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A Survey of the Provisions and the Administration of the Sales Tax and Compensating Tax Statutes of New Mexico

William Carl Nolan

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A SURVEY OF THE PROVISIONS
AND THE ADMINISTRATION
OF THE SALES TAX AND
COMPENSATING TAX STATUTES OF
NEW MEXICO

WILLIAM CARL NOLAN

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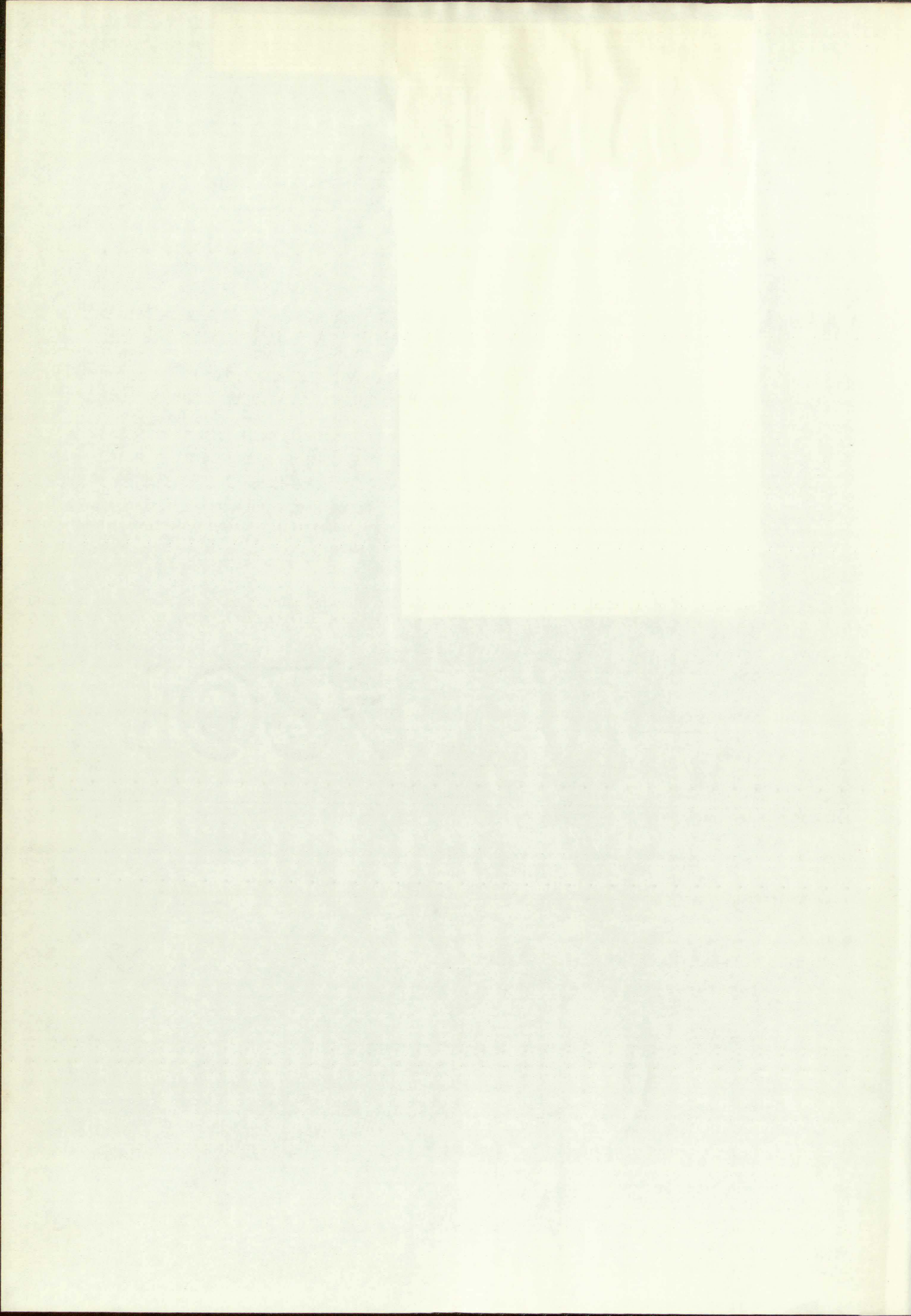
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A SURVEY OF THE PROVISIONS AND THE ADMINISTRATION
OF THE SALES TAX AND COMPENSATING TAX
STATUTES OF NEW MEXICO

A Thesis
Presented to
the Faculty of the Department of Government
The University of New Mexico

In Partial Fulfillment
of the Requirements for the Degree
Master of Arts

by
William Carl Nolan

July 1947

This thesis, directed and approved by the candidate's committee, has been accepted by the Graduate Committee of the University of New Mexico in partial fulfillment of the requirements for the degree of

MASTER OF ARTS

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TABLE OF CONTENTS

PART	PAGE
I. INTRODUCTION.	1
Purposes	1
Organization	1
Source of information.	2
II. SUMMARY OF THE PROVISIONS OF THE SALES TAX LAW.	4
Definitions	6
Rates	7
Natural resources	8
Manufacturing	9
Wholesale	9
Retail.	9
Public utilities.	11
Contractors	11
Amusements	11
Professional and non-professional services.	12
Real estate	12
Brokers	13
General exemptions	13
Sales to government	14
Gold and silver	18
Taxes	18
Nonprofit societies	18
Agriculture	19

PART

PAGE

Wages and salaries	21
Specific exemptions	22
Tax previously levied	22
Public institutions	23
Banks, securities, loans, etc.	23
Water	23
Wholesaler of services	23
Newspapers and magazines	24
Freight rates	24
Occasional sales	25
Interstate commerce	25
Continuity of transit	26
Sales to taxing state	27
Sales from taxing state	28
New Mexico sales tax	29
Double taxation	30
Enforcement of the sales tax statute	31
Bureau of revenue	31
Licenses	32
Remittances	33
Overpayment	33
Methods to secure compliance	33
Rules	33
Resale certificate	34

PART

PAGE

Records.	34
Natural resource reports.	35
Dissolution.	35
Bankruptcy	36
Security sales	36
Impact.	36
Absorbing the tax	37
Tax tokens	37
Administrative hearings	38
Audit.	38
Investigations	39
Petitions.	40
Protest payment.	40
Penalties	42
Tax Penalty.	42
Restraint from continuing in business.	43
Distrain procedure.	43
General penalties	43
Constitutional penalties	44
Divulging returns	44
Funds	44
III. SUMMARY OF THE PROVISIONS OF THE COMPENSATING TAX LAW	46
Rates	47
Exemptions.	48

PART

PAGE

Collection	4
Legality.	5
Administration of the compensating tax act	5
Funds	5
IV. ADMINISTRATIVE ORGANIZATION.	5
Bureau of revenue	5
Bureau of revenue.	5
Commissioner of revenue.	5
Fiscal control	5
Divisions.	6
Compensating and sales tax divisions.	6
Personnel.	6
Administrative districts	6
Office procedures for tax returns	6
License department	6
Business classification and tax forms	6
Business classification	6
Licenses	7
Sales tax forms.	7
Compensating tax forms	7
Publications.	7
In general	7
Report of the Bureau of Revenue.	7
Tax bulletin	7
Investigations	7

PART

PAGE

Audits	76
Inadequate records	76
Green cards	77
Field Auditor's report	77
Agreements	78
Coercive methods of enforcement	78
Distrainment procedures	78
Court procedures	79
Tax Collections	79
Sales tax	79
Compensating tax	83
V. ADMINISTRATIVE PROBLEMS	88
Problem of collection	88
Sales tax	88
Compensating tax	90
Political problems	91
Legal problems	93
Constitutional exemptions	93
Admendments of the laws	95
Interpreting the laws	95
Personnel problems	96
Field force	96
Personnel classification	97
Earmarked funds	99

PART

Disadvantages	9
Advantages	10
Compromise proposal	10
Conclusion	10
VI. CONCLUSION	10
BIBLIOGRAPHY	10

LIST OF TABLES

TABLE	PAGE
I. COMPENSATING AND SALES TAX COLLECTIONS.	84
II. COST OF ADMINISTRATION	85
III. PROTEST PAYMENTS OF THE SALES TAX	86
IV. A. STATE SALES TAX RECEIPTS.	87
B. SALES AND USE TAX PERCENTAGE OF STATE	
TAX COLLECTIONS.	87

PART I

INTRODUCTION

Purposes. The largest single source of state tax revenue is collected under the provisions of the school or sales tax statute. As court decisions made the school tax inapplicable to certain types of sales, a complementary law--the compensating or use tax statute--taxing these sales was enacted. Practically every economic group and all levels of economic activity are taxed. Yet, despite the extensive scope of these statutes, surprisingly little has been written explaining the interpretations of the state laws or describing their administration. The purposes of this thesis therefore are: (1) to summarize the provisions and interpretations of the tax statutes; (2) to describe the administrative divisions, the executive control of these divisions, and the procedures used to enforce the laws; and (3) to survey briefly the outstanding administrative problems.

Organization. In Parts II and III the provisions of the sales tax and compensating tax statutes are summarized. Definitions of certain important terms are given, the rates on each type of business activity are listed, and the types of sales exempted from taxation are enumerated. The

relationship between the laws and the interstate commerce clause of the federal constitution also is discussed. Since it is not possible to explain how the law applies to every possible case, the principles and conclusions reached are general. The powers that the legislature granted to the bureau of revenue to enforce the tax laws and the procedures prescribed for depositing tax money are described in the remaining sections of Parts II and III.

The administrative organization of the tax collecting bodies, the supervision of the governor and his agents, and the fiscal control of the legislature are described in the first sections of Part IV. In other sections the following are explained: the procedures used by the divisions in enforcing the laws, the most commonly used tax forms, the publications of the divisions, the methods of investigations, and the coercive methods of enforcement. Finally, trends in amounts of collections and administrative expenditures are listed.

In Part V the administrative problems and the possible weaknesses of the tax laws are pointed out. This is not an exhaustive treatment of these problems. Its purpose is to indicate some of the outstanding difficulties facing the tax administrator.

Source of information. While some outstanding books on sales taxation have been published, only a limited amount

of material describing the New Mexico laws is available from such sources. Therefore, a large part of the information used in this study was secured in interviews with tax administrators and from official state publications. Among the official sources of information are: the statutes of the state of New Mexico, the rules and regulations of the bureau of revenue, the attorney generals' rulings, and the decisions of the state supreme court and federal courts. Reference was made in certain cases to legal journals to obtain general principles pertaining to sales taxation.

In securing information concerning the administration of the laws interviews were held with the director of the New Mexico Taxpayers' Association, the commissioner of the bureau of revenue, members of the sales tax divisions, and others. Some data was secured from periodicals and tax publications.

The approach is primarily legal and administrative; secondarily, economic. Some tables of tax collections and tax trends are given, but the major portion of the paper is devoted to an exposition of the provisions and the methods of enforcing the laws. Little attention is given to the economic effect of the law upon the taxpayers or upon state business activity. The expenditure of the tax money is also outside the realm of the thesis.

PART II

SUMMARY OF THE PROVISIONS OF THE SALES TAX LAW

New Mexico's first general sales tax law was passed in 1934¹ to raise revenue needed when a twenty-mill limitation was placed upon the property tax. However, technically, the existing law dates from 1935, when the regular legislature continued in substance the statute passed by the special legislative session of the preceeding year. As stated in the act, the purpose of the tax was to meet the emergency existing in public schools of the state by securing funds to continue their adequate operation. The revenue was to be raised "by imposing an excise tax upon the engaging or continuing in business, professions, trades, and callings for a profit in this state."² That the state was successful in raising revenues by this method of taxation is confirmed by noting that it is now the largest single source of state tax revenue.³

The statute is defined as a privilege tax levied against persons for their business activity within the

¹ Laws, 1934, ch. 7.

² New Mexico Statutes 1941 Annotated (hereafter abbreviated as NMSA), ch. 76, sec. 1401.

³ Rupert F. Asplund and Albert K. Nohl, New Mexico's Tax Structure (Albuquerque: University of New Mexico Press, 1946), p. 9.

state; the amount of the tax is computed on the basis of the value of the taxpayer's transaction.⁴ The act is not considered as directly assessing sales.

Since there seems to be no accepted precise terminology covering various types of sales taxes, the New Mexico statute has been classified by one author as a gross income tax imposed upon the privilege of doing business⁵ and by another as a gross receipts tax.⁶ However, as the tax applies to several stages of business activity--for example, manufacturing, wholesaling, and retailing--it also may be described as a multiple-stage sales tax.⁷

In the following pages the scope and the rate and the application of the sales tax will be described with emphasis placed upon the interpretations of the act by the bureau of revenue and the rulings and decisions of the attorney general and state supreme court.

⁴ NMSA, ch. 76, sec. 1404.

⁵ Asplund, op. cit., pp. 9-10.

⁶ Thomas A. Rousse and George C. Hester, The Sales Tax (Austin: University of Texas Publication, 1938), pp. 7-8

⁷ Harold M. Groves, Financing Government (New York: Henry Holt and Company, 1945), pp. 306-307. The author suggests this term in comparison with a tax upon retail sales only--single-stage sales tax.

Definitions

Indispensable to an accurate comprehension of any law are definitions of certain frequently recurring key words. The following paragraphs will give the interpretation of these.

1.) The words "person or company" are used interchangeably and refer to any individual or group or combination that acts as a business unit.

2.) "Gross receipts" are the total receipts the taxpayer received from non-professional or professional services or obtained from the sales of a business or trade. No losses or expenses of any kind can be deducted from this amount.⁸

3.) The "gross proceeds of sales" refer to any value received from the sale of tangible personal property.⁹

⁸ NMSA, ch. 76, sec. 1402.

⁹ Ibid. This valuation includes the amount realized from the sale of property handled on consignment; any services that are a part of the sales; and all receipts, cash, credits, and property allowed to the purchaser by the seller. No expenses, including cost of the property sold, cost of material used, interest losses, or labor or services charged can be deducted from the total amount; however, cash discounts on sales and refunds on articles returned by the customer need not be included in the gross proceeds of sales.

