sales tax. In any event, the Illinois

118. See notes 60-85 and accompanying text *supra*.

119. See notes 86-105 and accompanying text *supra*.

120. See notes 106-17 and accompanying text *supra*.

121. Sales tax revenues for Illinois in fiscal 1981 are expected to total approximately \$2.3 billion. Chicago Sun-Times, March 6, 1980, at 6, col. 1. Although the exact figures are unavailable, estimated losses to the state, in the event the value of coupons is not taxable, could run into the millions of dollars.

122. *Id.* See also note 42 *supra*.

123. See notes 47-50 and accompanying text *supra*.

124. 78 Ill. App. 3d 125, 396 N.E.2d 1185 (1979).

125. *Id.*, appeal docketed, No. 52703 (Ill. Sup. Ct., Nov. 14, 1979).

126. See notes 35-36 and accompanying text *supra*.

Supreme Court's decision will be of great interest to both residents of Illinois and residents of those states¹²⁷ which, like Illinois, tax the value of retailers' coupons.¹²⁸

Scott J. Horne

127. Maryland, Massachusetts and New Jersey.

128. Interview with Patricia Rosen, Assistant Attorney General for the State of Illinois, March 7, 1980, in Chicago. Ms. Rosen indicated that she has had several calls from parties, outside the State of Illinois, who were particularly interested in the outcome of *Saxon-Western Corp. v. Mahin*, 78 Ill. App. 3d 125, 396 N.E.2d 1185 (1979), *i.e.*, whether the State planned to appeal the Illinois Appellate Court decision.