4.) The term "business" includes all personal, professional, and corporate activities conducted to secure a direct or indirect gain or advantage.¹⁰

5.) The sale of any tangible personal property purchased for consumption and not to be resold in any form is defined as a "retail sale". "Consumption" means the use of the article or property so that it will never again enter into trade channels as a commodity or merchandise.¹¹

6.) "Location business" is described as game machines--marble games, pin games, or a game involving skill or chance.¹²

Rates

With certain specific exemptions, the New Mexico sales tax reaches virtually every level of business activity from the initial exploitation of the natural resources to the retail sale of the finished product. The rates vary from one eighth of 1 per cent to 2 per cent. The following paragraphs will summarize the scope and the rate of the tax upon business transactions within the state.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

Natural resources. Any person engaged in the business of extracting natural resources, except water and coal, for commercial use or sale is subject to a tax of one half of 1 per cent on the gross receipts. However, the receipts secured from the extraction of oil, natural gas, carbon dioxide gas, and potash are taxed 2 per cent. The fact that the products may be delivered and sold outside of the state and thus enter interstate commerce does not exempt the person from payment, for the tax is levied against the privilege of doing business within the state and computed on the value of the entire production. If a natural resource is prepared as a manufactured product in a plant located within the state and if the product is subject to the manufacturing tax levied by this act, the producer or purchaser is relieved from paying the natural resource sales tax. If the resources are consumed in a business in such a manner that their value is not included in the gross receipts, the bureau of revenue may determine their cash value by uniform and equitable rules.¹³

¹³ NMSA, ch. 76, sec. 1404. This is not a severance tax. The basis of the tax is the value of the product in New Mexico. No tax is assessed in case the product is destroyed or stored in the state and not sold. One holding a royalty interest is held to be engaged in business in the state, and the person severing the resource is required to pay the tax for the royalty holder. But he may secure a lien on future production in case the royalty holder does not reimburse him. Bureau of Revenue, Rules and Regulations,

Manufacturing. The tax rate on persons engaged in manufacturing is one fourth of 1 per cent. Again the tax is higher upon certain articles, for the receipts of business concerns "smelting, leaching, refining, reducing, or processing oil, natural gas, carbon dioxide gas, potash, copper, gold, silver, limestone..." are taxable at the rate of one half of 1 per cent.¹⁴

Wholesale. The gross receipts of all persons in wholesale business are taxable at the rate of one eighth of 1 per cent.¹⁵

Retail. The receipts from retail sales are taxed at 2 per cent. Gross receipts from the sale of new or second hand automobiles, trucks, or tractors are taxed at the rate of 1 per cent; and allowances for trade-ins may be deducted from the total. However, exempt from the provisions of this paragraph are the sales of livestock, feed, plants,

New Mexico School Tax Laws, New Mexico Compensating Tax Act (Santa Fe: July, 1945), pp. 3-4 (hereafter abbreviated as Rules).

¹⁴ NMSA, ch. 76, sec. 1404. Manufacturing includes "smelting, refining, reducing, processing, compounding, fabricating, packing, preserving, distilling, preparing for sale or commercial use, or the making of wares, commodities or material products by hand or machinery, including the generation of electricity." (*Italics added.*)

In *Iden v. Bureau of Revenue*, 43 N.M. 205, p. 209 (1939) the state supreme court concluded "that the word 'manufacturer', as used in this statute, has reference to one who manufactures and sells his products, and not to one who consumes them."

¹⁵ NMSA, ch. 76, sec. 1404.

and all agricultural implements excluding tractors.¹⁶

The bureau of revenue rulings indicate that the distinguishing between a retail and a wholesale transaction presents complications to the tax administrator. Several cases have arisen contesting decisions of the bureau. In Iden v. Bureau of Revenue the courts held that a business selling ties to a railroad company that prepared them for its use and not for resale was selling products at retail as the ties were consumed by the railroad.¹⁷ Again sales to a plumber are classified as retail sales since, in installing their equipment, plumbing contractors are not dealers in goods, wares, and commodities in that the material purchased is used in fulfilling their contract.¹⁸ While no exact rule can be drawn from such cases, the determining principle seems to be whether the product becomes part of an article manufactured or constructed for resale. For example, electricity may be used as power in producing an article; therefore, it is purchased for consumption and

¹⁶ Ibid. Classified as retail sales are the rentals and leaseings of tangible personal property. The sale of coal in carload lots or the sale of coal to licensed retail dealers who haul coal from mines in trucks is considered as a wholesale sale.

¹⁷ 43 N.M. 205 (1939).

¹⁸ Albuquerque Lumber Co. v. Bureau of Revenue, 42 N.M. 58 (1937).

is taxable at the retail rate.

Public utilities. A 2 per cent tax is levied upon the sale of services or products of public utilities. This effects consumer purchases of electrical power or gas; of telegraph, telephone, or radio messages within the state; and of intrastate transportation services requiring a franchise or permit. Relieved from paying this tax are those who transport their own property or haul timber products of which 90 per cent of the capital stock is owned by the transporter.¹⁹

Contractors. Contractors are subject to the same rate as retailers, but costs of materials used in the construction of a project or becoming a part of the structure, providing a 2 per cent tax has been paid previously, may be deducted from the amount of the return.²⁰

Amusements. The gross receipts secured from amusement enterprises are charged with the 2 per cent tax. This category includes picture shows, radio broadcasting stations, location business, fairs, dance halls, and any

¹⁹ NMSA, ch. 76, sec. 1404. The attorney general ruled that "a corporation manufacturing electricity must pay a tax of $\frac{1}{4}$ of 1 % on its entire gross receipts in addition to 2 % on retail sales and $\frac{1}{4}$ of 1 % on sales to consumers for power purposes." Opinion of the Attorney General, September 9, 1937, quoted in New Mexico Tax Structure (Chicago: Commerce Clearing House, Inc., 1944), p. 6553.

²⁰ Ibid. "Gasoline, motor fuel, grease and oil,

business charging admission for the purpose of entertainment. While the act provides that "any religious, fraternal, educational or other nonprofit organization not regularly engaged in such enterprises shall be exempt from taxation", it is held that as long as the proceeds from such enterprises are used solely for religious, fraternal, educational, or civic purposes the tax will not apply even though such events are held regularly.²¹

Professional and non-professional services. Any person rendering professional, technical, or scientific services and remunerated on a fee basis must pay 2 per cent of the gross income from such sources. The same tax rate is imposed upon the income secured by persons furnishing nonprofessional services--such as services rendered by laundries, undertaking establishments, barber shops, beauty parlors, hotels, filling stations, etc.²²

Real estate. Commissions received for the sale of real estate are taxable at the rate of 2 per cent; however,

freight or transportation charges, wages, and salaries paid, small tools and accessories shall not be considered deductible items."

²¹ Ibid. Also see Rules, p. 6.

²² NMSA, ch. 76, sec. 1404. The threshing or cleaning of agricultural products (including the ginning of cotton) is considered as manufacturing, not a non-professional service.

rentals or leases of real property are not taxable.²³

Brokers. Finally, the sales tax levies a 2 per cent tax upon the commissions of agents, factors, or brokers.²⁴ The term "agent" was defined further by the state supreme court in Comer v. State Tax Commission. It was held that:

In every instance the tax is levied against the business of an owner or operator, and not against the employee acting as manager or agent for the principal who is "engaged in business."

...we find no intention to tax employees at all and that persons working for ordinary salaries and wages include persons who are working on commission.

...it is clear that the Legislature intended to limit the meaning of the term "agent" to a particular and circumscribed business, to wit, a general agency business, that is, one not engaged as agent for a single firm or person but one who holds himself out to the public as being engaged in the business of being agent.²⁵

General Exemptions

While a cursory examination of the tax statute might lead to the deduction that virtually every source of

²³ Rules, pp. 10-11. Income received from hotels, camp grounds, etc., are not considered as real estate rentals. NMSA, ch. 76, sec. 1404.

²⁴ NMSA, ch. 76, sec. 1404.

²⁵ 41 N.M. 403, p. 406 and p. 408 (1937).

business income falls within the scope of the tax, certain groups, institutions, and commodities upon which no assessment is levied are specifically enumerated in the act. An attempt will be made here to classify these exemptions as either specific or general. While it is realized that no concise distinction can be made in some cases between a specific and a general exemption, it is believed that such an arrangement will offer an opportunity to present a more intelligible summary of these privileged items. A specific exemption will refer to those particular commodities or institutions that are exempt by name, and a general exemption will refer to a large group such as a particular economic class or function.²⁶

Sales to government. The tax does not apply to any business or transaction exempt from taxation by the constitution of the United States or of New Mexico,²⁷ and assessments on sales made to the federal government or to any of its instrumentalities except corporate agencies

²⁶ The burden to prove an exemption rests upon the taxpayer, for all tax immunities are construed in favor of the state. Report of the Attorney General of New Mexico for the years 1939 and 1940, pp. 25-26 (hereafter abbreviated Report of Attorney General).

²⁷ NMSA, ch. 76, sec. 1405.

are exempt.²⁸ But this exemption apparently does not extend to sales made to private companies operating under a federal cost-plus contract. In the case State of Alabama v. King and Boozer, the United States Supreme Court held that such a sale was made to the contractor, not to the government. The decision was based on the following principle:

So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity.²⁹

Applying the principle of this decision, the Attorney General of New Mexico held that the school tax should be collected on sales made by a New Mexico company to another New Mexico company for its use under a contract with the United States.³⁰ The instructions given with the Official School Tax Return Blanks for 1946 stated that deductions

²⁸ Rules, pp. 23-24. Among these governmental corporate agencies to which the tax applies are: banks for co-operatives, Commodity Credit Corporation, Home Owners' Loan Corporation, Federal Crop Insurance Corporation, Federal Deposit Insurance Corporation, Federal Reserve Banks, and others. For a tentative recent interpretation see infra, p. 95.

²⁹ 314 U.S. 1, p. 9 (1941).

³⁰ Report of Attorney General, 1945-46, pp. 232-34. The Attorney General held that the New Mexico statute

for sales to federal government could be made "provided, however, that such sales shall be made direct to such governmental agencies and not through a third party."

While there is no definite answer to the problem of whether the sales tax can be levied on the sale of all goods purchased by or for the benefit of the federal government, the American Law Review suggests that if there is no attempt at discrimination, the tax may be said to be imposed upon the dealer when the article is in his possession and is therefore not a tax upon the federal agency. This does not imply, however, that a state can tax the instrumentalities of the federal government.³¹

As for sales to or property of municipal corporations used for government purposes, the American Law Review suggests that as a general principle these are exempt from taxation, but property of a municipal corporation held for income may be taxable by the state.³² The emergency school

exempted sales made directly to the government.

In Gallup American Coal Company v. Beall, 39 N.M. 188 (1935), the court held that sales to federal agencies and state or its departments or agencies cannot be taxed.

³¹ 56 A.L.R. 587. Also see James v. Dravo Contracting Co., 302 U.S. 134, p. 149 ff. (1937).

³² 60 A.L.R. 878. Also see American Jurisprudence, 1946 Supplement (San Francisco: Bancroft-Whitney Company 1946), XLVII, 5. Also see 155 A.L.R. 423-426, for distinction between property used for public or governmental

tax statute, however, does not differentiate between proprietary or governmental functions, and attorney generals of the state have held that sales to political subdivisions of the state--county school districts, departments or agencies, conservancy districts, and municipalities--may be deducted from tax returns.³³ Nevertheless, a situation may arise in the future where such a distinction will be made and sales to or by such profit organizations, taxed.

The bureau of revenue holds that sales on federal-owned land areas are taxable to the same extent as sales made elsewhere in the state. The question then may be raised whether sales within the federal Indian reservations are taxable under the state law. In a recent opinion the attorney general held "that the privilege of producing petroleum products on Indian lands, measured by the receipts from sales, would be taxable and have been taxable, since January 1, 1941." The basis of this opinion is the Buck Act of 1941, which stated in substance that no person could be relieved from the liability for a tax upon the ground that the sale took place in a federal area.³⁴ This ruling

purposes and property used for proprietary purposes.

³³ Report of Attorney General, 1933-34, p. 134; and Report of Attorney General, 1941-42, p. 134.

³⁴ Report of Attorney General, 1945-46, pp. 104-105.

does not apply to business receipts of Indians.³⁵

Gold and silver. Deposits of gold and silver with the United States mint are not considered sales to the federal government and are therefore taxable.³⁶

Taxes. Sums paid to the United States as taxes, excluding any stamp or income tax, may be deducted from gross receipts.³⁷

Nonprofit societies. All sales or services made or performed by societies and other organizations not organized or operated for gain or profit are exempted from taxes imposed by this act. (Supra, p. 12) However, it is not enough that the charter of the organization declare that it is not organized for gain. The corporation must show that it is not operating for profit, measured in money or services.³⁸ The state supreme court held that a company was organized for gain even though the "volume of purchases

³⁵ Rules, p. 21 and 25. Indians are classified as those persons registered on the tribal rolls and living within the reservation.

³⁶ NMSA, ch. 76, sec. 1405.

³⁷ NMSA, ch. 76, sec. 1413. This exemption does not permit the deduction of taxes paid on goods produced outside of New Mexico. Report of Attorney General, 1945-46, pp. 12-14.

³⁸ Report of Attorney General, 1939-40, pp. 225-26. The attorney general believes that exemptions apply only to religious, benevolent, and eleemosynary organizations.

from it [the company] by members, rather than the number of shares owned," constituted the measure of their gain.³⁹

Agriculture. The sale of practically all agricultural products by the producer or grower is exempted from sales taxation; however, the retail sales of commercial dairy products are not included on the exemption list. This privilege actually extends to several who may not be producers or growers; for the statute offers immunity not only to the farmer, rancher, or gardener, but also to all sales of livestock on the hoof "when made by the grower, producer, feeder or by any person engaged in the business of bartering, buying or selling live stock on the hoof" and to any "person engaged in the sole business of buying and selling wool or mohair."⁴⁰

Since livestock is sold on an interstate market in competition with products from non-taxing states, an increase in the price of livestock resulting from the sales tax, would be absorbed by the seller or passed backward

³⁹ Farmers Oil Co., Inc. v. State Tax Commission et al., 41 N.M. 693, p. 697 (1937).

⁴⁰ NMSA 1945 Supplement, ch. 76, sec. 1415. This paragraph states: "The sale of live poultry and the unprocessed products of the farm, ranch, grove, or garden when made by the grower or producer thereof, and duly organized nonprofit cooperative market associations, the members of which are bona fide growers or producers, shall, for the purpose of this section, be considered to be growers or producers; the sales of live stock on the hoof when made by the grower, producer, feeder or by any person engaged in

upon the producer. Thus, this statute by including on the exemption list any person selling livestock on the hoof (or in effect those intermediary persons selling on the interstate market) prevents the possibility of the tax being passed backwards to the producer through a decreased purchasing price.

If it is conceded that the sales tax should apply equally to all business activities, and, if it is granted that the favorable features of a sales tax outweigh its regressive characteristics, it is only with difficulty that this broad exemption can be rationalized. Nevertheless, the exemption can be defended, though weakly, by claiming that the business habits and bookkeeping procedures of the average small farmer would make administratively impossible the levying and collecting of the tax. But certainly this argument could not be extended to every "person engaged in the business of bartering, buying or selling live stock on the hoof." More probably the provision indicates the

the business of bartering, buying or selling live stock on the hoof; the sales of mohair and wool and the hides and pelts of domestic and wild animals when made by the grower or producer or trapper thereof, and persons engaged in the sole business of buying and selling wool or mohair shall, for the purpose of this section, be considered to be growers or producers."

The term "livestock" is limited to the dictionary definition and "does not include any of the by-products obtained from livestock, such as milk, cream, wool, hides, etc." Rules, p. 27.

influence of the strong agricultural group in the state.

It is doubtful if this section of the statute could be invalidated on the constitutional grounds of discrimination or inequality. The state supreme court has stated that a precise equality of taxation is not required as the state may select its subjects of taxation and grant exemptions.⁴¹ The judiciary usually has denied that a sales tax exempting particular persons, property, or transactions from taxation violates constitutional requirements of uniformity.⁴²

The principle that seems to determine the constitutional requirements of uniformity is whether the tax applies equally to all individuals within each particular class.

Wages and salaries. Finally, income received in the form of ordinary wages or salaries is exempted from sales tax assessments. The principle established by the attorney

⁴¹ Lougee v. New Mexico Bureau of Revenue Commissioner, 42 N.M. 115, pp. 134-135 (1938).

⁴² American Jurisprudence. (San Francisco: Bancroft-Whitney Company, 1943), XLVII, 204. "Thus, particular sales tax statutes have been upheld as against the contention that they were violative of provisions as to uniformity because, either by their terms or by the manner in which they were enforced by administrative officials, they were inapplicable ... to those engaged in agricultural or to sales of agricultural products or the means of producing them, such as farm instruments, fertilizer...."

Also see 128 A.L.R. 897. The supreme court of Washington upheld in *State v. Yelle*, 25 P. 2d 91 (1933) such an exemption since "farming is not a commercial pursuit."

general to determine tax liability is based upon the manner in which the individual receives his compensation. If he is paid on a fee basis, his income is subject to tax.⁴³ Several court decisions have followed this ruling and upheld the constitutionality of the provision.⁴⁴

Specific Exemptions

Tax previously levied. The gross receipts from the sale of certain articles upon the sale of which a tax is already levied are exempt from the provisions of the act. Included in this type of sales are premiums collected by insurance companies and receipts received from the sale of

⁴³ Report of the Attorney General, 1943-44, pp. 35-36. In other rulings the attorney general has held that accountants are professional men and when they receive compensation for their services by way of fees and not salaries, they cannot claim exemption for the tax. NMSA 1945 Supplement, ch. 76, sec. 1404.

For the same reason dancing and music teachers and teachers conducting schools of every nature who receive an agreed price per week or month can be taxed. Report of the Attorney General, 1939-40, pp. 123-124. See also Rules, p. 9.

⁴⁴ The state supreme court has ruled that the privilege tax law was not unconstitutional as arbitrary and discriminatory because it imposed a tax on lawyers whose compensation was received in the form of fees but exempted wage earners and salaried employees, which class might include a few lawyers. Lougee v. New Mexico Bureau of Revenue Commissioner et al., 42 N.M. 115, p. 116 (1938).

However, employees receiving compensation on a commission basis are classified as working for a wage or salary, and therefore, exempt from payment of the tax on their income. Comer v. State Tax Commission of New Mexico, 41 N.M. 403 (1937).

gasoline or motor fuel.⁴⁵

Public institutions. Other exemptions apply to the proceeds of the sale of school books where the price is fixed by the state; the gross receipts of hospitals, infirmaries, or sanitariums; and the gross receipts from dormitories and dining halls of state educational institutions.⁴⁶

Banks, securities, loans, etc. The tax does not apply to building and loan associations and state and national banks. "Income received in the form of interest on money loaned, or in the form of dividends from stocks, bonds, securities, or from real estate rentals, and the proceeds from the sale of stocks, bonds and other securities" are not taxed.⁴⁷

Water. The sale of water is not subject to the tax.⁴⁸

Wholesaler of services. Services performed by a wholesaler of services for a retailer who is liable for the

⁴⁵ NMSA, 1945 Supplement, ch. 76, sec. 1415. This exemption on gasoline sales applies only to that tax on retail, wholesale, and agent transactions; and it does not include the receipts from the sale of gasoline to be used off the highways under the provisions of NMSA, ch. 68, sec. 1226-27.

⁴⁶ NMSA 1945 Supplement, ch. 76, sec. 1415.

⁴⁷ Ibid.

⁴⁸ Ibid.

retail sales tax are not taxed by this act.⁴⁹

Newspapers and magazines. Only the receipts secured from the sale of advertising space in newspapers and magazines are taxed by this act.⁵⁰

Freight rates. When the freight charges for the shipping of products of a business engaged in contracting, extracting resources, wholesaling, or manufacturing are prepaid or included in the gross receipts of the above business activities, they may be deducted from the tax return.⁵¹

⁴⁹ Ibid. Both retailer and wholesaler must be engaged in the same type of business.

⁵⁰ Ibid. Commercial printers have been classified as manufacturers. Report of the Attorney General, 1939-40, pp. 33-34.

This provision has been upheld by the United States Supreme Court. The court stated in regards to the tax on sale of advertising space in a magazine published in New Mexico that "we think the burden on the interstate business is too remote and too attenuated to call for a rigidly logical application of the doctrine that gross receipts from interstate commerce may not be made the measure of a tax."

.....

"Here it is perhaps enough that the privilege tax is of a type which has been regarded as so separate and distinct from interstate transportation as to admit of different treatment for purposes of taxation... and that the value of the privilege is fairly measured by the receipts. The tax is not invalid because the value is enhanced by appellant's circulation of their journal interstate..." Western Live Stock v. Bureau of Revenue, 303 U.S. 250, p. 259 (1938). Also see Western Live Stock v. Bureau of Revenue, 41 N.M. 141 (1937).

⁵¹ NMSA, ch. 76, sec. 1410,

Retail shippers are not included in this provision; and the exemption applies only to outgoing, not incoming products.⁵²

Occasional sales. If a person makes only occasional or isolated sales, no tax is applied to the receipts thereof.⁵³

Interstate Commerce

One area of tax revenue in which distinct limits to a state's taxing power have not been fixed is found in the field of interstate commerce. The regulation of interstate and foreign commerce lies within the jurisdiction of Congress; yet, while a state is prevented from levying taxes directly upon such commerce, under certain circumstances taxes may be imposed "which may have some incidental effect upon such commerce, but,... it appears to be impossible to reconcile completely the many cases which have considered the application of this principle to particular state sales tax statutes."⁵⁴ Therefore, the problem confronting state administrators and state legislators is to ascertain what transactions constitute interstate commerce and what do

⁵² Official School Tax Return Blanks for 1946, instruction sheet.

⁵³ Rules, p. 29.

⁵⁴ American Jurisprudence, op. cit., XLVII, 209.

not.⁵⁵ While it is not within the province of this thesis to review at length court rulings that interpret the commerce clause of the federal constitution, some attention will be given to several general principles upon which state sales taxation on interstate commerce may be legally justified.

Continuity of Transit. A suggestion of what principle the courts may use in defining the state power to tax commerce may be found in the following statement quoted from McGoldrick v. Berwind-White Company:

It was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing business, Western Live Stock v. Bureau of Revenue.... Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress. A tax may be levied on net income wholly derived from interstate commerce. Non-discriminatory taxation of the instrumentalities of interstate commerce is not prohibited. The like taxation of property, shipped interstate, before its movement begins, or after it ends, is not a forbidden regulation.⁵⁶

From the above statement it may be inferred that, if

⁵⁵ The bureau of revenue recognizes this problem by ruling only on specific cases when particulars are supplied. Rules, p. 26.

⁵⁶ 309 U.S. 33, pp. 46-47 (1940). Italics added.

the tax is nondiscriminatory, the decisive question in determining the validity of a sales tax on such articles is the "continuity of transit."⁵⁷

Sales to taxing state. With respect to the sale of goods involving their shipment from another state into the taxing state the American Law Review advances several principles:

On their facts these cases hold that a general sales tax does not unconstitutionally burden interstate commerce as applied to sales (1) on orders solicited in the taxing jurisdiction (the contracts themselves sometimes being entered into there also), (2) by a seller maintaining a place of business in the taxing jurisdiction, (3) even though the orders, by reason of convenience or impracticability, are to be filled through subsequent interstate transportation of the merchandise from a source beyond the borders of the taxing jurisdiction, (4) providing that delivery is made to the purchaser in the taxing jurisdiction either (a) directly from such extra state source, or (b) by relay through the offices of the seller in the taxing jurisdiction, and (5) provided further that no congressional enactment of policy is thereby offended.⁵⁸

However, in cases where the courts have decided that the facts of the case do not fit the above criteria, such a tax upon goods purchased in another state and shipped to the taxing state has been held a burden upon interstate

⁵⁷ Walter F. Dodd, Cases and Materials on Constitutional Law (St. Paul, Minnesota: West Publishing Co., 1942), p. 440.

⁵⁸ 128 A.L.R. 900-901.

commerce.⁵⁹

Sales from taxing state. Again in determining the constitutionality of the sales tax as applied to goods sold to destinations outside of the taxing state, attention must be devoted to the nature of the "continuity of transit" of the product (it may have a moment of rest before or after shipment wherein it is no longer considered as interstate commerce) and to the possible discriminatory features of the tax. One authority stated that the validity, under the commerce clause, of the application of a state sales tax statute to a sale involving the shipment of goods sold to a destination outside the taxing state has been denied usually.⁶⁰ In one case where the gross receipts of a manufacturing concern which sold 80 per cent of its products outside of the state were taxed, the federal supreme court held that such was an unconstitutional burden

⁵⁹ *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, p. 330 (1944). In this case Mr. Justice Frankfurter pointed out the difference between a sales tax and a use tax. "A sale tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. A sales tax is a tax on the freedom of purchase.... A use tax is a tax on the enjoyment of that which was purchased."

⁶⁰ American Jurisprudence, op. cit., XLVII, 209

upon interstate commerce.⁶¹

New Mexico sales tax. The New Mexico statute explicitly provides that the gross proceeds secured from extracting natural resources, brokerage, manufacturing, or nonprofessional services (laundries, abstractors, undertaking establishments, etc.) will be taxed at their respective rates even though deliveries may be made out of the state.⁶² In case no money is exchanged in such sales, the bureau of revenue may ascertain the value of the products in the form in which they existed before being shipped in interstate commerce and assess a tax upon that amount.⁶³

The question arises how the constitutionality of the tax on minerals shipped out of the state can be upheld. Among several possibilities for upholding the tax is a distinction that may be drawn by the judiciary between a sales tax on gross receipts of a business and a tax on the privilege of doing business within the state, the amount of the tax being computed on the value of the gross receipts. While in the Adams Manufacturing case the United States

⁶¹ Adams Manufacturing Co. v. Storen, 304 U.S. 307, pp. 313-314 (1938). See also American Jurisprudence, op. cit., XLVII, 209-210 fn.

⁶² NMSA, ch. 76, sec. 1408.

⁶³ NMSA, ch. 76, sec. 1409.

Supreme Court held that a tax on gross receipts secured from the interstate sale of goods manufactured in the taxing state constituted an invalid hindrance to interstate commerce, Justice Roberts continued:

So far as the sale price of the goods sold in interstate commerce includes compensation for a purely intrastate activity, the manufacture of the goods sold, it may be reached for local taxation by a tax on the privilege of manufacturing, measured by the value of the goods manufactured, or by other permissible forms of levy upon the intrastate transactions. It is because the tax, forbidden as to interstate commerce, reaches indiscriminately and without apportionment, the gross compensation for both interstate commerce and intrastate activities that it must fail in its entirety so far as applied to receipts from sales interstate.⁶⁴

Double Taxation

The state supreme court has sustained the emergency school tax against one charge of imposing double taxation upon certain occupations. In State ex rel. Attorney General v. Tittman the court ruled that the New Mexico Constitution does not prohibit double taxation "if the taxes are equal and uniform upon subjects of the same class, nor does the Federal Constitution afford protection against double taxation by the authorities of a state."⁶⁵

⁶⁴ Adams Manufacture Co. v. Storen, 304 U.S. 307, pp. 313-314 (1938). This obiter dictum was referred to in McGoldrick v. Berwind-White Co., 309 U.S. 33, pp. 57-58 (1940).

⁶⁵ 42 N.M. 76, p. 81. (1938)

Enforcement of The Sales Tax Statute

Without the delegation of adequate enforcement powers to administrative agencies the effectiveness with which a tax may be collected is problematical, regardless of whether the tax law imposes a levy sufficient to raise needed revenue. Therefore, the provisions of the act granting enforcement authority to the bureau of revenue will be examined in the following pages to determine the means by which the tax may be enforced.

Bureau of revenue. The bureau of revenue is now empowered to administer the sales tax statute and is authorized to establish such rules and regulations and prescribe such forms as are necessary for the enforcement of the act. Each fiscal year 5 per cent of the money collected under the sales tax act, or as much of that as is needed, is appropriated to finance the expenses of the bureau for collecting the sales tax revenue. The commissioner of revenue with the approval of the governor may employ personnel needed to perform these duties of the bureau, and he may fix their compensation within the limits of the appropriations act.⁶⁶

Thus, responsibility for proper administration of

⁶⁶ NMSA, ch. 76, sec. 1441, 1443, and 1446. Commissioner may also pay necessary office expenses from this sum.

the sales tax act is placed under the supervision of a single administrator, who is responsible to the governor for the proper performance of his tasks.

Licenses. In order to facilitate and make possible the enforcement of the law, each person subject to the tax and engaged in a business in the state is required to apply for a license. The fee is one dollar. The license is not transferable from taxpayer to taxpayer; but when a person, registered under the act, changes the location of his business, no additional registration fee is required. And no additional fee is required when the kind of business is changed. Protecting the taxpayer from political discrimination in granting of the license is the provision that upon request the bureau "shall issue to each applicant a license for each place of business of the applicant."⁶⁷ Failure to secure a license is defined as a misdemeanor punishable by a fine of not more than \$500 or by an imprisonment of not

⁶⁷ NMSA, ch. 76, sec. 1416-17. A license is required for each place of business except telephone toll and pay stations; and "contractors, itinerant vendors, traveling shooting gallery operators, those engaged in location business, traveling shows and circuses are required to obtain only one license."

Each license is to have a number and must be displayed in a conspicuous place.

The license form must include the name and type of business, the location, and other information. All notices to be mailed must be addressed to the taxpayer at the address given on the form. See also Rules, p. 27.

more than three months or by both.⁶⁸

Remittances. The monthly tax installment is due and payable on the 15th of the month following the tax period; however, for due cause the bureau of revenue may prescribe payment on some other date, extend the date of filing for not more than 30 days, or if it is thought necessary to insure payment, require payments and returns on other than monthly periods. Remittances--draft, check, cashier's check, money order, or cash--must accompany the return.⁶⁹

Overpayment. Whenever the taxpayer pays an amount in excess of the tax due, such sum is credited to any future tax liability. If no future taxes will be due, the amount of overpayment is refunded from the suspense fund.⁷⁰

Methods to Secure Compliance

Rules. Under circumstances where a sale or transaction of the article does not indicate its true value, the bureau of revenue may prescribe uniform rules to

⁶⁸ NMSA, ch. 76, sec. 1418 and 1440.

⁶⁹ NMSA, ch. 76, sec. 1419, 1420, and 1435.

At the taxpayer's option the receipts from charge and time sales may be included in the returns at the time of the sale or at the time when payment is made. NMSA, ch. 76, sec. 1406.

⁷⁰ NMSA, ch. 76, sec. 1444.

determine the gross receipts upon which a tax is levied.⁷¹

Resale certificate. To prevent evasion of payment of the amount due, all sales are taxed at the rate of 2 per cent or as retail sales unless the taxpayer presents a resale certificate or any other acceptable evidence ascertaining that the purchaser intends to resell the article. These certificates are subject to the examination of the bureau at all reasonable hours. Any person who draws up a false certificate can be punished by fine or imprisonment.⁷²

Records. It is the duty of all persons subject to the sales tax to keep for a three year period suitable books, accounts, invoices, and records of his gross receipts necessary to determine the amount of tax liability. These records may be examined by the commissioner or his authorized agent.⁷³ Without this proviso, effective enforcement of the statute would be impossible; yet, no specific penalty is provided for failure to comply with this section though

⁷¹ NMSA, ch. 76, sec. 1411. This value shall "correspond as nearly as possible to the gross proceeds from the sale of similar products of like quality or character by other businesses...." For further information see Rules, pp. 25-26.

⁷² NMSA, ch. 76, sec. 1414 and 1440. The resale certificates must be executed by recognized "retail dealers, restaurants, wholesalers, distributors, jobbers or manufacturers of tangible personal property...." A "blanket resale certificate" is provided for the taxpayer who regularly purchases from a wholesaler. See Rules, p. 32.

⁷³ NMSA, ch. 76, sec. 1433.

a person might be fined or imprisoned under the general penalty provision.⁷⁴ Failure of many small business concerns to keep adequate records presents one of the difficult problems of sales tax collection in New Mexico.

Natural resource reports. Any person extracting natural resources must report the amount of resources produced, royalties and "similar interest", and the tax due. The bureau of revenue also may require the purchaser to file a report of the amount of natural resource products purchased and to pay the tax on it. However, if a purchaser pays any such tax, he may deduct the sum from the amount due the owner.⁷⁵

Dissolution. Before a corporation can dissolve or withdraw from the state, a written notice must be secured from the bureau of revenue stating that all taxes levied under this act have been paid. If any business is sold, a return must be filed within 30 days after sale and a certificate secured from the former owner showing taxes have been paid. If the taxes remain unpaid after this period, the purchaser is personally liable for the amount due; but he may withhold from the purchase money an amount adequate to meet the taxes until the former owner produces a certifi-

⁷⁴ NMSA, ch. 76, sec. 1440, Infra, p. 43.

⁷⁵ NMSA, ch. 76, sec. 1404.

date showing that sales tax has been paid.⁷⁶

Bankruptcy. When a business is placed in receivership or bankruptcy and if any sales tax remains unpaid, the bureau of revenue has a preferred claim against the property except over the amount of ad valorem property taxes due. Whoever sells such property must first ascertain from the bureau of revenue whether all sales taxes have been paid.⁷⁷

Security sales. Whenever the bureau of revenue deems it necessary to insure compliance with the provisions of the sales tax act, a security deposit may be required from the taxpayer. This deposit may be sold at a public sale to recover any tax, penalty, or interest due.⁷⁸

Impact

While the problem of whether the vender or the purchaser ultimately pays the sales tax is not considered here, the impact of the tax rests upon the seller or producer for he is responsible for paying the tax to the

⁷⁶ NMSA, ch. 76, sec. 1432 and 1438.

⁷⁷ NMSA, ch. 76, sec. 1432.

⁷⁸ NMSA, ch. 76, sec. 1421. Notice of the public sale is to be published in a Santa Fe newspaper once a week for two consecutive weeks. Notice is to be served personally or mailed to the person concerned. If there is any surplus over the amount due, the cost of the advertisement, and the cost of the sale, it will be returned to the person making the security deposit.

state. It might be said that the dealer is an agent of the state in collecting the tax; however, retailers are cautioned against claiming this as the tax is levied against the privilege of doing business in the state.⁷⁹

Absorbing the tax. Apparently, the seller has choice of shifting the tax or absorbing it himself. While the act specifically warns the taxpayer from directly advertising that the tax is not considered as an element of the price, the attorney general has ruled that this section "does not require that the tax be passed on directly or as a part of the price of the property sold. It merely prohibits advertising, that it is not passed on as a part of the price of the article sold."⁸⁰

Tax tokens. While the bracket system is used extensively throughout the state in determining the amount of tax

⁷⁹ Rules, p. 29.

The state supreme court has declared that the act was not unconstitutional because it required the seller to collect the tax as the tax is against the seller. State ex rel. Attorney General v. Tittmann, 42 N.M. 76, pp. 82-83 (1938).

⁸⁰ Report of the Attorney General, 1945-46, p. 233. In the Report of the Attorney General, 1933-34, pp. 129-130, the attorney general wrote: "As I interpret Section 204, S. B. No. 15, passed by the special session of the 11th legislature it does not prohibit any person from absorbing the 2% tax but merely prohibits any person from offering to absorb the tax 'by any character of public advertisement' or from advertising that such tax 'is not considered as an element of the price of property or services.'"

due on retail sales, tokens in one and five mill denominations also are available for this purpose. These tokens are particularly suited for use in transactions where the sales are in small amounts. Although formerly there was opposition to the bracket system it has proven itself satisfactory; and the plan in practiced, although not endorsed.⁸¹ The bracket system is used more extensively in the state than tax tokens.

Administrative Hearings

Audit. Any authorized agent of the bureau of revenue may examine the records and books of a business

⁸¹ Rules, p. 29. The bureau is authorized to promulgate the necessary rules for token distribution. Tokens are sold without discounts, commissions, or fees of any kind and are to be accepted by any business as payment of the school tax. Counterfeiting is classed as a misdemeanor punishable by a fine of not less than \$100 or more than \$500. NMSA, ch. 76, sec. 1407.

The bracket system provides a chart whereby sales of certain amounts are assessed a fixed amount of tax. No tax less than one cent is charged. The amount of the tax is based upon the bracket or the predetermined range of prices within which the amount of purchase falls. Thus, sales less than \$.25 are not taxed; sales from \$.25 to \$.75 are taxed one cent; sales from \$.75 to \$1.00, two cents; etc. This method theoretically offers the consumer the opportunity to pay approximately the correct tax upon the aggregate of purchases. The purchaser may pay more than the tax on one sale, but on other sales he will pay less. When the bracket system is used, there is no need for tokens. It seems that the law requires all merchants to accept tokens when offered for payment of the tax.

subject to the tax to establish tax liability or to verify accuracy of returns. When the audit has been approved, records may not be re-audited after eighteen months unless the time is expressly extended by the bureau.⁸²

Investigations. The commissioner of the bureau of revenue or the director of the sales tax division may require a taxpayer to produce records pertaining to sales tax liability or to require attendance of any person for the purpose of taking testimony relating to the emergency school tax. The above officials are empowered to administer oaths for this purpose. These investigations are not bound by any technical rules of evidence. "No informality in any proceeding, or the manner of taking testimony shall invalidate any order, decision, rule or regulation made, confirmed or approved...."⁸³

If an individual refuses to attend these hearings, to testify, or to produce documents on "matters regarding which he may be lawfully interrogated", any state district court, on the application of the bureau, may compel the individual to comply with the above requests. The district court also is authorized to punish for contempt.⁸⁴

⁸² NMSA, ch. 76, sec. 1434.

⁸³ Ibid. See 149 A.L.R. 312-314 for "constitutionality of statute which provides for summary entry of judgment upon certificate of finding by taxing body or offices."

⁸⁴ Ibid. The person is punished for contempt of a court order and not by reason of the act.

Petitions. After a notice of action has been received a taxpayer may petition the bureau of revenue within 30 days for a reconsideration of the ruling. The petition must state reasons for granting rehearing and the amount the tax is to be reduced. The bureau is authorized to deny or grant such a hearing and, if granted, to establish just and lawful rulings.⁸⁵ Thus the power to review the decision is given to those officials who originally established the ruling.⁸⁶

Protest payment. The taxpayer, if he is dissatisfied with the rulings of the bureau may contest the action of the bureau by paying the tax under protest and then suing within a four month period for recovery of protested payment.⁸⁷

Sufficient power seems to be granted to the bureau to conduct investigations and hearings. But are there adequate safeguards to protect the interests of the taxpayers? The question to be raised is whether under every

⁸⁵ NMSA, ch. 76, sec. 1427.

⁸⁶ The American Law Review stated: "In reply to the objection of invalid delegation of judicial authority, courts have sustained the intrusting to public boards and officers of administrative functions essential to practical enforcement of sales tax laws, where such functions have been circumscribed by intelligible definitive limitations and subject to appropriate review." 128 A.L.R. 906. *Italics added.* Also see American Jurisprudence, op. cit., XLVII, 213-214, 243-244, and 244 fn.

⁸⁷ NMSA, ch. 76, sec. 1431

possible eventuality the legal remedy offered to the aggrieved individual (making protested payment and suing for its recovery) is adequate to protect constitutional rights. The state supreme court has ruled upon this question.

In Lougee v. New Mexico Bureau of Revenue Commissioner the supreme court contended that:

While the Legislature cannot deprive the district court of its power to issue injunctions in proper cases, a litigant has no vested right in such remedy; and its use may be limited by the Legislature, if litigants are supplied with means of redress by some effective procedure, ordinarily held to be a plain, speedy, and adequate remedy at law.⁸⁸

However, the collection of taxes may be interfered with by an injunction where exceptional circumstances bring the case within some acknowledged head of equity jurisprudence.⁸⁹ An adequate, speedy method (not always through court procedure) must be provided in every case to the taxpayer for redress against an action of the bureau of revenue.

In a later case the court held that "the remedy afforded by the New Mexico statute is adequate for the

⁸⁸ 42 N.M. 115, pp. 130-131 (1938).

⁸⁹ Ibid. The exceptional circumstances found in this case was the stipulation in the existing sales tax law requiring filing of a multiplicity of suits to protect a single right. Therefore the appellant could report to court of equity for relief.

This principal was upheld by the United States District Court of New Mexico in Whitmore v. Bureau of Revenue of State of New Mexico, reported in New Mexico Tax Service, op. cit., pp. 6826-6830.

correction of taxes erroneously or illegally assessed, where the constitutionality of the act is not brought in question." Thus, in controversies regarding correct amount of tax assessment, the court held that an adequate and speedy remedy is provided by the act.⁹⁰ But when unusual circumstances arise, collection of the taxes could be checked by injunctions.

Penalties

Tax Penalty. To make possible effective tax collection, the tax statute authorizes adequate penalties for violations of the laws. The New Mexico act provides separate penalties for failure to make a return and for unsatisfactory returns. In the first case a 50 per cent penalty is added to the computed tax, which sum is charged with an interest rate of 1 per cent per month. In the latter case, where the return is unsatisfactory, a 50 per cent penalty with interest is added to the computed amount if the deficiency is due to intent to evade the tax; and 10 per cent, if the deficiency is due to negligence. If a

⁹⁰ State v. Tittmann, 42 N.M. 76, pp. 85-86 (1938). With reference to the section under which the state would grant hearings for reconsideration of tax assessments, the court stated that "the taxpayer under this statute is not given a right to be heard." Whether he may be heard is left to the wisdom, caprice, or arbitrary act of the tax commission bureau of revenue. The right should be absolute, and therefore does not afford due process of law to the taxpayer." (p. 84). But the court further pointed out that another remedy was provided by permitting taxpayers to sue the bureau of revenue for recovery of protested tax payments.

remittance is not included with the return, the taxpayer is subject to a penalty of 10 per cent plus interest for each month of delay.⁹¹

Restraint from continuing in business. The tax is a personal debt to the state and may be collected by any action in the district court instituted by the attorney general or any district attorney. And by proper procedures instituted by the attorney general or any district attorney, a person can be restrained from continuing in business until the tax is paid.⁹²

Distrain procedure. If the tax remains unpaid for 30 days the commissioner of revenue may attach a lien to the property of the delinquent taxpayer. This lien is superior to all subsequent liens except those for ad valorem taxes. After the lien has been recorded, the sheriff of the county may be directed to sell the property of the debtor for payment of the tax, penalty, and interest.⁹³

General penalties. Any violation of the act including refusal to make returns, refusal to provide proper

⁹¹ NMSA, ch. 76, sec. 1422, 1424, 1425, and 1426. Within five days after service of notice of assessment to the taxpayer, the tax with penalty and interest is due.

⁹² NMSA, ch. 76, sec. 1429 and 1430.

⁹³ NMSA, ch. 76, sec. 1431.

The attorney general ruled that "a Bureau of Revenue claim becomes operative when filed and subordinate to prior recorded lien instruments as far as real property is concerned." Report of Attorney General, 1939-40, p. 43.

information, making fraudulent returns, or refusal to permit lawful examinations of the records may be punished by a maximum fine of \$500 or maximum imprisonment of three months or both. Making a fraudulent return with the purpose to evade the tax is deemed perjury and punishable by imprisonment in the state penitentiary for a term of two to five years.⁹⁴

Constitutional penalties. If a public officer makes a profit out of public monies or uses such for unauthorized purposes, he is guilty of a felony and disqualified from public office.⁹⁵

Divulging returns. Except on judicial order, information from returns cannot be revealed. This does not prevent inspection of the returns by the legal representatives of the state or publishing of anonymous statistics. Violations of this provision are punishable by fine and imprisonment and disqualification from public office for five years.⁹⁶

Funds

The sales tax money is earmarked for educational

⁹⁴ NMSA, ch. 76, sec. 1429 and 1440. Corporations making fraudulent returns are punishable by a fine of not more than \$5,000.

⁹⁵ Constitution of New Mexico, art. 8, sec. 4.

⁹⁶ NMSA, ch. 76, sec. 1437.

purposes except for any surplus remaining in the administration fund.⁹⁷ The sums, including license fees, collected under the authority of this statute are deposited in the emergency school fund. The state treasurer transfers 3 per cent of this sum to the teacher retirement fund.⁹⁸ From the emergency school fund \$12,000 is appropriated annually for a suspense fund, out of which is refunded all protested tax payments with penalty and interest.⁹⁹ At the end of the month all sums remaining in the emergency school fund are transferred into the public school equalization fund by the state treasurer.¹⁰⁰

⁹⁷ NMSA, 1945 Supplement, ch. 7, sec. 125. This surplus will be transferred to the state general fund.

⁹⁸ NMSA, 1945 Supplement, ch. 55, 1119. "The state treasurer shall transfer to a special fund to be known as the Teacher Retirement Fund: Three (3) per cent of the emergency school tax; three (3) per cent of the schools' part of the state income tax; three (3) per cent of the schools' part of the receipts from the mineral leasing act; and an amount equal to three (3) per cent of said institutions and the state board for vocational education payrolls to their regular full time employees...."

⁹⁹ NMSA, ch. 76, sec. 1444. Any surplus in this fund will be covered into the emergency school suspense fund.

¹⁰⁰ NMSA, ch. 76, sec. 1445 and ch. 55, sec. 632.

PART III

SUMMARY OF THE PROVISIONS OF THE COMPENSATING TAX LAW

The use or compensating tax was not much used in the United States before 1920, and the first American general use tax was not enacted until 1935. Prior to 1935 the use tax had been levied on only a few commodities such as gasoline.¹ Now, a use tax usually applies to all retail sales.

While the New Mexico sales tax had been successful in raising revenue for its stated purpose, certain of its disadvantages necessitated the passage of a supplementary tax based upon another taxing principle. These disadvantages were: first, interstate commerce sales were not subject to sales taxation; second, the sales tax increased the cost of commodities by the amount of the tax, thus placing local business concerns at a competitive disadvantage with retail sellers in neighboring nontaxing states. This situation made probable the loss of business to merchants across the state line; and, for this reason, the state legislature enacted the New Mexico compensating

¹ Maurice Griz, The Use Tax (Chicago: Public Administration Service, 1941), p. 9.

tax act in 1939.² The primary purpose of the law is to protect New Mexico merchants from the unfair competition of tax-exempt retailers shipping goods into the state³-- to equalize competitive conditions between intrastate and interstate merchants.

It was expected that with the increase of the stock inventory of local merchants that the revenue from this source would decrease; however, such has not yet been the case. In fact while protection is the outstanding feature of the statute, the amount of revenue secured from the tax has not been negligible. (Infra Table I, p. 84).

The complementary and supplementary features of the compensating tax to the sales tax will be described in the following pages. No attempt will be made to enumerate administrative provisions identical or similar to those of the sales tax.

Rate

Upon the privilege of storage, use, or consumption of all personal tangible property within the state there is

² State of New Mexico, Report of Bureau of Revenue for the Biennium, July 1, 1944, to June 30, 1946, p. 5.

³ New Mexico Statutes 1941 Annotated, ch. 76, sec. 1501. (Hereafter abbreviated as NMSA).

levied a 2 per cent excise tax computed upon the sale price of such property. The person using, storing, or consuming the article is liable for the tax and may pay it to the state or to a retailer recognized by the bureau of revenue.⁴

Exemptions

Since the purpose of the compensating statute is to tax out-of-state purchases by residents, exemption is extended to those articles upon which an equal or greater use or sales tax already has been paid and to most of the transactions exempt in the sales tax act.⁵ Any property which is

⁴ NMSA, ch. 76, sec. 1503. Automobiles, trucks, and tractors are taxed only 1 per cent with deductions allowed for trade-ins.

"Storage" is defined as "any keeping or retention in this state for any purpose except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased from a retailer."

"Use" means "the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business."

A "retailer" includes all persons making sales for storage, use, or consumption; and the term may include salesmen, representatives, peddlers, or canvassers.

The above definitions are given in NMSA, ch. 76, sec. 1502.

⁵ NMSA, ch. 76, sec. 1504. This includes sales exempt by constitutional provisions, sales made to state and federal governments, sale of products of New Mexico farms and livestock when made by producer, sale of gasoline already taxed, sale of newsprint, and other sales.

subject to the New Mexico sales tax act is not taxed.⁶ Also exempted from compensating taxation are: electricity, gas, or fuel consumed in manufacturing; articles becoming a component part of a manufactured product; railroad locomotives, tenders and cars, railroad bridge materials, and rails; and certain chemicals used by mining, milling, or oil companies for processing ores or oil.⁷

Collection

One of the most perplexing problems in the administration of the tax is its collection. Without authority to compel retailers (supra p.48fn.) maintaining a place of business in the state to collect the tax, it would be impossible to administer the statute effectively. Securing all collections only from the purchasers would be unprofitable as the administrative costs probably would

If a tax less than 2 per cent is paid in another state, the difference between this tax and 2 per cent is paid to the bureau of revenue. New Mexico Tax Service (Chicago: Commerce Clearing House, Inc., 1944), p. 6733.

⁶ Bureau of Revenue, Rules and Regulations, New Mexico School Tax Laws, New Mexico Compensating Tax Act (Santa Fe: July, 1945), p.41. In other words sales made in New Mexico may be taxed under the compensating tax if they are not taxed under the sales tax statute.

⁷ NMSA, ch. 76, sec. 1504.

exceed the revenue so obtained.

The law partially meets this need by requiring every retailer selling property for storage, use, or consumption to register with the bureau of revenue, listing all agents operating in the state and all places of business in the state. These registered retailers then are required to collect the tax and give the purchaser a receipt.⁸

When the seller is not registered with the bureau, the person purchasing taxable property is required to file a return.⁹

To prevent evasion of the act all sales sold for delivery in the state are presumed to be sold for storage, use, or consumption unless a certificate or other suitable evidence is obtained from licensed retailers or wholesalers stating that the property will be resold.¹⁰

The constitutionality of requiring these foreign state corporations to collect the compensating tax on sales delivered into the state is of vital importance to the tax administrator. At first retailers who did not maintain a retail outlet in the state were considered as existing outside the state's taxing jurisdiction. But decisions of

⁸ NMSA, ch. 76, sec. 1505-1507. Returns are due by the twenty-fifth of each month.

⁹ NMSA, ch. 76, sec. 1506-1507.

¹⁰ NMSA, ch. 76, sec. 1507.

the United States Supreme Court extended the types of business that could be considered as maintaining a place of business in the state. In 1939 the supreme court held that a corporation with agents and offices in the state was maintaining a place of business in the state and could be constitutionally required to collect a use tax upon its sales.¹¹ In later cases attempts of a state to require a corporation maintaining retail outlets in the state to collect a tax on sales made by branches of the corporation located outside of the state were upheld.¹² The supreme court in 1944 held that a corporation not qualified to do business in the taxing state but soliciting orders by salesmen in the taxing state also could be required to

¹¹ Felt & Tarrant Co. v. Gallagher, 306 U.S. 62 (1939). An Illinois corporation solicited orders for its products in California through agents for whom offices were maintained in the state. Orders taken were subject to approval of the home office. The court held that such a corporation could be required to collect the use tax.

¹² In Nelson v. Sears, Roebuck, and Co., 312 U.S. 359 (1941) and Nelson v. Montgomery Ward, 312 U.S. 373 (1941), the court held that a corporation maintaining retail stores in Iowa may constitutionally be required to collect the tax on mail order sales to Iowa purchasers by its out-of-state branches. These orders were filled by direct shipment by mail and were not solicited or placed by one of the corporation agents in Iowa.

The court held that "the fact that under Iowa law the sale is made outside of the state does not mean that the power of Iowa 'has nothing on which to operate.' ...The purchaser is in Iowa and the tax is upon use in Iowa. The validity of such a tax, so far as the purchaser is concerned, 'has been withdrawn from the area of debate.'" 312 U.S. 363. Furthermore, if the corporation refused to collect the tax, the state could revoke its business permit.

collect the tax upon the sale of its products.¹³ By these decisions the power of a state to enforce use tax collections has been extended almost to the point where, as Justice Jackson observed in a dissenting opinion, anyone shipping to a state can be made a nonresident tax collector.¹⁴ However, this extreme is not yet the case.

Legality

The courts usually have upheld a nondiscriminatory tax upon the storage, use, or consumption of personal tangible property as not unconstitutionally burdening interstate commerce. The taxable moment is reached when the

¹³ General Trading Co. v. Tax Commission, 322 U.S. 335 (1944). The court held valid a requirement that a non-resident Minnesota corporation collect tax on sale of property made by its solicitors in Iowa even though no place of business was maintained in the state and orders were subject to the approval of the Minnesota office.

The court stated that "...the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which he may draw from a State to the upkeep of which he may be asked to bear his fair share. But a fair share precludes legislation obviously hostile or practically discriminatory towards interstate commerce." 322 U.S. 338.

¹⁴ Ibid. p. 340. It is doubtful if the New Mexico statute authorizes the state to compel the corporation to collect the tax in such extreme cases.

property is momentarily or permanently at rest in the state and no longer part of interstate commerce. It is held that the privilege of use is only one of the many attributes of personal property that the state may tax.¹⁵

In Monamoter Oil Co. v. Johnson the constitutionality of a use tax upon the sale of gasoline was upheld as not taxing interstate commerce but taxing the use of motor fuel after it had come to rest in the state.¹⁶ The supreme court ruled in another case that "the tax is not upon the operation of interstate commerce, but upon the privilege of use after commerce is at an end." The use tax was constitutional as long as "equality" was its theme.¹⁷ However, frequently debated are the rulings determining whether an article is no longer part of interstate commerce.

Administration of The Compensating Tax Act

Administrative provisions empowering the bureau of revenue to enforce the compensating tax law are similar to those granted it to enforce the sales tax act. The power

¹⁵ 129 A.L.R. 224, 225. Also see American Jurisprudence, (San Francisco: Bancroft-Whitney Company, 1943), XLVII, 251-252, and 153 A.L.R. 610. For cases where the use tax was held violating the commerce clause, see 153 A.L.R. 613-615.

¹⁶ 290 U.S. 86 (1934).

¹⁷ Henneford v. Silas Mason Co., 300 U.S. 577, p. 582 (1937).

to administer the act is vested in the bureau of revenue. The commissioner is authorized to employ needed personnel and fix their compensation within the limits of the appropriation act.¹⁸

Security deposits may be required to ensure payment of taxes. Delinquent taxes may be collected by suit in a district court or by distraint procedures.¹⁹

The statute requires the taxpayer to preserve suitable records necessary to determine the tax amount; and these may be audited by the bureau. The commissioner of the bureau of revenue or the director of the compensating tax division may require investigations and hearings in matters relating to the compensating tax. Technical rules of evidence or procedure need not be followed at these hearings, and contempt of hearings may be punished by a district court. The taxpayer may petition the bureau for a reconsideration of rulings, and the petition may be granted or denied by that body. While the tax collection cannot be enjoined, the aggrieved individual after making protested payment may bring action in the district court of Santa Fe County to recover protested payment. However, failure to bring suit before the courts within four months is considered a waiver

¹⁸ NMSA, ch. 76, sec. 1526 and 1528.

¹⁹ NMSA, ch. 76, sec. 1517-1519 and 1509.

of the protest.²⁰

Penalties provided for failure to make a return, for unsatisfactory returns, and for perjury are similar to those listed in the sales tax law. Any violation of the act may be punished by a maximum fine of \$500 or by imprisonment for not more than three months or by both.²¹

Funds

All taxes, penalties, and interest, except sums paid under protest, collected under the authority of the compensating tax act are placed by the state treasurer in the compensating tax receipts fund. Annually appropriated from this fund is \$3,000 which with the protested payments is deposited in the compensating tax suspense fund. All refunds to the taxpayer are paid from the suspense fund. Sums remaining in this fund after protested payment refund has been denied are placed in the compensating tax receipts fund.²²

For administrative expenses of the bureau in col-

²⁰ NMSA, ch. 76, sec. 1515, 1516, 1518, 1520, and 1521.

²¹ NMSA, ch. 76, sec. 1510, 1512, 1513, 1514, 1524, and 1525.

²² NMSA, ch. 76, sec. 1527 and 1529.

lecting the compensating tax 10 per cent, or as much thereof as is needed, is appropriated from the compensating tax receipt fund.²³ Any surplus remaining in this administrative fund at the end of the fiscal year may be transferred to the state general fund.²⁴

At the end of each month the state treasurer transfers all sums remaining in the compensating tax receipts fund to the state social security fund.²⁵

23 NMSA, ch. 76, sec. 1528.

24 NMSA 1945 Supplement, ch. 7, sec. 125.

25 NMSA, ch. 76, sec. 1530.

PART IV

ADMINISTRATIVE ORGANIZATION

The compensating tax division and the sales tax division comprise only a part of the state financial structure; therefore, before the administrative organization of these fragments can be adequately described, a summary of the structural organization of the bureau of revenue with existing fiscal, personnel, and policy controls must be presented.

Bureau of Revenue

Bureau of revenue. The compensating and sales tax divisions are two of the several tax collecting agencies grouped under the supervision of the bureau of revenue, which is now the largest single revenue collecting administrative unit in the state. In 1935 the state legislature created the bureau to supervise the collecting of revenue from relief and welfare taxes. It was thought that greater efficiency and economy in administration would result from centralizing the collection of these taxes¹ under a single administrator. Vested in the bureau were certain

¹ "Bureau of Revenue," New Mexico Tax Bulletin, 20:113-114, August, 1941.

tax collecting powers and duties formerly delegated to the state tax commission, state comptroller, and state treasurer.²

Commissioner of revenue. The control and direction of the bureau are placed under the supervision of a commissioner of revenue, who is appointed for a two year term by the governor with the advise and consent of the state senate. The commissioner employs such personnel as needed, fixing their compensation within the limits of the appropriations act and within the provisions of any salary classification plan fixed by law. However, no personnel can be appointed or their compensation fixed without the approval of the governor.³ The duties of the commissioner include appointing division directors, adjusting differences between the taxpayer and the divisions, and acting as the final authority on all matters of policy.⁴ His salary is fixed by the governor and the state board of finance, and he is required to post a \$50,000 bond.⁵

² NMSA, ch. 76, sec. 1101, and NMSA 1945 Supplement, ch. 76, sec. 1101. The law requires that the bureau's offices be maintained in the capitol building. NMSA, ch. 76, sec. 1106.

³ NMSA, ch. 76, sec. 1103.

⁴ New Mexico Blue Book for the Years 1945-46 (Santa Fe: Quality Press), p. 138.

⁵ NMSA, ch. 76, sec. 1103 and 1107. The commissioner must be a citizen of the United States and a legal resident of the state. Constitution of New Mexico, art. 7, sec. 2.

In the final analysis, however, the responsibility for proper administration of the bureau rests upon the governor, for he entrusted with the supreme executive power of the state and is empowered to remove any appointive official for incompetency, neglect of duty, or malfeasance.⁶

Fiscal control. Legislative control of the bureau of revenue originates from the legislature's power to create, destroy, or modify the authority and duties of the bureau. Policies of the bureau also are directed through the appropriation act and biennial budget.⁷

Executive control of the activities of the bureau of revenue is exercised through the annual budget; for before any state department can make expenditures for the fiscal year, its budget must be approved by the state board of finance. And all actions of the state board of finance are subject to review and modification by the governor. The state board of finance also is given supervision and control of the budgets of all state offices and general supervision of the fiscal affairs of the state.⁸

⁶ Constitution of New Mexico, art. 5, sec. 4 and 5 and art. 20, sec. 5.

⁷ For an example of appropriation control see the General Appropriation Act of 1945, NMSA 1945 Supplement, ch. 7, art. 6, sec. 5.

⁸ NMSA 1945 Supplement, ch. 7, sec. 401.

The state comptroller, although not a member of the board of finance, is the executive officer of that board⁹ and under the direction of the board has general supervision of the fiscal affairs of the state.

The state auditor pre-audits and authorizes all expenditures of the state departments. He also brings suit against all public officers who fail to collect or pay public money into the state treasury.¹⁰

The relation of the auditor and comptroller has been aptly described by one author as follows:

With the fixing of the budgets, the state auditor and state comptroller become the agents of control. The auditor, by pre-auditing or approving all warrants ..., keeps expenditures within appropriations and, according to law, sees that no fund is more than half spent and encumbered before the end of six months. The comptroller makes annual post-audits of all state agencies... and requires cumulative quarterly reports of their revenues and expenditures throughout the fiscal year. The comptroller becomes, therefore, the state auditor in the accepted sense of the word, and the auditor merely approves disbursements from the treasury.¹¹

⁹ NMSA, ch. 7, sec. 103 and 118. Duties of the comptroller include power to examine all financial affairs of every state bureau, board, and commission (NMSA, ch. 7, sec. 109); power to approve any and all contracts for auditing entered into between any officer of the state and private accountant (NMSA, ch. 7, sec. 120); and power to formulate and prescribe and install a system of accounting and reporting (NMSA, ch. 7, sec. 104).

¹⁰ NMSA, ch. 3, sec. 202 and 220.

¹¹ William J. Parish, The New Mexico State Budget System (Albuquerque; The University of New Mexico Press, 1946), p. 14.

Divisions. There are eleven tax collecting divisions of the bureau of revenue. These are: the school tax division, gasoline tax division, motor vehicle division, liquor control division, severance tax division, income tax division, luxury tax division, compensating tax division, succession tax division, driver's license division, and motor transportation division.¹² If the number of employees on the payroll can be considered as indicative of a division's importance and size, the school or sales tax division ranks first; and the compensating tax division, seventh.¹³

¹² New Mexico Bureau of Revenue Tax Bulletin, 1:9, April, 1947, p. 2. Funds from the divisions are distributed as follows: compensating tax--state welfare department fund; driver's license--state safety fund, municipalities, and New Mexico state police fund; gasoline tax--state road fund; income tax--school equalization fund, general indebtedness fund, and current general fund; liquor control--public welfare department fund; luxury (tobacco) tax--department of public welfare for old age assistance; motor transportation--state road fund; motor vehicle--county road fund, county levies fund, state road fund, and general fund; school tax--state school equalization fund; severance tax--department of state welfare fund, insane asylum fund, and state general fund; and succession tax--state general fund. New Mexico Blue Book for the Years 1945-1946, op. cit., pp. 137-142.

The luxury tax division was added in 1945. The legislature provided that, to promote economy, the same person directing the school tax division would direct this division. NMSA 1945 Supplement, ch. 76, sec. 1610.

¹³ "State Employees," New Mexico Tax Bulletin, 20:69, May, 1941. This conclusion is based upon the size of the 1941 payroll.

In 1945 the administration of these divisions was placed under the supervision of six directors. One of the directors administers four tax divisions--the school tax, the compensating tax, the luxury tax, and the severance tax.¹⁴ The commissioner and his agents are required by law to enforce the collection of the above taxes. Upon their request, state policemen are assigned to enforce specific provisions of any of the laws.¹⁵ The expenses of the commissioner of revenue are charged against the various funds according to the value and importance of the service performed.¹⁶

Compensating and Sales Tax Divisions

The administration of the sales tax and compensating tax is performed by the office and field forces of one organization. Procedures used to enforce both tax laws vary only slightly. The following description of the procedures of the organization is based on the premise that there are certain functions that must always be per-

¹⁴ State of New Mexico, Report of Bureau of Revenue for the Biennium July 1, 1944 to June 30, 1946, p. 4. See pp. 5-14 for a summary of the taxes these divisions enforce.

¹⁵ NMSA, ch. 76, sec. 1105 and ch. 40, sec. 217.

¹⁶ NMSA, ch. 76, sec. 1104. However, the Senate Bill Number 224 of the 18th Legislature of the State of New Mexico provides for the consolidating of all the administrative funds of the bureau of revenue into a single administrative fund out of which all expenses of the divisions of the bureau would be paid.

formed if the taxes are to be effectively collected. No attempt will be made to relate the exact details of an organizational structure or a flow-of-work plan.¹⁷

Personnel. No statutory basis exists for the selection of the personnel of the bureau of revenue. Within the limits of certain technical qualifications and demands, the choice of the personnel lies entirely within the discretion of the commissioner of the bureau. There are no legal provisions to prevent discriminatory discharging of employees. The personnel of the bureau, therefore, is exposed to political demands and forces of the moment; and if an opposing political party were elected to office, a complete turnover of the field and office forces would be possible. However, to assume that the tenure of office of every employee has been unstable is erroneous as several have been employed in the sales tax division for eleven or twelve years. In addition there has existed a trend toward a customary classification of personnel.¹⁸

¹⁷ The material for this discussion was obtained largely in interviews with members of the sales tax division, with a former commissioner of revenue, and the present commissioner of revenue. No position-classification plan is used by the bureau. The description of the duties of the personnel of the division was given by a member of the sales tax division and the former commissioner of revenue.

¹⁸ Interview with Mr. R. L. Ormsbee, former commissioner of revenue (Santa Fe, New Mexico, April 23, 1947). It was pointed out that the customary classification of the personnel depended upon the discretion of the administrator.

The duties and qualifications of the principal personnel are described in the following paragraphs on the basis of the type of work to be performed rather than upon the specific task of each position.

1.) At the top of the administrative heirarchy of the division is the director who supervises the efforts of his staff. The director with the approval of the commissioner of the bureau of revenue selects the personnel of the division. Although the commissioner seldom interferes with the operation of a division, he possesses the authority to overrule any action of the director.¹⁹

2.) The assistant to the director provides an information service for answering taxpayers' questions relating to the sales and compensating tax laws.²⁰

3.) There are two chief field auditors. One supervises the work of the field auditors; and the other audits the records of large state and out-of-state corporations. The later official must be a capable, highly qualified accountant.²¹

One of the classification systems was the grading of clerks into junior and senior categories.

¹⁹ Mr. R. L. Ormsbee, op. cit.

²⁰ Interview with Mr. Ernest Gilbert, Statistical Department, Assisting the Sales Tax Director (Santa Fe, New Mexico, April 23, 1947). The assistant director is also a member of the statistical department.

²¹ Mr. R. L. Ormsbee, op. cit. The chief field

4.) The successful enforcement of the tax laws depends upon the activities and efforts of the field auditors, for these officials execute the line functions of the divisions. They audit the taxpayer's records; verify the accuracy of returns; explain proper procedures; and clarify any questions concerning deductions, rates, and exemptions. All violations of the statutes are investigated by them.²²

5.) The finance officer is accountable for all receipts, financial reports, and deposits of the divisions. He directs payment of all administrative costs of the divisions.²³

6.) The office auditors check the accuracy of computations, deductions, and exemptions on returns.²⁴

7.) Independent auditors (accountants not included on state payrolls) have been contracted annually to audit the records of the divisions.²⁵

8.) The legal work of the department is performed by attorneys permanently assigned to the bureau of revenue.

auditor responsible for checking the records of large out-of-state corporations has also been called the general auditor or the operator-at-large.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

At times in the past lawyers were attached to the commissioner of revenue and then assigned to particular cases. Now (1947), the attorneys are apparently assigned to one division or director and are responsible for the legal work of only that organization.²⁶

9.) Each department--finance, addressograph, license, statistical, etc.-- of the office organization has a manager. The particular duties of these departments are described in a later section with department office procedures (infra., p. 67).²⁷

10.) Other employees of the sales tax and compensating tax divisions include clerks, secretaries, stenographers, assistants to department heads, mail carriers, cashiers, and janitors.²⁸

Administrative districts. To simplify the enforcement of the sales and compensating tax statutes, the state

²⁶ Mr. R. L. Ormsbee, op. cit., and Mr. Ernest Gilbert, op cit. The pooling of the attorneys under the commissioner and then assigning them to specific cases was an attempt to fully utilize their efforts. Under this plan no division could monopolize the time of any attorney without reason. The assigning of attorneys permanently to a division was a recognition that the legal work of certain divisions demanded lawyers specializing in one phase of tax law.

²⁷ Mr. Ernest Gilbert, op. cit.

²⁸ New Mexico State Budget Submitted to the Sixteenth State Legislature for the Biennium Ending June 30, 1945, p. 28 and p. 38. Also see Report of Officers, Employees and

is divided into thirteen administrative districts. Transportation facilities and the concentrations of population determine the location of the boundaries of each district. The area of these districts encompasses several counties. A district office is located in Albuquerque, where the volume of business as well as the nature of the business-- wholesale houses, jobbers, etc.--makes necessary the concentration of a large field force. Only one other district has more than one field auditor.²⁹

Office procedures for tax returns. All incoming mail is deposited in the addressograph department, where tax returns and remittances are separated from other mail and sent to the cashier of the finance department.³⁰ The finance department records the total amount of payments and

Agents of Each State Office, Institution, Board, Bureau, Commission or Other State Agency for the Period July 1, 1946, to December 31, 1946. While titles of the personnel for the various years could be secured from the above sources, without a position-classification plan, no exact duty statement could be secured for each position.

²⁹ Mr. Ernest Gilbert, op. cit. Each district encloses the approximate area of the following counties: District 1, Santa Fe, Rio Arriba, Taos, San Miguel, and Mora; District 2, Sandoval, Bernalillo, and Valencia; District 3, McKinley and San Juan; District 4, Colfax, Union, and Harding; District 5, Guadalupe and Quay; District 6, Sierra and Luna; District 7, Dona Ana and Otero; District 8, Chavez and Lincoln; District 9, De Baca, Roosevelt, and Curry; District 10, Eddy; District 11, Lea; District 12, Hidalgo and Grant; District 13, Socorro, Torrance, and Catron.

³⁰ Other duties of the addressograph departments include memographing material, sending out reports, etc.

checks the amount of remittance included with each return against the final computation of tax debt on the tax return. Then, in the validating department the amount of payment, the license number, and the date of the returns are recorded by receipt number. The returns are next sent to the posting department where the tax receipts are printed on a ledger card and a tape. The figures on this tape are compared with the payments received in the finance department.

In the auditing department the accuracy and legality of the computations and exemptions entered on tax returns are verified. Errors are frequently discovered, and debit or credit vouchers are mailed to taxpayers.

The statistical department then tabulates the tax revenue by county and by business classification. All returns are finally deposited in the filing department.³¹

This method of handling tax returns serves a dual purpose; first, a flow-of-work chart is provided whereby all returns can be verified and recorded with a minimum of effort and duplication; and second, administrative supervision of fiscal affairs is made possible. A record of the amount of revenue received can be checked through the reports of the financial department, posting department, or statistical department. Only through conspiracy of

³¹ Mr. Ernest Gilbert, op. cit. The office procedure was outlined by Mr. Gilbert.

individuals in these several departments could shortages in collection funds go undetected for any length of time.³²

License department. Since the license is the basis for determining tax liability, one of the most important organizations of the divisions is the license department. This organization maintains current records of all persons registered under the tax laws. Information is supplied by the filing department and the field men for checking applications for licenses, changes in business classification, suspension of licenses, discontinuance of business, and changes in location. Without the department's efforts to keep the field force informed of the current status of taxpayers, effective enforcement of the tax laws would be almost impossible.³³

Business Classification and Tax Forms

Business classification. The bureau of revenue classifies all business activity, subject to the tax, under 14 headings. Retail sales are grouped under six classifi-

³² Interview with Mr. Victor Salazar, Commissioner of Revenue (Santa Fe, New Mexico, April 23, 1947). Such a combination to misappropriate funds is difficult. There has been no shortages of funds caused by employees for a number of years.

³³ Mr. R. L. Ormsbee, op. cit. Mr. Ormsbee regards the license department as one of the most important in the division.

cations--apparel group, automotive group, subsistence group, furniture group, lumber and building material group, and other retail stores group. The remaining types of business activity are defined as: public utility and common carrier group; contracting group; professional and personal service group; amusement group; factors, agents, and brokers group; wholesale and jobbing group; natural resource group; and manufacturing, processing, and refining group. Each division is further divided into subclassifications identified by descriptive titles. The classifications with divisions, subheadings, and tax rates are printed on explanation sheets and distributed to taxpayers. By this system the sales tax division can determine the type of sales made by registered taxpayers; and, in addition, the simplicity of the form enables most businessmen to determine with a minimum of effort the tax rate on their single or several business pursuits. The classification system also reduces the variety of possible types of businesses that would arise if no method of classification existed. Thus, the classification form through its simplicity and brevity lessens the administrative work in collecting the taxes.³⁴

³⁴ See the reverse side of the Information Return for the business classification. Also see New Mexico Tax Service (Chicago: Commerce Clearing House, Inc., 1944). pp. 6567-6573, for samples of tax forms and information returns.

Licenses. The approximate location of a business can be determined through license numbers, for each license is identified by a county number and a serial number. The 31 counties of the state are numbered alphabetically, the number "thirty-two" denotes the businesses located outside of the state, and the number "thirty-three" identifies consolidated reports where the returns include tax computations for a number of business locations of a single firm.

Licenses are valid until suspended for infractions of regulations or changes in proprietorship, but they may be reinstated when suspensions are lifted or when a person previously registered re-enters business.³⁵

Sales tax forms. The tax form provides the customary method by which tax administrator and taxpayer communicate with each other. In most cases the information required for tax assessment or for registration of a business is entered upon a single form. This minimizes the number of exceptional or individual cases that the division handles, and it enables the division to establish one procedure for checking all returns. Simplicity and brevity characterize the information and tax return forms published by the sales tax

³⁵ Mr. Ernest Gilbert, op. cit.

division. In the following paragraphs a brief description of those forms most frequently used will be given.³⁶

1.) The "information return" is used to secure additional information for the continuance or correction of a license. The taxpayer is required to supply the name and location and classification number of his business, the type of ownership and the name of the owners or principal partners, the location of the books and records which the bureau of revenue may examine, and other information.

2.) The information required on the "application for license" form is similar to that required on the above form. A fee of \$1.00 must accompany this form.

3.) A "wholesaler's resale certificate" is provided for retail dealers, restaurant operators, wholesalers, jobbers, or manufacturers who purchase merchandise for resale. This certificate is used to secure exemption from the 2 per cent retail tax.

4.) The "sales tax return blank" requires only the minimum of information. The total gross income and any change in ownership of the business are entered upon the form. Space is provided for listing gross income received from different types of classified-business activity. The

³⁶ Colors are used to differentiate the various copies of each form and to distinguish compensating tax forms from sales tax forms.

tax rate is printed opposite each business classification. Grouped under 10 headings are the types of deductions which may be subtracted from the gross income. In the final column the amounts of the tax due on income secured from the various business activities are added to give the total tax.

5.) The oil and gas forms for reporting the severance tax and the school tax are consolidated into a "producer's monthly report" form for the convenience of the taxpayer. Space is provided for either the producer or the purchaser to pay the tax. This form requires more information than any of the returns described above.³⁷

6.) A "location schedule for consolidated returns" is furnished to those taxpayers who have more than one business outlet and desire to report their entire gross receipts on a single form.

7.) Other forms are provided for monthly reports of crude oil and gas transportation, sales of refined oil products to the public, and other special business pursuits.

Compensating tax forms. Forms used by the compensating tax division are similar to those used by the sales tax division; but since the compensating tax is levied upon the use, storage, or consumption of tangible personal

³⁷ New Mexico Bureau of Revenue, "Producer's Monthly Report," instructions.

property, a somewhat different type of information is required.

1.) The "application for certificate of registration" is similar to an application for a sales tax license. However, the applicant is required to list the address of his home office; the location of all distribution or sales houses, offices, and business outlets in the state; and the name and address of all agents and salesmen operating within the state. The applicant also is requested to state whether he will buy or/and sell personal tangible property in the state. The classification of business and trades are identical with sales tax business classification; but the compensating tax rate upon almost all business sales is 2 per cent, and no registration fee is required.

2.) A "wholesaler's resale certificate" and a "location schedule for consolidated returns" are also provided for those registered under the compensating tax statute.

3.) Separate compensating tax report forms are provided: (a) for registered taxpayers both selling and purchasing tangible personal property for use, storage, or consumption; (b) for operating consumers primarily purchasing petroleum and allied products; (c) for vendors primarily selling petroleum and allied products, and (d) for individuals purchasing tangible personal property from unregistered

vendors.³⁸

Publications

In general. The success of enforcing any law depends in part upon the information channels existing between the enforcing agency and the public. Publications furnish only one of the means through which the governing body can keep the taxpayer informed of regulations, interpretations, and common problems. The bureau of revenue publishes several reports, bulletins, and pamphlets that are available to the taxpayer. Copies of the sales tax and compensating tax statutes and rules and regulations interpreting the laws are printed periodically and distributed to taxpayers.

Report of the Bureau of Revenue. The bureau of revenue issues a biennial report listing revenue trends and amounts and costs of tax collections. A brief explanation is given of the purposes of each division in the bureau.³⁹

Tax bulletin. Each month there is published the New Mexico Bureau of Revenue Tax Bulletin, in which is printed articles on recent interpretations or changes in the tax

³⁸ For "b" and "c" see New Mexico Tax Service, op. cit., p. 6742. Under "d" the "business concerns making purchases subject to Use Tax need not itemize their purchases above on the form", since their books and records must be kept available to auditors of the School and Compensating Tax Division of the Bureau of Revenue."

³⁹ State of New Mexico, Report of Bureau of Revenue

laws and a monthly tax calendar. Tables of the total tax collection of each county and each business classification are also included in this bulletin.

Investigations

Audits. Theoretically, the books and records of every business subject to the tax laws are to be audited at frequent intervals; however, the small size of the field force prevents the frequent checking of all accounts. Therefore, those business concerns that are known to keep complete records and books and to file accurate returns are checked only occasionally. But the records of taxpayers who illustrate ignorance of the law or who attempt to evade the law are audited at frequent intervals.⁴⁰

Inadequate records. Retail stores keeping inadequate records of sale and purchase transactions present the type of business with which field auditors have the greatest difficulty in determining the tax debt due. Many businesses of this kind exist in the state of New Mexico. The procedure in such cases is to require wholesalers to produce records of purchases made by the tax violator and then to

for the Biennium, July 1, 1944 to June 30, 1946.

⁴⁰ Mr. R. L. Ormsbee, op. cit.

take an inventory of the present stock, estimating what existed previous to the period of tax liability. On the basis of this information an estimate is made of the amount of the wholesale price of the goods sold. Then a certain percentage is added to this wholesale price in order to determine the total retail gross receipts. The taxpayer usually contests the amount of the percentage markup, but the field auditor sends the pertinent data to the director, who sets a date for a hearing. If the settlement is not agreeable to the taxpayer, he can pay under protest and bring suit against the bureau.⁴¹

Green cards. When the tax period ends, clerks in the sales tax division check the ledger cards of taxpayers and list on "green cards" the accounts of delinquent taxpayers. These cards are sent to the field auditors who contact the delinquent individuals and investigate their records.⁴²

Field auditor's report. A "field auditor's report" form is filled out wherever an audit is made. Such questions as the following must be answered: "Was audit made of taxpayer's books?", "Did you reconcile books with bank account or some other proof showing they were in balance?", "Was gross income estimated?", and "Did you check carefully any deductions to ascertain if allowable?" Answers to

⁴¹ Mr. R. L. Ormsbee, op. cit.

⁴² Mr. Ernest Gilbert, op. cit.

these questions give the division director an idea of how thorough was the investigation.⁴³

Agreements. Subject to the approval of the commissioner, the field auditor may obtain a certificate of indebtedness from delinquent taxpayers. This agreement permits the paying of delinquent taxes by installments.

Coercive Methods of Enforcement

Distrain procedures. Before the bureau of revenue can initiate collection procedures by distraint, a notice of assessment must be sent to the delinquent taxpayer. There are two types of assessment forms: one, "delinquent form A," is used when the taxpayer has failed to file a return; and the other, "delinquent form B," is used when the return does not disclose the true amount of the tax due. Accompanying these notices are form letters disclosing the reasons for the action of the tax division and a form with which the individual can petition the commissioner for a reconsideration of assessment.

The tax with interest and penalty is due five days after the notice of assessment has been received; however, the thirty-day period during which the taxpayer can petition for a hearing begins with the date of mailing the notice.

⁴³ School Tax Division, "Field Auditor's Report", and Mr. Ernest Gilbert, op. cit.

If the taxpayer fails to take action on the notice of assessment, a notice of lien upon all personal and real property of the taxpayer is filed with the county clerk in the county wherein the taxpayer operates. After the notice of lien has been filed, the sheriff of the county can be directed to serve a distraint warrant upon the delinquent taxpayer. If the sheriff is unable to collect the amount due, he can seize and sell property in the manner of execution sales.⁴⁴

Court procedures. The above procedures refer to the collection of overdue taxes without resort to courts. The bureau of revenue may refer tax collections through the courts by suing the delinquent taxpayer and obtaining an attachment on his property, by securing a padlock order until the tax is paid, or by filing information, which, if sustained, would lead to fines and penalties.⁴⁵

Tax Collections

Sales tax. The sales tax collections are a barometer of the economic conditions of the state as fluctuations in

⁴⁴ Bureau of Revenue, Rules and Regulations, New Mexico School Tax Laws, New Mexico Compensating Tax Act. (Santa Fe, New Mexico, July, 1945), pp. 35-37. (Hereafter abbreviated as Rules.) Distraint warrants need not be filed with the local county clerk but should not be served until a notice of lien has been filed.

⁴⁵ Rules, p. 37.

the tax revenue indicate the rise and fall of business fortunes.⁴⁶ The school tax division collects 37 per cent of the total revenue collected by all divisions of the bureau⁴⁷ and has collected from 10 per cent to 20 per cent of the total state revenue from all sources. (Infra, Table I p. 84).

During the period from 1938 to 1946 about 73 to 80 per cent of the entire sales tax collections were derived from the tax upon retail sales and personal and professional services.⁴⁸

Since 1941 the revenue from this tax has increased about a million dollars yearly. The average percentage of increase is greater than the average increase registered.

⁴⁶ However, fluctuations in sales tax collections might well indicate the consistency with which field auditors investigate the records of taxpayers.

⁴⁷ Report of the Bureau of Revenue, op. cit., p. 12. Since no machinery has been authorized for the collection of the oil conservation tax, the school tax division also collects this tax. Mr. Victor Salazar, op. cit.

⁴⁸ This conclusion is based upon the average monthly percentage of total sales tax collected from sales made by the following business classifications: apparel group, automotive group, subsistence group, furniture group, lumber and building group, other retail stores group, public utility and common carrier group, amusement group, and professional and personal service group. The percentages by fiscal year, ending June 30th, are as follows:

1939	75.75%	1943	79.14%
1940	77.78	1944	79.03
1941	77.49	1945	79.73
1942	77.93	1946	82.53

This data was furnished by the Bureau of Business Research of the University of New Mexico on a chart, "New Mexico--Total Sales Tax Collections and Retail Sales Tax Collections."

in other sales tax states. The bureau of revenue believes that the increase of sales in New Mexico is not due entirely to a war boom and consequently will not deflate to the original level with peace.⁴⁹

The administrative costs for collecting the sales tax has varied from 1 per cent to over 4 per cent of the amount of collections. For the period between 1942 to 1946 the average cost of collection was about 3 per cent of the total receipts. During this period the amount of the administrative costs on a whole decreased while the collections increased about 88 per cent. (Infra, Tables I and II, pp. 84 and 85). While no data was secured to compare conclusively the administrative costs of sales tax collections of New Mexico with the administrative costs in other states, it is evident, nevertheless, that the efficiency in the administration of the sales tax law has increased.⁵⁰

The efficiency and economy with which a tax law is administered may be measured in part through the amount of

⁴⁹ Report of the Bureau of Revenue, op. cit., p. 12.

⁵⁰ The administrative costs for collecting the taxes on sales was lower in Utah in 1945 and 1946. The amount collected closely approximated that collected in New Mexico, but the cost of collection was only 1 per cent. See Eighth Biennial Report of the State Tax Commission of Utah for the Years 1945-1946, p. 55. For the period from 1934 to 1939

taxes that are paid in protest. A high percentage of tax payments in the suspense fund will increase legal expenses as well as, in New Mexico, prevent the use of the revenue for needed purposes. In this state the amount of sales tax revenue represented in the suspense fund usually has been at a minimum. The exceptional increase in the protested payments made in 1943, 1944, 1946, and 1947 (Infra, Table III, p. 86) is attributable to suits contesting the legality of taxing sales made by contractors to the government and the taxing of the gross receipts of radio stations.

Since there are many variables in the sale tax laws and in the economic conditions of every state, comparisons of sales tax revenue of the different states may lead to unwarranted conclusions. In Table IV (Infra, p. 87) the sales tax revenues of four western states and their sales tax percentage of the total tax collections have been contrasted.⁵¹ Allowing for differences in tax statutes and

the cost of collecting the sales tax in Michigan averaged slightly less than 2 per cent of the total receipts. See Bureau of Government, "Retail Sales Taxation in Michigan," Michigan Pamphlets, Number 12 (University of Michigan: Bureau of Government, 1941), p. 15. Nevertheless, without close comparison of the tax laws and other contributing circumstances--transportation, staffs, etc.--no generalization of the comparative efficiency of the administration of the sales tax laws in the different states can be made.

⁵¹ Colorado, Utah, and Arizona were selected as representing corresponding economic conditions and similar administrative problems. However, the tax statutes are

the amount of sales in these states, the collections from the New Mexico tax approximate the collections and percentages of the total tax revenue in the other states.

Compensating Tax. Since the compensating tax statute was first enacted, its revenue collections have doubled. The administrative costs have varied from over 9 per cent of total collections to 4.6 per cent; however, the average collection costs for the period from 1940 to 1946 have been approximately seven cents on the dollar (Infra. Tables I and II, pp. 84 and 85.)⁵²

The industries purchasing equipment and machinery used for manufacturing and building have been the principal contributors to the compensating tax revenue. While the bureau of revenue believes that eventually this source of revenue will decrease, it is thought that collections would remain on a high level as long as industrial expansion is anticipated in the state.⁵³

not identical, and the volume of sales will vary from state to state.

⁵² Report of Bureau of Revenue, op. cit., p. 5. The higher administrative costs may be caused in part by the difficulty in collecting the tax and by the smaller amount collected.

⁵³ Ibid.

TABLE I

COMPENSATING AND SALES TAX COLLECTIONS

Fiscal year ending June 30th	Sales tax collection	Compensating tax collection	Total state revenue ^a
1934	\$ 109,175.85 ^d	\$	\$17,111,598.60
1935	2,001,398.31		21,889,482.55
1936	2,361,705.03		19,860,743.69
1937	3,053,574.87		28,893,910.19
1938	3,633,435.58		32,438,239.86
1939	3,442,296.65		26,958,677.50
1940	3,885,511.04	301,385.19	29,639,363.51
1941	3,879,672.70	339,711.59	28,923,630.92
1942	4,679,872.26	420,601.52	32,230,374.90
1943	5,301,836.73	528,865.28 ^b	31,587,668.27
1944	6,162,069.21	538,516.92 ^b	34,890,424.06 ^b
1945	7,070,505.74 ^b	568,408.06 ^b	35,355,509.67 ^b
1946	8,807,828.72 ^b	655,367.81 ^b	42,057,621.72 ^b
1947	10,994,936.66 ^c	953,485.99 ^c	

NOTE: Some of the data for this table was secured from the Report of the State Auditor, State of New Mexico.

a Total state revenue includes revenue received from all sources.

b These figures were computed from data contained in the files of the State Taxpayer's Association of New Mexico.

c "State Revenues Top 28 Millions For New Record," The Albuquerque Tribune, July 2, 1947, p. 5.

d Includes the period from May, 1934, to July, 1934.

TABLE II

COST OF ADMINISTRATION

Year ^b	Sales statutes ^a	Compensating statutes
	Amount	Amount
1934	\$ 12,686.13 ^c	\$
1935	20,461.32 ^d	
1936	67,544.05 ^e	
1937	88,184.63	
1938	129,777.01	
1939	145,014.99	
1940	196,782.83	26,405.49 ^h
1941	169,483.02	32,439.10 ⁱ
1942	218,190.71	45,420.01
1943	198,126.42	28,847.97
1944	192,407.81	33,708.27
1945	198,584.35	34,958.71
1946	210,215.98 ^f	30,394.57
1947	176,512.94 ^f	

^a Some of the data for this column was secured from the records in the Finance Office of the Sales Tax Division of the New Mexico Bureau of Revenue.

^b This is a fiscal year ending June 30, 1934.

^c New Mexico State Budget for the Biennium 1936 to 1937, p. 48.

^d State of New Mexico, Biennial Report of the State Treasurer ending June 30, 1936, p. 7.

^e Ibid., p. 45.

^f Represents the period from July 1, 1946 to March, 1947.

^g Some of the data used in this column was secured from Report of the Bureau of Revenue, op. cit., p. 5.

^h Report of State Treasurer, 1939-40, p. 47.

ⁱ "Bureau of Revenue--Collections and Costs," New Mexico Tax Bulletin, 22:140, September, 1943.

TABLE III

PROTESTED PAYMENTS OF THE SALES TAX

Fiscal year ending June 30th	Amount
1935	\$ 633.27 ^a
1936	248.75 ^b
1937	859.03
1938	3,681.45
1939	2,866.71
1940	1,586.60
1941	7,668.73
1942	8,811.21
1943	21,440.86
1944	16,676.70
1945	902.95
1946	28,087.09
1947	22,945.85 ^c

NOTE: Some of the data used in this table was secured from the files of the Finance Office of the Sales Tax Division.

^a State of New Mexico, Report of the State Auditor for the Twenty-third and Twenty-fourth Years, pp. 52-53.

^b Ibid.

^c Period included is July 1, 1946 to March, 1947.

TABLE IV - A

STATE SALES TAX RECEIPTS¹

Calendar Year	Arizona	Colorado	New Mexico	Utah ²
1936	2,928,824	5,809,285	2,362,513	2,943,372
1937	3,703,460	6,688,908	3,069,592	3,390,014
1938	3,898,420	6,823,007	3,649,570	3,443,230
1939	3,569,145	6,856,813	3,451,998	3,612,961
1940	4,033,143	7,281,529	3,890,846	4,199,373
1941	4,402,530	7,741,160	3,910,192	4,541,548

¹ Tax Research Foundation, Tax Systems (ninth edition; Chicago: Commerce Clearing House, Inc., January, 1942), pp. 333, 335, 348, and 354.

² Includes receipts from sales and use tax.

TABLE IV - B

SALES AND USE TAX PERCENTAGE OF STATE TAX COLLECTIONS³

Calendar Year	Arizona	Colorado	New Mexico	Utah
1936	22.209	27.405	21.875	21.086
1937	21.950	24.211	22.823	21.991
1938	22.985	26.495	24.247	19.781
1939	18.563	25.035	21.538	20.276
1940	19.412	23.676	23.817	21.513
1941	21.616	23.945	22.969	21.845

³ Ibid., p. 327.

PART V

ADMINISTRATIVE PROBLEMS

Certain difficulties harass the sales and compensating tax administrators. Some of their problems pertain to the use of the administrative organization for personal or political purposes, to the legal interpretations of the law, to personnel policies, and to the earmarking of tax funds. However, the collection of tax revenue is the outstanding problem. The purpose of the following discussion is to outline the conspicuous obstacles confronting the sales and compensating tax divisions in their administration of the tax laws. While certain remedies are suggested, the discussion is not an exhaustive treatment of all possible problems or solutions. Some aspects of these problems are mentioned in previous chapters; however, they are reiterated to emphasize their significance.

Problem of Collection

Sales tax. The crux of the problem of collecting the tax is to obtain tax returns from all vendors (or consumers as the case may dictate) and to verify the accuracy of these reports. The success with which the tax

revenue due the state is collected rests largely upon the degree of activity of the field auditors. While the central office force can direct the efforts of the field force, the accuracy of tax returns can be confirmed only through the investigations of the field auditors. In 1937 the chairman of the Oklahoma tax commission wrote, "The sales tax is a type of tax that cannot be adequately enforced by a 'desk administration.' It is necessary to maintain many auditors and investigators in the field in order to secure a half-way acceptable administration of this law."¹

As noted previously (Supra, Part IV, p. 76) the failure to keep adequate records of sales transactions confronts the New Mexico field auditors with a complex and time consuming situation. The difficulty investigators have in determining how much of a liquor stock was sold by the drink and how much by the bottle furnishes another example of this problem since the manner in which it is sold determines the amount of the gross receipts.² From such cases as these the conclusion may be drawn that success in

¹ Delight Keller Dixon, "A Survey of the Sales Tax in the United States," (unpublished Master's thesis, The University of New Mexico, Albuquerque, 1937), p. 37, citing H. L. McCracken, Chairman of Oklahoma Tax Commission.

² Interview with Mr. R. L. Ormsbee, former commissioner of revenue (Santa Fe, New Mexico, April 23, 1947). Mr. Ormsbee mentioned that in 1942 about \$90,000 of delinquent taxes were collected in several counties and cities where records of sales had been inadequate.

collecting the tax depends in part upon the cooperation of the taxpayers.

Since the New Mexico sales and use tax acts are so extensive in scope taxing virtually every type of sale, the determination of what sales are taxable does not present the problem to the administrators of this state that it does in other sales taxing states. Nevertheless, in certain cases the question of what constitutes a sale arises.³

Compensating tax. Strict enforcement of the compensating tax act is improbable. The yearly increase of revenue from this source illustrates that it is possible to effectively collect the tax on purchases of considerable value. Still, the tracing of all minute purchases from out-of-state vendors is costly as well as administratively impracticable. Methods might be used to tax articles at port-of-entry stations, truck terminals, or express offices. The man on the street smoking a cigarette purchased across the state line might also be taxed. But the cost of such enforcement would be greater than the revenue so derived, and the public reaction to such unfavorable tactics might well result in legislative abolishment of the tax statute.⁴

³ Bureau of Revenue, Rules and Regulations, New Mexico School Tax Laws, New Mexico Compensating Tax Act (Santa Fe, New Mexico, July 1945), pp. 24-26. See the ruling on interdepartmental sales or transfers. (Hereafter abbreviated as Rules.)

⁴ Interview with Mr. Rupert F. Asplund. (Santa Fe,

The problem confronting administrators is to determine those types of purchases on which a tax may be economically collected while observing as far as possible the intention of the legislature as expressed in the tax statute.

The bureau of revenue has made agreements with out-of-state vendors to (1) register with the bureau and collect the tax or (2) to report to the bureau all sales made to purchasers within the state.⁵ However, not all foreign state firms cooperate in such a manner, and this noncooperation makes it difficult to collect compensating tax in the southern part of the state where large volumes of goods are purchased in El Paso.⁶

Political Problems

The collection of any tax which furnishes a major portion of state revenue and directly affects every purchaser and vendor in the state cannot avoid political implications. Interested groups will support or oppose

New Mexico, May 12, 1947). Mr. Asplund believed that very strict enforcement of the compensating tax act would result in the abolishment of the law by the legislature.

⁵ Interview with Mr. Ernest Gilbert (Santa Fe, New Mexico, April 23, 1947).

⁶ Mr. R. L. Ormsbee, op. cit.

the laws.⁷ Certain groups support the sales tax to secure funds for schools while others support it to get a reduction in property tax rates. Those individuals to whom the statutory exemptions are beneficial will protect their favored positions; others will seek to reduce or repeal the tax rate upon their particular products. Therefore, while the tax statutes can be altered only by legislative action (in certain instances by court action or legal interpretations), the administrator must be cognizant of the conflicting political elements. He cannot enforce the unenforceable. Since no law operates in a vacuum, its durability must meet the test of popular acceptance.

The manner in which tax statutes are enforced determines in part whether the electorate will seek repeal or continuance of the laws. Snooping tax collectors might provoke the abolishment of the tax laws as well as the tax offices. The administrators who favor the tax must enforce the laws by methods that are acceptable to the mass of taxpayers.

Another aspect of the political problem is whether partiality in collecting the tax is used for political or

⁷ For a summary of groups favoring or opposing the sales tax in other states, see Robert Murray Haig and Carl Shoup, The Sales Tax in the American States (New York: Columbia University Press, 1934), pp. 17 ff; and Roy G. Blakey and Gladys C. Blakey, Sales Tax and Other Excises (Chicago: Public Administration Service, 1945), pp. 2-5 and 30.

personal purposes. While such indications were not found or sought in this study, writers have levied this criticism against the sales tax.⁸ However, such possible use of the tax collecting machinery is not limited to sales tax administration alone.

Legal Problems

Constitutional exemptions. The federal and state constitutions prohibit taxation upon certain institutions and functions. While these constitutional restrictions are usually not challenged, the administrative officials have difficulty in deciding what degree of the function and what level of the institution are immune from taxation.

No state can tax interstate commerce; yet under certain circumstances a tax having an incidental effect on interstate commerce may be levied. The problem thus is to determine if a tax hinders interstate commerce and to decide when commerce assumes an intrastate character.

A state cannot tax the instrumentalities of the federal government. However, does this immunity apply only to sales made directly to the federal government or in addition to sales made to a private business operating under a government contract? Furthermore, what are the

⁸ Thomas A. Rousse and George C. Hester, The Sales Tax (Austin: University of Texas, 1938), p. 151.

instrumentalities of the federal government? As the bureau of revenue rules, not all government organized agencies are immune from sales taxation.⁹

Usually, sales made on federal areas--Indian reservations, military posts, etc.--are exempt from taxation.¹⁰ However, in some cases (Supra, Part II, p.17) such sales may be taxed. The bureau of revenue must determine when these sales may be assessed and when the state possesses jurisdiction to tax them.

Sales made to or by state agencies are exempt in New Mexico from sales taxation. But should this immunity be extended to sales made by municipal proprietary organizations? As private utility corporations are converted to public ownership, the sales tax coffers are gradually depleted of the tax revenue obtained from sales of the private companies. Thus, the question to be answered is whether the bureau of revenue can distinguish between state proprietary and state governmental functions. The opinion appears to be that the New Mexico statute does not permit this distinction.¹¹ However, since any trend toward

⁹ Rules, pp. 23-24.

¹⁰ Ibid., p. 24.

¹¹ Interview with Mr. Ernest Gilbert (Santa Fe, New Mexico, May 12, 1947).

government ownership tends to exhaust the sales tax resources, either a new source of taxation must be found or a novel method of taxing government sales be adopted. In pursuit of the second suggestion, it is possible that under the compensating tax act the consumer may be taxed for the use, storage, or consumption of products purchased from tax exempt institutions.

Amendments of the laws. The legislature's exemption of the sale of wholesale services from sales taxation has reduced the amount of tax collections.¹² Also reducing the tax revenue is the omission by the 1947 legislature of federal corporate agencies from the list of taxable federal instrumentalities.¹³ While such changes in the law reduce or increase tax revenue, they also necessitate changes in procedures and regulations.

Interpreting the laws. Presenting a greater problem to the bureau than legislative amendments is the interpreting of those parts of the statutes where the legislature has failed to express precisely its intent or meaning. Definitions of such words as "agent," "sale," "societies not organized for profit," and "live stock"

¹² State of New Mexico, Report of Bureau of Revenue for the Biennium, July 1, 1944 to June 30, 1945, p. 13.

¹³ "Amendments to School Tax Law," New Mexico Bureau of Revenue Tax Bulletin, 1:1, May, 1947.

have required further clarification. The meaning given some of these words by the bureau has been contested in state courts.¹⁴ Reversals in interpretations also change the amount of revenue collectable.¹⁵ The bureau of revenue in defining the statutes, therefore, must consider legislative intent, state and federal court rulings, attorney generals' opinions, and the inevitable result upon the taxpayer.

Personnel Problems

Field force. In the last analysis the effectiveness with which the sales and use taxes are collected depends upon the caliber and activity of the field auditors' force; consequently one of the critical problems of administration is the supervision of their work. The sales tax director is able to check partially field auditors' efficiency by the data entered on their report form and by the amount of collections from each district. However, the fluctuations in the amounts of total collections may indicate changes in business activity as well as variations in the efforts put forth by the field auditors. The chief field auditors

¹⁴ Some of these cases are: *Ideen v. Bureau of Revenue*, 43 N.M. 205, 89 P.2d 519 (1939); *Comer v. State Tax Commission*, 41 N.M. 403, 69 P.2d 936 (1937); and *Farmers Oil Co. v. State Tax Commission*, 41 N.M. 693, 73 P.2d 816 (1937).

¹⁵ Report of Bureau of Revenue, op. cit., pp. 12-13.

also may investigate the work of the field force. The problem to consider is whether the field force is adequately staffed to perform its investigations and whether the central office can properly supervise the field auditors' efforts.

Without proper supervision of field auditors' work a political or personal patronage machine could be built by biased examinations of books and records of sales. At this level intentional neglect of the auditor in performing his duties involves slight possibility of detection accompanied with little risk of criminal prosecution if discovered. On the other hand manipulations of tax revenues or misrepresentation of tax reports seem unlikely after tax returns have been filed.

No qualifications for field auditors have been legally established. The need for a personnel classification system is discussed in the following section.

Personnel classification. The lack of a merit system and a personnel and salary classification plan is an administrative weakness not only of the bureau of revenue but of most of the state departments and agencies. The remedy for this situation can be accomplished only by state legislative action. However, before the legal creation of a merit system is likely, the electorate of the state must realize its advantages. The legislature usually enacts

only those laws demanded by their constituents.

Among the arguments advanced for a merit system are:¹⁶ without such a plan similar work probably will not receive similar pay, salaries may arbitrarily be determined by department heads, adequate executive supervision of salary disbursements will be impossible, personnel may be chosen on some basis other than efficiency, efficiency in the use of personnel will not be fully utilized, and the recently established retirement plan for state employees will be ineffective unless permanency of tenure is guaranteed. A merit system by insuring a better choice and placement of personnel furthers economy in state administration.

Since the trend in New Mexico is to centralize tax collection powers under a single administrator, people of the state should create safeguards to prevent political patronage from also becoming centralized. One means of protection is a merit system preventing the discriminatory hiring, firing, or compensating of employees for their political work.

¹⁶ Some of these points were suggested by Mr. Rupert F. Asplund, op. cit. The problem is discussed in an unpublished paper in the files of the New Mexico Taxpayers' Association--"Salary Control Needed." A condensation of this article is printed in the Albuquerque Journal, "Taxpayers' Group Asks Job Study," April 20, 1947.

Earmarked Funds

The difficulties arising from earmarking sales tax revenues for school purposes only may determine whether the present form of the sales tax will be continued. The advantages and disadvantages of the present procedures are as follows:

Disadvantages. The school tax statute allocates all but 5 per cent of its revenue for the maintenance of a state public school system. Efforts have been made to amend the law so that its funds will be deposited in the state general fund to pay for any state expenses. The present law is criticized since any surplus existing after school expenses have been paid remains in the county treasury where it cannot be used by the state. The state can not meet its current expenses even though this surplus exists. Fiscal control of tax monies is handicapped.¹⁷

The New Mexico Tax Bulletin stated in 1945:

At the present time the public elementary and high schools are so well furnished with revenues that large balances are held to their credit in the various counties. On the other hand, half of the counties of the State and many of the incorporated cities, towns and villages, are barely able to furnish the most essential services... A reappraisal of the financial resources

¹⁷ Mr. Rupert F. Asplund, op. cit. Mr. Asplund produced charts showing that the large surpluses remaining in county treasuries give weight to this contention.

for State and local needs is imperative.¹⁸

The budget system of appropriations is rendered rigid and inflexible as the amount of money to be used for designated purposes depends upon tax collection, not legislative enactment. The amount collected may be more or less than needed. Usually, a larger sum than is necessary is marked for the specific purpose which results in a dearth of funds for other purposes.¹⁹

Advantages. A large part of the support for the earmarking of funds arises from the taxpayer's desire to control the spending of his tax money. The procedure of using the money only for a specific purpose offers the sleptic protection against misuse of tax revenues by a state political machine.

It is doubtful if the sales tax act would have been approved in 1935 if its funds had not been marked for educational purposes.²⁰ Without the designation of the funds to the educational system, schools would have had to take their chance of securing adequate funds with other state

18 "New Mexico Tax Problems," New Mexico Tax Bulletin, 24: 159-160, October, 1945.

19 "Retail Sales Taxation in Michigan," Michigan Pamphlets No. 12 (University of Michigan: Bureau of Government, 1941), p. 20.

20 Mr. Rupert F. Asplund, op. cit.

departments, and the fear existed that the schools might not receive their share. Now, as long as the present source of funds is adequate, school revenue is ensured.

Compromise proposal. Mr. Rupert F. Asplund, Director of the State Taxpayers' Association, suggests a compromise procedure for allocating the sales tax revenues. He believes that the preferred method would be to guarantee sufficient revenue to meet predetermined school expenses and then to deposit the surplus in the general fund of the state treasury.²¹

Conclusion. The continual earmarking of funds for school purposes relies upon the strength of those who favor such use of the tax money. Unless some compromise proposal is acceptable to them, it is unlikely that the tax statute will be amended.

²¹ Ibid.

PART VI

CONCLUSION

While in effect the compensating tax and school tax statutes both assess sales, the laws were created for different purposes and based on different taxing principles. The school tax was passed to raise revenue for the support of schools and to reduce the tax upon property. It is a tax upon the privilege of doing business within the state, and the amount of tax is computed upon the volume of sales made. The compensating tax was enacted primarily to tax those sales which were exempted from sales taxation by federal court interpretations of the interstate commerce clause. Its purpose was to equalize competitive conditions between merchants within the state paying the tax and those within a nontaxing state. The compensating tax statute assesses the use, storage, or consumption of personal tangible property. Thus, the use tax reaches sales exempted from sales taxation by the interstate commerce clause of the federal constitution, for the tax is levied after the article is at rest and no longer part of commerce. Also the use tax may be levied upon other sales that are immune from sales taxation such as sales of public utilities. Since one tax law may assess sales immune to taxation by the other,

the two taxes are complementary and must be considered together.

Features of these taxes probably outweigh regressive characteristics. Although close examination of the law reveals that certain sales of coal and all sales of agricultural products by the producer are exempted without a justifiable reason, most groups contribute fully to sales tax revenues. Total collections of both taxes have increased greatly during the past few years. The revenue received from the sales and compensating taxes is used to finance educational and social services for the people of the state. While the sales tax may be criticized for imposing hardship upon low income groups, its equity must be judged by the merits of the entire state taxation system rather than by that of the sales tax alone. Each person should contribute to the support of the state and its institutions. The persons with larger incomes pay a multitude of taxes; those with lower incomes, fewer taxes. Furthermore, it is possible that if all economic groups are conscious of paying taxes, they will be more interested in securing economical and efficient administration of their state institutions.

Examination of the tax statutes indicates that sufficient power to enforce the laws has been delegated to the bureau of revenue. Much of the difficulty found in

collecting the use tax arises from the fact that the purchase is often made without the jurisdiction of the state. The administration of the tax collecting agencies has been placed under a single administrator. Therefore, the success with which the taxes are collected depends largely upon the quality of the supervision of the directors and the commissioner of revenue and upon the activity of the field force.

Responsibility for the efficient administration of the tax bodies rests first with the electorate, then with the legislature, and finally with the governor. The legislature creates the bureau of revenue and exercises a degree of control through appropriation acts and approval of budgets. But the legislature has slight contact with the bureau and can know little of its detailed operations. The commissioner of revenue possesses enough power to properly supervise the bureau. However, the commissioner is not directly accountable to the electorate. The governor assisted by the state board of finance and by a budget director (recently created by the 18th legislature) has opportunity to investigate methods and policies of the bureau of revenue. The selection of the personnel must meet his approval. Therefore, in the last analysis, if the governor is an individual of uncompromising integrity, there is little opportunity to use the bureau of revenue for political or personal gains. Since it is difficult to hold a large body such as the

legislature responsible for the administration of any agency, the governor must be held accountable for efficient operation of the bureau and its tax collecting divisions; and if his administration is corrupt and inefficient, the electorate can repudiate him at the polls.

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